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Independent Review of the BHP Diamond Mine Process

Submitted to the
Mineral Resources Directorate
Department of Indian Affairs and Northern Development

by the
Canadian Institute of Resources Law
The University of Calgary

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PF-B 3330, The University of Calgary, Calgary, Alberta, Canada T2N 1N4. Tel: (403) 220-3200 Fax: (403) 282-6182

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du projet de mine de diamants de la BHP*

Executive Summary

This report was prepared for the Mineral Resources Directorate of the Department of Indian Affairs and Northern Development (DIAND) by the Canadian Institute of Resources Law (CIRL). CIRL was asked to conduct an independent review of the regulatory and negotiated processes that led to the final approval of the diamond mine proposed by BHP Diamonds Inc. (BHP) in the Lac de Gras area of the Northwest Territories (henceforth the "BHP process"). Two principal objectives were specified for CIRL's review: (1) to document the BHP process; and (2) to assess whether the rules set in place for the BHP project should become the norm for mineral development in the North.

This report is based on in-depth interviews with people directly involved in the BHP process and on a selective review of relevant documentation. A list of people interviewed is included as Appendix 1. While the content of the report owes much to the candid and insightful comments of the interviewees, the analysis, conclusions and recommendations are those of CIRL alone. This work was undertaken between February 11 and May 30, 1997.

CIRL's documentation of the BHP process begins with an overview of the environmental assessment (EA) of BHP's proposed mine and then focuses on the principal negotiated and quasi-judicial processes that produced the final regulatory and benefits package. The most innovative components of that package are the Environmental Agreement and the Socio-Economic Agreement. The former was negotiated by BHP, the federal government, the Government of the Northwest Territories (GNWT) and four Aboriginal groups. It includes important elements of the environmental regulatory regime that applies to the project and creates the Independent Environmental Monitoring Agency. The Socio-Economic Agreement was negotiated between BHP and the GNWT and addresses the economic benefits and social impacts of the project from the perspective of residents of the Northwest Territories as a whole. The two other principal components of the regulatory and benefits package are the impact and benefits agreements (IBAs), negotiated bilaterally between BHP and Aboriginal groups, and the water licence issued by the Northwest Territories Water Board. Each of these elements of the BHP process also included important innovations. Finally, the regulatory and benefits package includes a *Fisheries Act* authorization by the Department of Fisheries and Oceans (DFO) and six land leases for the areas of BHP's mining operations. Appendix 2 contains a chronology of the principal events relating to the BHP project.

After describing the key elements of the BHP process, the report presents a thematic overview. Six themes are identified: (1) the impact of the fluid institutional and policy environment; (2) the lack of confidence among some non-governmental participants in traditional approaches to regulation and decision-making; (3) the redefinition of the role of government in certain areas; (4) the centrality of innovation in the BHP experience; (5) the challenge of process coordination; and (6) the importance of inclusive and participatory processes. Attention to these themes is essential to a full understanding of the BHP process and its implications for future mineral development in the North.

CIRL's evaluation of the BHP process is organized around ten criteria. Not surprisingly, the process exhibited strengths in certain areas and weaknesses in others.

The BHP process rated highly in terms of transparency, inclusiveness of interests, inclusiveness of issues and the promotion of consensus and dispute resolution. It also appears to have some positive features in terms of cross-cultural sensitivity. As for its effectiveness, the process must be evaluated largely in light of the end products which, it appears, enjoy broad support among participants.

According to other criteria, however, the BHP process displayed significant weaknesses. Most importantly, no one involved in that process would rate it highly on the criterion of predictability. In addition, uncertainty of various types was a problem throughout much of the process. This uncertainty was attributable in large measure to the absence of settled land claims and the lack of clear precedents for important elements of the process.

Finally, certain criteria yield mixed assessments of the BHP process. For example, while its efficiency was clearly hampered by the *ad hoc* nature of certain components, the process also has some positive lessons in this respect. In particular, the process yields important clues regarding the efficient operation of both quasi-judicial and negotiated processes. The criterion of fairness was also one where participants gave the process mixed reviews, although the process as a whole appears to have met a reasonable standard of fairness.

The report also considers the importance of the BHP process and the regulatory and benefits package that it produced as a precedent for future mining projects in the North. Four principal points are discussed in relation to this issue: (1) satisfaction with the end result is more widespread than is satisfaction with the process; (2) the BHP process reflects certain underlying trends and values relating to socio-economic, cultural and environmental considerations in the North; (3) the value of this process as a precedent remains in important respects uncertain so long as important components of it lack a firm basis in law and policy; and (4) the BHP process has established a number of standards that future projects will likely be expected to meet. CIRL's overall conclusion is that there is much of value in the BHP process, but that attention to a number of matters is required if it is to be transformed into a policy and regulatory template for future mineral development in the North.

The report presents a discussion of the matters which, in CIRL's view, should be addressed if the BHP model is to be applied in the future. The recommendations that follow from this discussion are consolidated in Appendix 3. This part of the report is divided into thirteen sections.

1. Implications of the Land Claims Situation

The location of BHP's diamond property in an area of unsettled and overlapping land claims strongly influenced both the process and the final outcome. Many of the problems and frustrations experienced throughout the process can be traced to this land claims context. While the settlement of land claims will not remove all areas of uncertainty for a project such as BHP's diamond mine, it would likely provide a

clearer definition of certain rights and obligations of the proponent and Aboriginal parties. The report therefore recommends that government and Aboriginal groups work together to settle land claims in an expeditious manner.

2. Determining the Purpose of Environmental Assessment

The criticisms of the BHP EA process that were expressed by some, but by no means all, of the participants raise fundamental questions about the role of EA. In particular, is EA intended to be a comprehensive process that attempts to address the entire spectrum of issues related to a particular project or is it a much more limited undertaking, the purpose of which is to determine whether the likely environmental and other effects of a project are sufficiently adverse or unpredictable that the project should not be allowed to proceed. There appears to have been significant confusion regarding the role of the EA in the BHP process. In order to address this issue, government should determine the appropriate role for EA in relation to the broad spectrum of policy and regulatory issues raised by projects such as BHP's diamond mine.

3. Defining the Relationship between Environmental Assessment and the Regulatory Processes

Once the role of EA is defined, it will be necessary to determine how it fits with subsequent regulatory processes. EA and regulatory processes will work together best if they operate as separate but related elements of a decision-making continuum. They should have discrete and complementary functions, although some degree of overlap in certain circumstances may be inevitable or desirable. Government should therefore clarify the relationship between EA and regulatory processes, providing for coordination where necessary.

4. Ensuring Effective Regulatory Processes: The Quasi-Judicial Model

The water licence was the only component of the BHP regulatory and benefits package that was the product of a quasi-judicial process. Although the Northwest Territories Water Board has a statutory basis and well established procedures, its consideration of BHP's water licence application involved certain important innovations. In addition, several standard components of Water Board practice proved their value in the BHP process. Lessons from the Water Board will remain relevant even when that Board is replaced by other quasi-judicial bodies under land claims agreements and related legislation. These lessons include the usefulness of various formal and informal procedures, the need for a clearer basis for allocating intervenor funding, and the importance of process coordination.

5. Ensuring Effective Regulatory Processes: The Negotiated Model

Arguably the most innovative feature of the BHP process was the use of negotiations to establish key elements of the regulatory and benefits package. These negotiations contributed significantly to both the substance of the final package and to the degree of consensus that surrounds it. The key lessons concern

the role of government in structuring negotiated processes. In order to promote the efficiency, effectiveness and fairness of negotiated processes, government should create an appropriate incentive structure, establish end points, facilitate negotiations, oversee linkages with other components of the regulatory and benefits package, and ensure that the public interest is protected.

6. Making Participatory and Inclusive Processes Work

One of the strengths of the BHP process was the inclusiveness of affected interests and their direct participation in decision making. For this model to work: (1) there should be some certainty regarding who should participate and the appropriate parties must be at the table; (2) active participation in decision making should be distinguished from traditional consultation; (3) a balance must be struck between imposing deadlines and allowing time for processes to proceed in a planned and manageable fashion; and (4) parties must have adequate financial resources to participate effectively.

7. Clarifying the Role of Impact and Benefits Agreements

There appears to be widespread agreement among participants in the BHP process that IBAs are an important and useful component of the regulatory and benefits package. However, several issues raised by IBAs should be addressed if the BHP model is to be applied in the future. First, consideration should be given to establishing specific legislative requirements or policy guidelines regarding IBAs. A formal basis for IBAs could be provided through legislation or the land claims process. Second, the potential implications of IBAs for the public interest should be addressed. These implications relate to the possible impact of IBAs on the participation of Aboriginal groups in regulatory processes and the consequences of significant cash transfers through IBAs for the overall fiscal regime for mining projects and for the design of mechanisms to achieve redistributive goals. Third, action is required to increase the likelihood that the expectations generated by these agreements will be met.

8. Providing for Compensation

Compensation issues were addressed at several points in the BHP process, notably before the EA panel and the Water Board and in connection with the authorization under the *Fisheries Act*. Some compensation procedures are in place, and BHP released its own compensation policy. It appears, however, that there is no binding process for handling certain types of compensation claims that may arise in connection with BHP's project, notably claims alleging land-related losses. In addition, compensation claims relating to losses suffered due to the cumulative impacts of several projects within the Slave Geological Province could raise difficult issues. Government action to provide fair, transparent and legally binding mechanisms to address all types of compensation claims could avoid problems in this area in the future.

9. Coordinating the Department of Fisheries and Oceans' Fish Habitat Compensation Policy with other Components of the Regulatory Process

BHP's project required an authorization under the *Fisheries Act* to destroy fish habitat. The terms of this authorization reflect the fish habitat policy administered by DFO. Two areas can be noted where improved coordination between this policy and other components of the BHP process might be achieved. The first relates to regulatory coordination with the water licence and Environmental Agreement and the second concerns the use of the Independent Environmental Monitoring Agency in allocating money from the fish habitat compensation fund.

10. Ensuring Effective and Efficient Monitoring and Follow-up

The Independent Environmental Monitoring Agency is a key component of the BHP regulatory package. While it is too early to judge its usefulness, three points can be made at this time regarding its role. First, it may evolve beyond a technical oversight function into a mechanism for involving Aboriginal groups in ongoing project management and regulation. Second, some coordination between the BHP Independent Environmental Monitoring Agency and monitoring arrangements for other projects may be desirable if future mineral development occurs in the Slave Geological Province. Third, project-specific monitoring agencies should be linked with broader initiatives, such as the West Kitikmeot/Slave Study.

11. Coordinating Regulatory and Benefits Requirements

The need for coordination among elements of the regulatory and benefits package is a recurring issue for the BHP model. In particular, some formal coordination appears desirable in relation to security deposits, monitoring and reporting, and socio-economic benefits.

12. Establishing a Statutory Basis for Regulatory Requirements

A notable feature of the BHP process is the absence of clear legal requirements regarding certain elements of the regulatory and benefits package. The creation of a statutory basis for these elements of the BHP model would increase regulatory certainty and reduce the precariousness of parts of that model in political and legal terms. Finally, the merits of statutory versus negotiated regulatory instruments should be considered.

13. The BHP model and the Evolving Institutional Context

Any application of the BHP model in the future will inevitably reflect the changes in the institutional framework for resource management in the Northwest Territories that will follow from the settlement of land claims, the passage of legislation implementing land claims agreements, and the devolution of authority from the federal government to the GNWT. While some of these changes may fundamentally affect key aspects of the model, it is likely that other issues raised by the BHP process will continue to require attention regardless of the institutional arrangements that are put in

place. Emerging institutional arrangements in the North should be thoroughly examined with a view to determining their implications for the application of the BHP model to future projects.

The report concludes by underlining the importance of identifying and acting on the lessons from the BHP process. These lessons should be translated into specific policy measures so that the strengths of the BHP process can be reinforced, its weaknesses corrected, the role of government more clearly defined, and the need to reinvent the wheel with each new project eliminated. The recommendations presented in this report are intended to provide some ideas for achieving these objectives.

Disclaimer

This report presents the findings of the independent review of the BHP process conducted by the Canadian Institute of Resources Law (CIRL) for the Mineral Resources Directorate of the Department of Indian Affairs and Northern Development (DIAND). The report is not intended to be a statement of either DIAND policy or the views of the Mineral Resources Directorate. The analysis, conclusions and recommendations that it contains are those of CIRL alone.

List of Abbreviations

BHP	BHP Diamonds Inc.
CEAA	*Canadian Environmental Assessment Act*
CIRL	Canadian Institute of Resources Law
DFO	Department of Fisheries and Oceans
DIAND	Department of Indian Affairs and Northern Development
EA	environmental assessment
EARPGO	Environmental Assessment and Review Process Guidelines Order
EIS	environmental impact statement
GNWT	Government of the Northwest Territories
IBA	impact and benefits agreement
MVRMA	*Mackenzie Valley Resource Management Act*
RERC	Regional Environmental Review Committee
TAC	Technical Advisory Committee of the Northwest Territories Water Board
WEM	Water Effects Monitoring
WKSS	West Kitikmeot/Slave Study
WWF	World Wildlife Fund

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1 Introduction

The proposal by BHP Diamonds Inc. (BHP) to develop the first diamond mine in Canada in the Lac de Gras area of the Northwest Territories attracted considerable attention in the North and throughout Canada. While the mine offered the potential of significant economic benefits, it was located in an area of unsettled and overlapping land claims and in a region of the Northwest Territories that had experienced little industrial development. As a result, BHP's proposal became a focal point for Aboriginal and environmental concerns. This context resulted in important innovations in negotiated and quasi-judicial regulatory processes and in the regulatory and benefits provisions that apply to BHP's diamond mine. The BHP experience may therefore provide the basis for a new policy and regulatory model for mineral development in the North.

In February of 1997, the Mineral Resources Directorate of the Department of Indian Affairs and Northern Development (DIAND) commissioned the Canadian Institute of Resources Law (CIRL) to conduct an independent review of the regulatory and negotiated processes that led to the approval of BHP's diamond mine (henceforth the "BHP process"). DIAND asked CIRL to document the BHP process and to assess whether the rules set in place for BHP's diamond mine should become the norm for mineral development in the North. For the purposes of this review, the BHP process begins with the company's formal proposal to develop a commercial diamond mine and ends with the final regulatory approvals for the project. The principal components of the BHP process examined in this report are therefore the environmental assessment (EA) process and the quasi-judicial and negotiated processes that resulted in the final regulatory and benefits package.

The description and analysis of the BHP process contained in this report are based on interviews with many of the people most directly involved in that process. A list of people interviewed is included as Appendix 1. CIRL also conducted a selective review of documentation related to the BHP process. This work was undertaken between February 11 and May 30, 1997.

The content of this report owes a great deal to the insightful and candid observations of the participants in the BHP process who agreed to speak with the CIRL project team. An effort was made throughout the report to reflect many of these observations, although interviews were conducted on the understanding that comments were not for direct attribution. The final conclusions and recommendations that follow are, however, those of CIRL alone. They are based on CIRL's independent review and analysis of the BHP process as a whole and of the many factors that shaped the final regulatory and benefits package that applies to the first diamond mine in Canada.

Several comments are in order on the study methodology used in preparing this report. CIRL conducted a single round of in-depth interviews with a broad range of people involved in the BHP process. Interviews were relatively unstructured, with each interviewee being asked an initial open-ended question regarding his or her impressions of, and comments on, the BHP process. The result was that all issues relating to the BHP process were not discussed in each interview and it was impossible to provide each interviewee with an opportunity to respond to all of the points raised in the other interviews. Consequently, this report does not attempt to capture the full range of perspectives on every issue raised, nor does it

purport to present a consensus view on these issues. In some cases, opinions of participants are simply reported, without commentary by the authors and without the rejoinders that other participants might have provided, had they been given the opportunity. Readers should be aware that the inclusion in this report of opinions that were expressed to CIRL during the course of interviews does not imply an endorsement of these opinions either by CIRL or by other participants in the BHP process.

There is no doubt that the parties involved in the BHP process could engage in a lively debate regarding many of the issues and commentary that are documented in this report. Given the intensity with which certain of their views are held, it may be a source of frustration to some participants that these debates could not be played out in full in the following pages. The objectives here, however, are to reflect the range of impressions of the BHP process that were related to the CIRL study team during the course of the interviews and to identify the issues that, in CIRL's view, warrant particular attention when considering the applicability of the BHP model to future mineral projects. Given these objectives and the limitations of time and resources available for this review, CIRL concluded that it was neither possible nor necessary to document all viewpoints on each issue or to provide an independent assessment of each opinion that was recorded in the report.

Readers should also be aware that CIRL's review of the BHP process is not intended to provide a report card on the performance of the various participants. The final results of the BHP process are a credit to the creativity, flexibility and determination of everyone who was involved. All parties were confronted with a complex political and regulatory environment and a very short time frame to assemble the final regulatory and benefits package. It appears that everyone did their best at the time under difficult circumstances. Equally, all participants could probably identify things that might, in retrospect, have been done differently. The intent of this report is not to second-guess participants' decisions with the benefit of hindsight, but rather to identify the strengths and weaknesses of the BHP process with a view to assessing whether, and in what ways, it should provide a template for future mineral projects in the North.

The report is organized as follows. Chapter 2 sets out the context for the BHP process. Topics addressed include the land claims situation, ongoing institutional and jurisdictional changes, the economic, social and cultural, and environmental context, and the legal and regulatory framework for mineral development in the North.

Chapter 3 documents the BHP process, beginning with overviews of the EA of the project and the government response to the EA panel's report. It then describes the negotiated and quasi-judicial processes that produced the final regulatory and benefits package that applies to the project. This chapter also discusses six important themes that emerged from the BHP process. A chronology of events pertaining to the BHP project is included in Appendix 2.

Chapter 4 evaluates the BHP process, focusing on criteria of effectiveness, efficiency, predictability, certainty, fairness, transparency, inclusiveness of interests, inclusiveness of issues, cross-cultural sensitivity, and the promotion of consensus and dispute resolution. This chapter also discusses the BHP experience as a precedent for northern mineral development. The overall conclusion is that there is much of value in

the BHP process, but attention to certain issues is essential if this model is to be transformed into a satisfactory template for future projects.

Chapter 5 analyses the principal issues raised by the BHP process and presents thirteen specific recommendations for applying that model in the future. The topics addressed include: the land claims situation; the purpose of EA; the relationship between EA and project regulation; the requirements for effective quasi-judicial and negotiated processes; preconditions for participatory and inclusive processes; the role of impact and benefits agreements; compensation; monitoring; regulatory coordination; the legal basis for regulatory requirements; and the evolving institutional context in the North. The recommendations based on this analysis are consolidated in Appendix 3.

The conclusions of CIRL's review of the BHP process are summarized in Chapter 6. The principal challenges identified in the report are to reinforce the strengths of the BHP process, correct its weaknesses, define more clearly the role of government, and ensure that the process need not be reinvented for each new project. If these challenges are met, the BHP experience may make a significant contribution to establishing an improved regulatory model for mineral development in the North.

2 Context for the BHP Process

This chapter sets out the context for BHP's diamond mine project and the process leading to its approval. Topics addressed include the land claims situation, institutional and jurisdictional changes in the Northwest Territories, and the relevant economic, social and cultural, and environmental factors. In addition, an overview of the legal and regulatory framework is presented.

2.1 Land Claims

The BHP project is located in a highly contentious area where two separate land claims are currently under negotiation and one is being proposed. The Nunavut comprehensive land claim has already been settled in the area north of the BHP project. A brief review of the situation of Aboriginal land claims in the area is needed to understand the complexity of Aboriginal issues raised in the BHP process.

The proposed diamond mine lies in the Lac de Gras area which has been traditionally used by both the Dene and the Inuit for centuries. The project site is located outside the boundaries of both Treaty 8 (signed in 1899) and Treaty 11 (signed in 1921), and to the south of the Nunavut land claim settlement area. While overlapping or shared use of the region by various groups is a historical reality, the drawing of boundaries as a result of the contemporary settlement of land claims has created conflict between the groups, particularly the Dogribs and the Yellowknives.

The two groups currently involved in land claims negotiations with the federal government are: (1) the Dogrib Treaty 11 Council; and (2) the Northwest Territories Treaty 8 Tribal Corporation, representing the Yellowknives Dene, ° utsel K'e and Deninu Kue. A third claims process is being sought by the Metis in the

Yellowknife area. All three groups were originally involved in negotiating the Dene/Metis Comprehensive Claim. When the Dene/Metis Comprehensive Land Claim Agreement was rejected in 1990, each of the groups involved undertook to negotiate its own land claim with the federal government on a regional basis. The withdrawal of lands from development in the North Slave region, which had been in effect since April 1989 as an interim measure to protect the lands until final land selections by the Dene/Metis, was terminated on January 31, 1991.

The Treaty 11 Dogrib are currently negotiating both a Comprehensive Land Claim Agreement and a Self-Government Agreement with the federal government. The Dogrib Framework Agreement was signed by all parties on August 7, 1996, with an agreement-in-principle expected to be completed in August 1997. The land claim settlement area as defined by the federal government in an Interim Protection Agreement currently includes the Lac de Gras area. In August 1994, the federal government withdrew certain lands from disposition pending the completion of land selection. This measure prevents the creation of third party interests on the lands but does not affect rights and interests existing at the time of withdrawal.

By contrast with the Dogribs, the Treaty 8 Tribal Corporation chose to negotiate Treaty Land Entitlements under the federal Specific Claims Policy. This process is intended to settle unfulfilled federal obligations under Treaty 8, notably the setting aside of entitlement lands and the provision of economic benefits. Negotiations began in 1992 and a Treaty Entitlement Negotiations Protocol Agreement was signed in 1995. The Corporation claims that the Akaitcho traditional territory overlaps the Dogrib Treaty 11 settlement area and includes the Lac de Gras area.

The Metis Nation of the Northwest Territories is involved in exploratory discussions with the federal government regarding a settlement of their claims to lands and benefits. The BHP project area lies within the traditional territory asserted by the Yellowknife Metis Council. A framework agreement with the South Slave Metis was initialled in January 1996. How the interests of the North Slave Metis will be considered has yet to be addressed.

Several of the Aboriginal groups appearing before the environmental assessment (EA) panel have stated that both the project site and the corridor for the winter road are located within their traditional territories, on lands for which they have never surrendered title. This position is disputed by the federal government, which contends that Treaties 8 and 11 effected a surrender of the Aboriginal title of the groups in the area. Aboriginal groups have persistently opposed mining developments until land claims are settled, arguing that the process of land selection would be seriously prejudiced by such developments. However, the federal government's policy, as developed during the Dene/Metis comprehensive claim negotiations, is that lands which are under a mineral disposition and determined to be in a stage of advanced exploration, development or production are not available for selection by an Aboriginal claimant group.

The fourth Aboriginal group involved, the Inuit of Nunavut, settled their land claim in 1993 under the *Nunavut Land Claims Agreement* and are thus in a different legal situation. The Nunavut agreement protects the quality and quantity of waters flowing into Nunavut as well as Inuit harvesting rights outside Nunavut. Concerned about the potential impacts of the BHP project on the Coppermine River drainage

basin, which flows through the Nunavut settlement area, and on traditional harvesting activities by the Inuit in the Lac de Gras area, the Inuit became involved in the BHP process through the Kitikmeot Inuit Association.

2.2 Institutional and Jurisdictional Changes

North of 60°, DIAND has the legislative mandate for land and water management, oil and gas rights and regulation, and mining regulation, which includes royalties. The Department is also generally responsible for promoting economic development and managing the sustainable development of natural resources. This traditional role is changing, with powers being increasingly shared with Aboriginal organizations as a result of land claims settlements and with the territorial government as devolution of provincial-type programs proceeds.

Land claim settlements create new forms of governance, establishing resource management bodies with powers in the areas of environmental review, land and water management and land-use planning. Legislation implementing land claims agreements, such as the proposed *Mackenzie Valley Resource Management Act*, provide concrete means of transferring responsibilities from DIAND to a new set of boards. The territorial division resulting from the creation of Nunavut as a separate political entity in 1999 also has tremendous implications for both federal and territorial responsibilities in the North.

The Government of the Northwest Territories (GNWT) currently is responsible for most matters of a local nature as well as for wildlife management. In the area of natural resources, the GNWT is responsible for forest management and fire suppression. The federal government's objective is to devolve to the territorial government all provincial-type responsibilities, in particular those relating to management of land and natural resources such as mines and minerals and oil and gas.

Compounding the current situation of institutional and jurisdictional instability and uncertainty is the down-sizing of government resulting from cuts in government spending and reduced government investments. These funding cuts have potential implications for government's policy development and management capability and for its regulatory activities. They also affect government's ability to fund new and existing programs.

2.3 Economic Context

The wage economy of the Northwest Territories is heavily dependent on government and mining, with the provision of government services remaining the single biggest source of employment in the North. The GNWT estimates that the impact of construction and initial operation of a new diamond mine on the northern economy would be considerable, with an annual increase of the GDP estimated at 4% during the construction period and 6% during the first year of production.

The Northwest Territories has the youngest population and the highest birth rate in Canada, and a high rate of unemployment. It has been estimated that 1,600 new jobs are needed to bring unemployment in line with national averages, and a further 260 new jobs a year thereafter to maintain that level of employment. The prospects of the BHP Diamonds Project generating approximately 1,000 jobs during the two-year construction period and an average of about 830 jobs annually during the anticipated 25 years of operations explain its significance to the economy of the Northwest Territories. In addition, the multiplier effect of the project could be substantial; according to BHP estimates, for every ten people hired by the company, six more would be hired by contractors and service companies, and two more by northern businesses.

For the Aboriginal population, the land-based or traditional economy is critical both in terms of reliance on country food and as a way of life that sustains cultural, spiritual and emotional values. A 1990 study indicates that approximately 60% of Aboriginal households obtain at least half of their meat and fish from hunting and fishing. Country food continues to be a staple diet of Aboriginal people even when they participate in the wage-based economy. Aboriginal people consistently stress the importance of protecting the long-term capacity of the land to support their traditional economy, should the wage-based economy fail them. In addition, many Aboriginal people are eager to take advantage of the employment and training opportunities offered by development in the North.

2.4 Social and Cultural Context

Social problems in Aboriginal communities in the region are characterized as being moderate to severe, with substance abuse, poor health, violence, family breakdown and child neglect resulting primarily from unemployment, poverty and cultural disruption. Low educational levels among Aboriginal people limit their access to skilled jobs. In addition, cultural factors and personal lifestyle choices may result in the decision to work only seasonally or casually to supplement the living earned from the land. Housing shortages further restrict movement and contribute to difficulties in finding employment.

Maintenance of the traditional economy is perceived as critical to the preservation of Aboriginal culture. Concerns about the impacts of mining developments in the Slave Geological Province and their potential to exacerbate social and cultural problems in the communities, based on past experience with mining companies, are widespread. At the same time, projects such as BHP's diamond mine may provide Aboriginal people with a way of addressing underemployment and other economic factors that contribute to the social problems in their communities. The attitude of Aboriginal people to development thus reflects the importance of both traditional and market economies to their social and cultural survival.

2.5 Environmental Context

The Northern environment is characterized by its harsh climate and susceptibility to disruption. The project site is located in the tundra environment, 100 km north of the tree line in an area of continuous permafrost. It lies within the Coppermine River drainage basin, in an area covered with numerous lakes

interspersed among boulder fields and eskers. Fifteen of these lakes, of which twelve are fish-bearing, as well as various associated streams, would be directly affected by the project, with consequent loss of fish and fish habitat. Concerns were raised by some parties that downstream effects of the mine on water quantity and quality could affect users of fish and drinking water in the Coppermine River watershed.

Wildlife populations in the vicinity of the mine include caribou, grizzly bears, wolves, wolverines, foxes and other furbearers. The Bathurst caribou herd, the largest in the Northwest Territories, migrates through the region during spring and fall. Caribou play a central role in the physical and cultural well-being of the Aboriginal people in the area, with the dollar value of the harvest, based on meat replacement costs, estimated at $11.2 million annually. The potential impact of the project on the health, numbers and migratory patterns of this herd was the major environmental concern raised during the project approval process. Grizzly bears, which are listed

as a vulnerable species, are found in the area and would likely be the species most sensitive to development.

Both subsistence and sport fishing and hunting are practised by Aboriginal and non-Aboriginal people in the Lac de Gras area. One of the recurring themes during the mine approval process was the need to collect additional baseline data on wildlife species and their habitat as well as on water and air quality and to monitor the long-term and cumulative effects of mining developments in the area.

2.6 Legal and Regulatory Framework

Legal and regulatory requirements applicable to mining projects follow a sequence as developments proceed from exploration to construction and operation. Due to the fact that a large portion of land and resources in the Northwest Territories is owned by the federal government, federal legislation applies to resource developments. DIAND assumes most of the responsibility for northern lands and resources.

The most important statute governing the use and management of lands and resources in the Northwest Territories is the *Territorial Lands Act* and the regulations enacted thereunder, notably the Canada Mining Regulations and the Territorial Land Use Regulations. Water resources are managed under the *Northwest Territories Waters Act*.

Other federal legislation with potential application to mining developments includes the *Canadian Environmental Assessment Act* (replacing the EARP Guidelines Order), the *Fisheries Act*, the *Canadian Environmental Protection Act*, the *Navigable Waters Protection Act* as well as a variety of statutes applicable to specific aspects of mining projects. Territorial legislation in the areas of wildlife, historical resources, and health and safety may also apply to mining developments.

2.6.1 Mining Law

The Canada Mining Regulations set out the mineral disposition system in force in the Northwest Territories. This regime is firmly grounded in the free entry system, which encompasses the right to enter lands in search of Crown minerals, the right to obtain a claim, and the right to go to lease and production. A prospecting licence or, in certain areas, a prospecting permit, must first be obtained. A prospecting licence enables the holder to stake a claim and, once a claim has been located, to record the claim. The Mining Recorder has no discretion to refuse to record the claim. The mining claim gives the holder the exclusive right to prospect for minerals and develop a mine for an initial period of two years.

Under the free entry system, the only option open to government to confine or exclude mineral exploration is to withdraw lands from mineral entry. The only limitations to the right of free entry are set out in section 11 of the Canada Mining Regulations. This section excludes automatically from entry specific lands, including national parks, lands used as a cemetery or burial ground, and lands already under a mining claim, mining lease or grant. In addition, the Governor-in-Council is authorized to either prohibit entry by order, or to withdraw lands for the purposes described in section 19 of the *Territorial Lands Act*. By Order-in-Council, any tract of territorial lands may be withdrawn from disposition or set apart and appropriated for a variety of purposes, including to settle Canada's obligations under treaties with Aboriginal people.

2.6.2 Land-Use and Environmental Regulation

The Territorial Land Use Regulations require that a permit be obtained for various land use operations. Section 6(b) specifically exempts from regulation anything done in the course of prospecting, staking or locating a mineral claim, unless it requires the use of equipment or material that normally requires a permit. The use of explosives, vehicles and drilling machinery, the establishment of campsites and fuel storage facilities, and the construction of roads, trails or rights-of-way require either a Class A or a Class B permit, depending on the level of activity involved. Permits are for temporary land use, are issued for two years, and may be subject to terms and conditions, notably in regard to environmental protection. A security deposit may be required as a condition of a permit.

Applications for land-use permits are subject to review, including a review by the Lands Advisory Committee (comprised of federal and territorial department representatives, and Aboriginal and public organizations) for Class A permits. Land use permits are also subject to an environmental screening by the Regional Environmental Review Committee (RERC), which includes representatives from federal departments, GNWT departments and Aboriginal organizations.

2.6.3 Project Review and Environmental Assessment

A project may be subject to review and environmental assessment (EA) under federal legislation. The purpose of the EA is to enable government agencies to assess a project's potential adverse environmental

statute is now the *Canadian Environmental Assessment Act* (*CEAA*), which received Royal Assent in 1992 but only came into force in January 1995. The Act repeals the Environmental Assessment and Review Process Guidelines Order (EARPGO), which was first adopted in 1984. The BHP project was referred to the Minister of the Environment in July 1994, and was assessed under the EARPGO in a period of transition between the two regimes. The Minister of the Environment requested that, even though performed under the EARPGO, the EA should be conducted in the "spirit" of *CEAA*.

Projects located in those areas of the Northwest Territories where comprehensive land claims have been settled may be subject to other EA processes under the land claims agreements. This raises complex issues of integration of federal and land claims environmental processes. The

Gwich'in and Sahtu final agreements provide for the establishment of an environmental impact review board whose mandate will extend to the entire Mackenzie Valley. The enactment of the proposed *Mackenzie Valley Resource Management Act* to implement key provisions of the Gwich'in and Sahtu agreements would substantially modify the EA regime currently in effect in the Slave Geological Province.

2.6.4 Licensing Processes and Regulatory Instruments

The most significant licences and permits required at various stages of mineral exploration and development may be grouped under three main categories: (1) mining; (2) land use; and (3) water.

Mining

Three types of authorizations are required under the Canada Mining Regulations: (1) a prospecting licence or permit in the early stages of exploration; (2) a mineral (or mining) claim to further prospect for mineral resources; and (3) a mineral lease at the development or production stage. A prospecting licence is issued for one year and a prospecting permit is issued for 3-5 years depending on location. A mineral claim can be held for up to 10 years provided that minimum levels of representation work are met. A mineral lease must be obtained before construction and operations begin. This lease is issued for a term of 21 years and is renewable.

Land Use

Two types of authorizations to use the surface of the land are required under the Territorial Land Use Regulations: (1) a land-use permit (Class A or Class B); and (2) a land lease. Land use permits are required for temporary uses of land and are issued for periods of two years with a possible extension of one year. Land leases provide long-term security of access to the land and are normally issued for between 5-30 years. They have a maximum term of 30 years and are renewable for another 30 years. A land lease is a contract between government and a tenant, granting rights of possession to the land. The lease agreement addresses use of the land in a comprehensive manner.

Water

The use of water is regulated under two main statutes: the *Northwest Territories Waters Act* and the *Fisheries Act*. Under the first statute, a water licence (Type A or Type B) must be obtained in order to use water or deposit waste in waters. Water licences are issued by the Northwest Territories Water Board for a period of up to 25 years. Type A licences are required for large scale operations, while Type B licences are issued for smaller scale exploratory projects. Applications for both types of licences are advertised, with public hearings normally held for Type A licences. The approval of the Minister of DIAND is required for Type A licences.

Subsection 35(2) of the *Fisheries Act* enables the Minister of Fisheries and Oceans to authorize the alteration, disruption or destruction of fish habitat under certain conditions. The objective of the departmental Policy for the Management of Fish Habitat is to achieve a net gain of fish habitat using the guiding principle of no net loss of habitat. Where habitat loss is unavoidable, attempts are made to replace habitat. In the BHP case, the compensation agreement negotiated between the Department of Fisheries and Oceans and the proponent is aimed at replacing lost fish habitat.

3 The BHP Diamond Mine Process

This chapter of the report is intended to document the principal elements of the BHP process. The process of interest here begins with BHP's formal proposal for a commercial diamond mine in the Lac de Gras area of the Northwest Territories and ends with the final regulatory approvals for that project. Consequently, the various regulatory requirements governing the exploration phase of BHP's activities will not be examined. While the regulation of mineral exploration is an important issue in its own right and has some implications for the regulatory processes that are triggered by a decision to develop a mine, this topic is beyond the scope of this report. The discussion that follows therefore takes as its starting point the entry of BHP's proposal into the environmental assessment process.

This chapter is divided into sections dealing with each component of the BHP process. These sections are followed by a brief summary of what is termed the regulatory and benefits package. Finally, a thematic overview of the BHP process is presented.

3.1 Environmental Assessment Process

The BHP project was reviewed under the Environmental Assessment and Review Process Guidelines Order (EARPGO) and followed standard environmental assessment (EA) procedure under that process. The key stages of the EA process are briefly summarized in this section. As noted above, the EARPGO has been replaced by the *Canadian Environmental Assessment Act* (*CEAA*) which, in turn, is likely to be superseded in portions of the western Northwest Territories by the *Mackenzie Valley Resource Management Act* at some time in the future. Consequently, subsequent mineral development projects in the area of the BHP mine will be subject to a different EA regime which may vary in significant ways from

the EARPGO.

The first stage of the EA process for the BHP project was a screening conducted by the Regional Environmental Review Committee (RERC). RERC is an interdepartmental committee of federal and GNWT officials and representatives of Aboriginal organizations. It is based in Yellowknife. RERC's role in the process was to determine whether the potential adverse environmental effects of the project were sufficiently uncertain or significant to warrant further study, up to and including a panel review. Further EA scrutiny may also be recommended on the basis of a finding of significant public concern regarding a project. RERC's recommendation to the Minister of DIAND regarding the BHP project was that a panel review should be held.

The official decision to refer the project to a panel review was announced on July 26, 1994. The principal steps in the EA process from that point on were the following:

- panel appointed by the Minister of the Environment (December 9, 1994);
- project description issued by BHP (December 9, 1994);
- operational procedures issued by the panel (January 23, 1995);
- draft guidelines for the preparation of an environmental impact statement (EIS) issued by the panel (January 31, 1995);
- scoping meetings held in eight Northwest Territories communities to obtain comments on the draft EIS guidelines (50 written submissions and approximately 125 presentations) (March 14 - April 8, 1995);
- panel issued final guidelines for the preparation of the EIS and requested specific information from government (May 23, 1995);
- intervenor funding decision announced by the Canadian Environmental Assessment Agency (July 7, 1995);
- EIS submitted by BHP and the 90-day review period commenced (July 24, 1995);
- responses to the panel's government information request received from the federal government and the GNWT (August 1, 1995);
- EIS public review period concluded (written submissions received from 26 parties) (October 23, 1995);
- panel issued draft procedures for public hearings for public comment (October 27, 1995);

- panel announced that the EIS was sufficient to commence planning for the public hearings but also requested additional information from BHP on specific issues (November 22, 1995);

- panel announced the schedule for public hearings and issued the final hearing procedures (December 13, 1995);

- additional information received from BHP (December 19, 1995);

- eighteen days of public hearings were held in nine Northwest Territories communities (75 written submissions and approximately 260 presentations) (January 22 - February 23, 1996);

- panel report issued (June 21, 1996).

Although a full description of this EA process is beyond the scope of this report, four elements warrant particular attention.

First, although the EA was conducted under the EARPGO, the Minister of the Environment stated that it was to reflect the "spirit" of *CEAA*. This statement was interpreted by certain participants as implying that the panel review would address the list of mandatory factors to be considered that is contained in section 16 of *CEAA*.

Second, the panel's work was guided by terms of reference issued by the Minister of the Environment and developed in consultation with DIAND, GNWT and the directly affected Aboriginal groups. These terms of reference are contained in the panel report and will not be reproduced here. In summary, they directed the panel to consider:

- the project's short- and long-term environmental effects within the Northwest Territories and the social effects directly related to these environmental effects; and

- the project's short- and long-term general socio-economic effects within the Northwest Territories.

A number of activities expected to give rise to potentially significant environmental effects are then set out in the terms of reference. Furthermore, the panel was directed to "give full and equal consideration to traditional knowledge" in addition to scientific knowledge in reviewing and assessing the project's environmental and socio-economic effects.

The terms of reference specify that the panel review "shall also include consideration of issues relating to long-term cumulative effects of the current project in addition to future development scenarios as identified by BHP on its Lac de Gras properties." A review of other development initiatives in the region was explicitly placed outside of the terms of reference, although the panel was permitted to identify generic

issues that, in its view, might also arise in conjunction with other development initiatives in the Slave Geological Province. The panel was specifically directed, however, that its work was not to be contingent on the findings of the proposed regional study (discussed below).

In the event of a conclusion that the effects of the project are acceptable, the terms of reference direct the panel to recommend terms and conditions under which the project could proceed and to suggest appropriate procedures for managing the cumulative effects of any future development by BHP on its Lac de Gras site. A conclusion that the effects are unacceptable is to be accompanied by a rationale.

The third element of the EA process that warrants note is the distinction between community and technical hearings. Community hearings followed a relatively unstructured format and were intended to ensure that all interested individuals had an opportunity to express their views on the project. Technical hearings, in contrast, operated under much stricter procedural constraints. Presentations were in general limited to 15 minutes, with a further 30 minutes available for questions. This limitation on the time available for technical presentations was a source of frustration for some intervenors.

A fourth element of the EA process relates to the funding and time frame of the review. The federal government originally allocated $250,000 to the panel to conduct the assessment and an additional $250,000 for intervenor funding (the final cost has been assessed at $900,000). This relatively modest level of funding, compared to other EA panel reviews of equivalent complexity, was criticized by several of the intervenors, notably the Aboriginal groups, as insufficient to ensure adequate preparation and participation in the hearings. The time frame for the panel to complete its report following its appointment was 19 months. From the point of view of some participants, the speed of the review and the strict adherence by the panel to a pre-determined schedule was seen as a positive element. Other participants expressed the view that the review was rushed, and that time restrictions adopted by the panel during the hearings reduced the opportunity for people to express their views fully.

3.2 The Environmental Assessment Panel Report and Government Response

As noted in the chronology set out above, the panel report was submitted on June 21, 1996. The official government response was issued on August 8, 1996 and took the form of a news release, accompanied by eight background documents, and a press conference by the Honourable Ronald Irwin, Minister of DIAND.

3.2.1 Overview of the Panel Report

The panel report begins with a brief project description and summary of the review process. It then provides a discussion of the panel's overall findings, focusing on the following issues: adequacy of baseline information; land claims and Aboriginal rights; traditional knowledge; sustainable development; corporate accountability; regulatory regime; environmental effects; socio-economic effects; and monitoring. Subsequent sections of the panel report deal in more detail with project engineering and management issues, environmental issues and socio-economic issues. Finally, the panel commented briefly on issues

relating to the West Kitikmeot/Slave Study (WKSS), cumulative effects, and the public review process.

The panel report made 29 recommendations regarding the BHP project and related issues. While the majority of these recommendations pertain to matters within federal jurisdiction, some relate to joint federal-territorial responsibilities, some concern issues solely within the responsibility of the GNWT, a few are directed to BHP and one relates to the WKSS. The panel report also includes a number of general findings of fact and conclusions reached by the panel on issues raised before it. While not all of these findings and conclusions resulted in specific recommendations, they provide background information on a wide range of issues relating to the project.

The panel's overall conclusion was that the project should be approved, subject to the other recommendations in its report. These other recommendations range from suggestions regarding general policy direction to specific proposals for project regulation. In addition, the panel identified a number of issues that, in its view, should be addressed through the regulatory process. Certain of the panel's recommendations were phrased as preconditions for approval, while others were more general suggestions regarding the project management process.

The panel's general policy recommendations related to topics such as the resolution of land claims, policy on traditional knowledge, and principles for legislation and management structures resulting from land claims. Project-specific recommendations addressed a variety of matters including reporting and monitoring requirements, environmental management plans, contingency plans for spills, the conclusion of impact and benefits agreements, socio-economic benefits and compensation. The panel's identification of specific issues for subsequent consideration focused particularly on matters within the regulatory authority of the Northwest Territories Water Board. These issues concerned water quality, notably in relation to the integrity of frozen core dams, suspended solids, acid generation from waste rock, kimberlite toxicity, nitrogen contamination of waste rock and the location of monitoring stations. In addition, the panel recommended that information put before it regarding the design, construction and monitoring of the Long Lake tailings compound be considered by DIAND and the Water Board.

3.2.2 The Government Response

The Government of Canada's response to the panel report was to accept virtually all of the panel's recommendations, thereby clearing the way for the project to enter the final regulatory processes. Comments on each of the panel's recommendations were included in the background material attached to Minister Irwin's news release. The government's announcement on August 8 was not, however, confined to addressing the panel's specific recommendations and setting the stage for the formal consideration of licence and permit applications. The Minister also specified that, before issuing major licences, he would require "satisfactory progress" on the negotiation of an environmental agreement between government and BHP and the negotiation of impact and benefits agreements (IBAs) between BHP and the four affected Aboriginal groups. In addition, he stated the government's intention to work with the GNWT, Aboriginal groups and other interested parties on a protected areas strategy for the Northwest Territories. The negotiation of the Socio-Economic Agreement between the GNWT and BHP was included within the 60-

day time frame later in August.

The connection between negotiated processes and regulatory approvals is of considerable importance and will be referred to at several points in the subsequent sections of this report that analyze the BHP process and make recommendations regarding its application in the future. Consequently, the precise language used in the government news release and in the Minister's press conference is worth quoting. The news release simply stated that: "Before issuing major licences, Mr. Irwin will review progress on the negotiation of an environmental agreement and the negotiation of impact benefit agreements between BHP Diamonds Inc. and the affected Aboriginal Groups." In the press conference, Minister Irwin stated:

> It is important for the government of Canada to get assurance that significant progress is being made on both the environmental agreement and the impact benefit agreements before final approval is given to the major licences, required to undertake key work at the project site. More specifically, I will be assessing progress on the environmental and benefits agreements before signing the water licence for the project. This process should not delay the project. Most other permits and authorizations can be issued and work can commence. And certainly the water licence can proceed through the hearings and the board process. However, for final cabinet approval of the project, the federal government needs to be confident that the satisfactory progress is being achieved on both the environmental and benefit agreements and that appropriate measures are in place. I am confident that such progress can be made before the water licence is due for signature.

Minister Irwin indicated that a 60-day time frame should be sufficient for the required progress on these matters.

The selection of 60 days as the time limit for progress on the regulatory and benefits package was not an accident. According to participants in the process, this period reflected the estimated time required to complete certain IBA negotiations and the concerns of BHP that a further delay in receiving approvals could cause the company to miss a critical window of time for winter operations. The company argued that even a relatively short delay that jeopardized its ability to take advantage of the winter road to the mine site could result in the project schedule being set back by an entire year.

The Minister's introduction of the requirement of an environmental agreement and his linking of regulatory approvals with progress on this agreement and on the IBA negotiations set the stage for the critical phase of the BHP process. Between August 8 and November 1, the principal elements of the regulatory and benefits package for BHP's diamond mine were worked out through a number of parallel negotiations and regulatory processes.

3.3 The 60-Day Period for "Satisfactory Progress"

Before turning to the specific elements of the regulatory and benefits package, it is necessary to describe in general terms what is commonly referred to as the 60-day period following Minister Irwin's

conditional approval of the project on August 8. This period in fact extended to November 1, when the Minister announced that satisfactory progress had been achieved on the various negotiated processes and that the project was therefore poised to receive final regulatory approvals. The complex issues to be addressed over this short period required intense activity for all participants in the BHP process. In important respects, the negotiated processes constituted uncharted territory for the parties. Five aspects of this stage of the BHP process warrant particular emphasis.

First, the Minister's announcement clearly altered the incentive structure for participants in the BHP process. The combination of a conditional approval, a tight time frame and considerable ministerial discretion regarding final approval resulted in tremendous pressure on all parties to address outstanding issues and reach agreement. It appears that the Minister's message to all parties was that they should negotiate in good faith and be reasonable in their demands. The pressure on BHP resulted from the risk of further delay in the project, while Aboriginal groups recognized that they had a defined window of opportunity to negotiate satisfactory agreements on IBAs and environmental conditions.

Second, the agenda for this period and the short time frame proposed by the Minister appear to have caught almost everyone by surprise. Neither DIAND officials nor the company had a clear idea at the outset, for example, of the final form that the environmental agreement would take. In fact, BHP maintains that the Minister's announcement was the first formal notification that the company received of the requirement that it negotiate an environmental agreement as part of the regulatory process. As a result, some time was lost at the beginning of the period while the parties, including DIAND, developed their strategies, put in place the basic framework for negotiations, and determined what issues should be addressed in what forums. The absence of a clear plan at the outset resulted in further compression of the time available for negotiations.

A third notable aspect of the 60-day period concerns the changing rules of the game as the process unfolded. For example, while the Minister's initial announcement stated the requirement of satisfactory progress on the environmental agreement and IBAs and referred to a longer-term objective relating to protected areas, it appears that both the protected areas issue and the agreement on socio-economic issues between BHP and the GNWT were effectively rolled into the 60-day agenda. In addition, there was ongoing uncertainty throughout part of this period regarding the role of Aboriginal groups in negotiations leading to the Environmental Agreement. Since there were no templates at the outset for either the process or the final products, participants were forced to adapt to a very uncertain and fluid environment.

A fourth point is the role played by the Minister's special envoy, Mr. Peter Nixon. Mr. Nixon's principal contribution was in relation to the IBA negotiations, but he was involved to some degree with virtually all of the negotiations during the 60-day period. One example of his role was in providing assistance in narrowing the gap between the parties' positions, notably in the IBA negotiations. In addition, he was active in keeping the various processes on track and providing a direct conduit for information to and from the Minister.

Finally, it is worth underlining that the 60-day period placed tremendous demands on all participants

in the BHP process. The need to be actively involved in several simultaneous negotiations strained the human and financial resources of Aboriginal groups particularly. It was generally recognized, however, that the company, DIAND and the GNWT were also stretched very thin during this period of time.

The 60-day period was thus the context within which the principal elements of the BHP regulatory and benefits package were developed. These elements are the Environmental Agreement, the Socio-Economic Agreement, the IBAs, the authorization under the *Fisheries Act*, the water licence and the land leases. In addition, negotiations regarding the protected areas strategy occurred during this period. The most important features of each element of the regulatory and benefits package and of related initiatives are described in the following sections.

3.4 The Environmental Agreement

The Environmental Agreement is a key component of the BHP regulatory package. This agreement represents a significant innovation in project regulation in the North in terms of both the process used to negotiate it and the substantive provisions that it contains. Although environmental agreements have been used for some projects in the past, notably for the Norman Wells pipeline, the BHP Environmental Agreement is unprecedented in its scope and public profile. In addition, the Implementation Protocol attached to the Environmental Agreement constitutes an innovative means of formally recognizing Aboriginal involvement and interests without making Aboriginal groups signatories to the agreement itself.

3.4.1 Rationale

Participants in the BHP process put forward a number of rationales for negotiating an environmental agreement. The Government's background information on the Environmental Agreement that was released on August 8 stated that this agreement was intended to address certain recommendations of the EA panel that were outside the scope of the standard regulatory instruments, notably the water licence, land lease and land-use permits. In particular, the government identified a number of issues relating to monitoring and reporting requirements and the review of environmental management plans. The agreement was also seen as a means of formalizing certain commitments made by BHP during the course of the EA process. The government indicated on August 8 that it was undertaking a review of panel recommendations to determine which should be addressed in the Environmental Agreement and which could be dealt with through the water licence, land lease and other regulatory instruments. It was thus clear from the outset that the final content of the Environmental Agreement would emerge over the course of negotiations.

Several participants in the BHP process put this rationale in stronger terms, arguing that the need for an *ad hoc*, project-specific agreement reflected deficiencies in the legal and regulatory regime for mineral development in the Northwest Territories. In their view, the Environmental Agreement was a necessary innovation, but reflected a second-best alternative when compared to a statutory basis for the monitoring, reporting and other requirements that it contained.

Perceived deficiencies in the land lease as a regulatory instrument provided a second rationale for the

Environmental Agreement. These deficiencies related to flexibility in enforcement mechanisms and to BHP's concern with an overly encumbered land lease. The concern in the first area arose because the common practice with land leases is, it appears, to establish a fairly rigid enforcement process. When the lease-holder is in violation of a term of the lease, the lease is first suspended and then cancelled in the event that the problem is not corrected within a specified time period. This relatively drastic and automatic enforcement mechanism was seen by some participants as inappropriate for the type of reporting and monitoring obligations that were under discussion for the BHP project. One concern expressed in several interviews was that BHP could end up having its lease suspended because of a failure to meet a reporting deadline. Although an argument could be made that the enforcement mechanisms within the lease itself could have been redrafted to allow for a more graduated and flexible approach to enforcement, the prevailing view was that a separate regulatory instrument was preferable. The Environmental Agreement was seen as offering the necessary flexibility.

BHP's concern with the use of the land lease as a regulatory instrument appeared to relate to project financing. BHP argued that financing would be complicated if the lease was overly encumbered with environmental terms and conditions that could result in its suspension or cancellation. Embodying requirements in a separate agreement allowed the land lease to remain relatively clear of these regulatory encumbrances, although it is important to note that certain provisions in the Environmental Agreement are directly enforceable through the land lease.

A third rationale for the Environmental Agreement was that it provided a relatively comprehensive and visible means of consolidating important features of the environmental regulatory regime for the project. Important aspects of environmental regulation remained subject to other processes, notably those administered by the Water Board and the Department of Fisheries and Oceans. Nonetheless, the Environmental Agreement served as a vehicle for addressing environmental provisions that might otherwise have been scattered among the IBAs, the land lease and land-use permits. In terms of visibility, the Environmental Agreement was also seen as a public affirmation of the commitment of government and BHP to the sound environmental regulation of the project. This aspect of the Environmental Agreement explains, perhaps, why it contains certain provisions that could have been included within the land lease and other less visible regulatory instruments.

The final rationale for the Environmental Agreement was that it provided a direct means of Aboriginal involvement in the regulatory process. This rationale was clearer as the process evolved and at its conclusion than it was at the outset. The inclusion of Aboriginal people in this way was seen to be especially valuable given their frustration following the EA panel report and their lack of confidence in the traditional regulatory process. Particularly as the proposal for an independent monitoring agency took shape, it became evident that a multi-party negotiation provided a useful mechanism to address the concerns of Aboriginal groups and develop consensus regarding key regulatory requirements. Furthermore, the Environmental Agreement itself provides a basis for ongoing Aboriginal involvement in project monitoring and input into regulatory processes and project management.

3.4.2 Parties and Process

The original intent was that the Environmental Agreement would be negotiated by the federal government and BHP, in discussion with GNWT and the four affected Aboriginal groups. Inclusion of GNWT as a formal party was agreed to relatively early in the process, and the Aboriginal role also evolved rapidly from consultation to direct and active participation. The question of whether Aboriginal groups would be signatories to the Environmental Agreement was under discussion for some time. In the end, however, they did not participate as signatories but rather affirmed their involvement and agreement by signing the Implementation Protocol. Environmental groups were not invited to participate in negotiating the Environmental Agreement, although one of the principal environmental activists involved in the BHP process was an advisor to an Aboriginal group in these discussions.

The process for concluding the Environmental Agreement was initiated with the Minister's announcement of August 8. Actual negotiations did not begin immediately, however, as it took some time for government officials to develop a strategy and prepare an initial draft agreement as the basis for discussions. Full involvement of all Aboriginal groups in this process did not begin until September.

Once all parties were at the table, negotiations moved into a phase of intensive meetings and drafting. DIAND officials and their legal counsel had primary responsibility for drafting, although specific ideas and draft language were put forward by a number of participants throughout the negotiations. As a result of the commitment and hard work of all participants, the Environmental Agreement was in essence completed within the 60-day time frame. On October 8, 1996, the parties initialled a statement to confirm that the draft Environmental Agreement and the draft Implementation Protocol were in large measure acceptable, subject to legal and technical review. The Implementation Protocol was signed on October 8. Signature of the Environmental Agreement was delayed until January 6, 1997, following finalization of the water licence, in order to ensure consistency between the two documents.

3.4.3 Content) Implementation Protocol

The Implementation Protocol is a device used to recognize the direct involvement of Aboriginal groups in negotiating the draft Environmental Agreement and to affirm and protect their ongoing interests in the finalization and implementation of that agreement. This technique was adopted once it was decided that Aboriginal groups would not be signatories to the Environmental Agreement.

The Implementation Protocol deals with two issues: finalization of the Environmental Agreement and establishment of the Independent Environmental Monitoring Agency. On the first matter, it states that the Environmental Agreement, to be signed by Canada, GNWT and BHP, shall be consistent with the draft of October 8 and that any change in substance shall require prior consultation with the Aboriginal groups with a view to achieving consensus. Provisions are included, notably a requirement of written reasons for any changes not agreed to by the Aboriginal people, in order to ensure full and meaningful consultation and a concerted effort to reach consensus regarding any proposed changes to the draft agreement.

The second component of the Implementation Protocol concerns the process for establishing the Independent Environmental Monitoring Agency. An implementation group consisting of representatives of the parties was to be established within two weeks of the execution of the Implementation Protocol. Initial funding was to be provided by Canada and GNWT. The purpose of the implementation group was to develop and carry out a work plan for the establishment and initial operations of the Independent Environmental Monitoring Agency. With the finalization of the Environmental Agreement and the establishment of the Independent Environmental Monitoring Agency, the Implementation Protocol's functions are completed and it ceases to have any practical effect.

3.4.4 Content) Environmental Agreement

The Environmental Agreement covers a range of issues and reflects the rationales reviewed above. The purpose of this agreement is set out in Article I as follows:

> This Environmental Agreement is intended to be a legally binding agreement which provides for Project-related environmental matters additional to such matters governed by legislation, regulations and Regulatory Instruments and for the establishment of and the identification of roles of the Independent Environmental Monitoring Agency, in order to achieve the following purposes:
>
> (a) to respect and protect land, water and wildlife and the land-based economy, essential to the way of life and well-being of the Aboriginal Peoples;
>
> (b) to facilitate the use of holistic and ecosystem-based approaches for the monitoring, management and regulation of the Project;
>
> (c) to provide advice to BHP to assist BHP in managing the Project consistent with these purposes;
>
> (d) to maximize the effectiveness and co-ordination of environmental monitoring and regulation of the Project; and
>
> (e) to facilitate effective participation of the Aboriginal Peoples and the general public in the achievement of the above purposes.

In addition, the parties undertake to carry out their obligations in ways that fully consider both traditional knowledge and scientific information, apply adaptive management principles making use of the best available information and technology, promote environmental protection measures to maximise environmental quality to the extent reasonably practical, and apply the precautionary principle.

The Environmental Agreement has eight salient features. First, the parties view it as a legally binding agreement. It includes several enforcement mechanisms, beginning with a provision for notice of default and

opportunity to cure. The sanctions for non-compliance begin with a draw-down on BHP's performance security deposit. The agreement specifies a number of circumstances under which the Minister of DIAND may use the security deposit. Major compliance problems can result in the suspension or termination of the land leases. The agreement also contains a formal dispute resolution procedure, involving mediation and referral of disputes to an arbitration committee.

Second, the Environmental Agreement establishes the Independent Environmental Monitoring Agency to serve as a public watchdog of the regulatory process and the implementation of the agreement. Its tasks include evaluating the compliance of BHP and government with their obligations in the areas of environmental effects and compliance monitoring and related environmental management and reporting activities. The Independent Environmental Monitoring Agency is also intended to provide an accessible repository of environmental information relevant to its responsibilities, participate as an intervenor in regulatory and other legal processes relating to environmental matters, and serve as a means of conveying to BHP and government the concerns of Aboriginal people and the general public regarding the project. The Independent Environmental Monitoring Agency is intended to exist until the full and final reclamation of the project is
completed.

The agency has been incorporated under the *Societies Act* and will have a Board consisting of seven people, four appointed by the Aboriginal groups and three appointed jointly by Canada, GNWT and BHP. The latter three appointees will not be employees of government or BHP and will be appointed in consultation with Aboriginal peoples. The agency by-laws provide that decision making is by consensus where possible, but that decisions can be made by majority vote in the event that consensus cannot be achieved.

The core budget of the Independent Monitoring Agency will be $450,000 per year for the first two years. BHP's contribution is $350,000 for each year. The remainder will be made up by government, with the federal government providing $100,000 for the first year and the GNWT contributing $100,000 for the second year. BHP will assume full responsibility for funding the agency after two years and the agreement states that "BHP shall ... provide adequate financial resources to the Monitoring Agency to carry out its responsibilities". A process is established for setting a core annual budget for the agency. In the event that the parties cannot agree on the budget amount, this issue is to be referred to the dispute resolution process established by the agreement.

The third important feature of the Environmental Agreement is the reporting requirements. BHP is obliged to provide annual reports dealing with a range of subjects including:

- compliance with the agreement and other regulatory instruments;
- monitoring programs;
- studies or other research;

- operational activities during the reporting year and planned for the subsequent year; and
- actions taken or planned to address impacts or compliance problems identified in the annual report.

The agreement also requires triennial environmental impact reports that will address, among other things, the longer-term impacts of the project, the results of environmental monitoring programs and the actual performance of the project when compared to the results predicted in the EIS. Provision is made for a deficiency review of the reports by the Minister of DIAND, GNWT, the Independent Environmental Monitoring Agency and the Aboriginal groups.

Fourth, the agreement requires BHP to prepare environmental management plans for both the construction and operational phases of the project. Issues to be addressed in these plans include, where applicable, the management of air quality, materials, wildlife, traffic, aquatic life, waste, and quarry operations. Environmental monitoring programs shall also be included in the plans. Each plan shall include quality control and assurance programs, environmental awareness training for employees and contractors, regular briefings on environmental matters to on-site supervisors, and environmental mitigation measures. An oversight procedure allows the Minister to issue a "Minister's Report" requiring BHP to address concerns regarding the adequacy or completeness of environmental management plans. This action may be taken on the Minister's own initiative or at the request of the Independent Environmental Monitoring Agency, the GNWT, or the Aboriginal groups.

The fifth important feature of the agreement is BHP's obligation to undertake compliance and effects monitoring programs. These programs are intended to maintain compliance with the regulatory requirements, to determine the environmental effects of the project, to test impact predictions, and to measure the performance of operations and the effectiveness of impact mitigation. Environmental components to be monitored include: ambient water, wildlife, esker disturbances, vegetation, permafrost, ambient air quality, stationary emission sources and indicators relevant to the success of reclamation efforts. Monitoring programs are to be reviewed in conjunction with the environmental management plans.

Sixth, BHP is required to obtain approval from the Minister of DIAND for a reclamation plan within two years from the signing of the Environmental Agreement. The agreement specifies matters to be addressed in the reclamation plan and sets out a deficiency review process involving the Minister of DIAND, the GNWT, the Independent Environmental Monitoring Agency and the Aboriginal groups. The overall objectives for reclamation are also set out, along with the principle of progressive reclamation. Penalties are specified for a failure to restore the project site as required by the reclamation plan and the regulations under the *Territorial Lands Act*. Finally, the restoration plan under the Environmental Agreement may be coordinated with BHP's obligations under the water licence.

Seventh, the agreement contains specific provisions dealing with ongoing environmental compliance (e.g., waste disposal, maintenance of project site, fuel and hazardous chemicals), archaeological sites, traditional knowledge, and studies and research.

Finally, security deposit obligations are set out. Security from BHP is required both to cover reclamation and as a guarantee of its performance of obligations under the agreement. Security takes the form of cash or cash equivalent deposits and an irrevocable guarantee from The Broken Hill Proprietary Company Limited, BHP's parent company. The total amount of the security deposit is to be increased progressively over a number of years and there is a provision for review of the adequacy of the deposit in light of changes in reclamation plans or cost estimates. The security deposit under the agreement is in addition to that required by the water licence.

3.5 The Socio-Economic Agreement

The Socio-Economic Agreement addresses the economic benefits and social impacts of the project from the perspective of residents of the Northwest Territories as a whole and was negotiated between the GNWT and BHP.

3.5.1 Rationale

This agreement was intended to establish commitments on the part of BHP and the GNWT that either could not be formalized in legal or regulatory requirements or that were better suited to a more flexible approach. The agreement also has a clear procedural orientation, providing a framework for ongoing cooperation on socio-economic matters between BHP and the GNWT and setting objectives which the parties undertake to work towards.

3.5.2 Parties and Process

The Socio-Economic Agreement is a bilateral agreement between the GNWT and BHP. The initial proposal to negotiate this agreement was made by the GNWT and a letter of intent to proceed with these negotiations was signed by BHP and the GNWT on July 31, 1996. Negotiation of this agreement was included in the 60-day process following August 8. The Socio-Economic Agreement was initialled on October 10 and signed on October 22.

3.5.3 Content

The principal purposes of the Socio-Economic Agreement are to maximize the economic benefits of the BHP project to residents of the Northwest Territories and to minimize its negative social impacts. The agreement also identifies the monitoring of socio-economic impacts and the provision of a mechanism for effective communication, consultation and cooperation between the parties as purposes.

The parties' intention to create a legally binding agreement is not as clear as in the case of the Environmental Agreement. The Socio-Economic Agreement contains standard contractual language and format, including a formal dispute-resolution procedure that provides for binding arbitration as a last resort. The agreement does not, however, specify penalties for non-compliance. It therefore appears that the Socio-Economic Agreement is intended primarily to facilitate cooperation and set out general commitments

and objectives, as opposed to establishing precise and legally binding obligations backed by specific sanctions. It remains to be seen whether the dispute resolution procedure will be called upon to oblige either of the parties to comply with obligations under this agreement.

The Socio-Economic Agreement sets out common objectives and commitments on the part of both BHP and the GNWT in a number of areas. Topics addressed include: employment and training; social issues; community mobilization; business development; and monitoring. The provisions in each area are generally designed to achieve two objectives. The first is to maximize the opportunities available to residents of the Northwest Territories to participate in and benefit from the project. The second objective is to assist people in taking advantage of these employment and business opportunities. The section on social issues has a somewhat different focus. These provisions are directed to minimizing the negative social impacts of the project and providing opportunities for the project to contribute to community wellness.

The specific provisions in the Socio-Economic Agreement are illustrated by the section on employment and training. This section deals with such matters as preferential hiring, recruitment criteria, specific employment targets, labour market information, employment by contractors, employment support (e.g., orientation, cross-cultural training, counselling, safety), student employment, and training programs. The section on business development is less extensive, but also sets out targets for the involvement of northern businesses in contract work associated with the project and steps that both BHP and the GNWT will take to support local businesses. For example, BHP agrees to unbundle contracts whenever practicable in order to make it easier for smaller local businesses to compete. On the related subject of community mobilization, the parties simply agree to continue supporting these initiatives.

The section on social issues provides for monitoring and assessment of health and wellness indicators and the design of plans of action to deal with any problems that are identified. Both the GNWT and BHP agree to take a proactive approach to addressing social issues in the communities that serve as points of hire for the mine. The section on monitoring contains commitments to monitor the results of the agreement in the areas of training, employment and business opportunities. Principles for monitoring are set out in a schedule to the agreement.

Schedules to the Socio-Economic Agreement set out specific target levels for the employment of northern residents in general and Aboriginal people in particular and for the purchase of goods and services from local businesses. Schedules also deal with reporting obligations, community mobilization activities, indicators of community health and wellness, baseline data sources for community health and wellness indicators, and principles for the monitoring of activities.

3.6 The Impact and Benefits Agreements

The impact and benefits agreements (IBAs) are private agreements between BHP and individual Aboriginal groups. These agreements were largely negotiated in closed sessions and include a confidentiality clause. As a result, IBAs are not publicly available and the authors of this report were not able to review these agreements. A full description of IBAs is therefore not possible in this report.

Nonetheless, a number of participants in the BHP process were willing to talk in general terms about the issues addressed in IBAs. These comments provide the basis for the brief discussion that follows.

3.6.1 Rationale

IBAs are intended to address specific social and economic impacts of development on Aboriginal peoples and to ensure that benefits flow directly to the Aboriginal communities affected by a project. Since these agreements are negotiated bilaterally between individual Aboriginal groups or communities and the company, the impact and benefits provisions can be tailored to the specific circumstances of the Aboriginal parties.

Mining legislation applicable to the Northwest Territories does not contain a statutory requirement regarding IBAs and, in the case of the BHP project, there was no settled land claim that obliged the company to negotiate IBAs. Nonetheless, BHP took the initiative in negotiating IBAs well before the Minister made satisfactory progress in this area a condition of project approval. The company recognized that concluding IBAs would contribute to its "good neighbour" policy with Aboriginal groups and would be an important factor in securing Aboriginal support for the project. From the Aboriginal perspective, IBAs simply reflected the right of Aboriginal groups to receive direct benefits from projects occurring within their traditional territories.

3.6.2 Parties and Process

IBA negotiations occurred between BHP and four Aboriginal groups: the Treaty 11 Dogribs; the Treaty 8 Dene; the Metis; and the Inuit. Although the absence of settled land claims meant that firm legal rights of various non-Inuit Aboriginal groups to land and resources had not been finally settled, it was clear that outstanding claims covered the area around the BHP site. These outstanding claims provided the basis for recognizing each group's legitimate interest in securing an IBA. The Inuit did not have a pending land claim in the area around Lac de Gras but they had used that area for hunting and were downstream of the proposed mine. They were therefore in a position to seek negotiation of an IBA despite the fact that the project was outside of their settled land claim.

IBA negotiations occurred bilaterally between the company and each of these four groups. At the outset, progress on these agreements was slow and the meeting schedule was erratic. Discussions between BHP and the Treaty 11 Dogribs were initiated in May 1994, although little progress was made for over two years. In May 1996, BHP signed a protocol agreement for an IBA with the Metis Nation of the Northwest Territories. Progress on these negotiations was delayed for a number of months, however, while the Metis determined which organization should serve as their representative. In June 1996, BHP and the Treaty 8 Yellowknives Dene agreed to a schedule for IBA negotiations.

These initial meetings did not, however, yield significant progress on IBAs. Intensive negotiations with all four Aboriginal groups did not begin in earnest until after the Minister's announcement of August 8 that progress on these agreements was to be achieved within the 60-day time period. These negotiations

resulted in an IBA between BHP and the Treaty 11 Dogribs that was initialled on October 8 and signed on October 18. There was also significant progress with the Treaty 8 groups during the 60-day period. Their IBA was signed by the Treaty 8 Yellowknives Dene on November 12 and by the ºutsel K'e Dene on November 14. Negotiations with the North Slave Metis and both the Hamlet of Kugluktuk and the Kitikmeot Inuit Association were at much more preliminary stages at the outset of the 60-day period and could not be completed within that time frame. As of May 30, 1997, IBAs have not been signed with these groups.

3.6.3 Content

The authors of this report have not reviewed the IBAs negotiated for the BHP project and can therefore provide only a general description of their content. It appears that these agreements concern primarily socio-economic issues. Topics addressed include employment practices and targets, business opportunities, training, scholarships and transportation to and from communities. IBAs also provide for annual cash payments to Aboriginal groups for the commercial life of the mine. Certain Aboriginal groups originally wanted to include environmental provisions in IBAs, but most apparently agreed that this topic could be adequately addressed though the Environmental Agreement. It appears, however, that the Inuit continued to press for some specific recognition of their environmental concerns in the IBA after the finalization of the Environmental Agreement. Several participants in the BHP process also mentioned that the initial IBA draft proposed by BHP included a provision requiring the Aboriginal party to refrain from objecting to the issuance of licences or permits for the mine. Whether this provision found its way into final IBAs is not a matter of public record.

3.7 Water Board Hearings and the Water Licence

The Northwest Territories Water Board is an independent quasi-judicial tribunal operating under authority conferred by the *Northwest Territories Waters Act*. The objects of the Board, as set out in section 12 of this statute, are "to provide for the conservation, development and utilization of waters in a manner that will provide the optimum benefit therefrom for all Canadians and for the residents of the Northwest Territories in particular." DIAND elaborated on these objects in its written submission to the EA panel hearings on the BHP project, stating that the main objectives of the *Northwest Territories Waters Act* are to:

1. provide for the equitable distribution and sharing of rights to use water in the North among interests with legitimate and sometimes conflicting claims on this resource;

2. ensure that the disposition or allocation of water rights is done in a manner that is consistent with immediate and long-term regional and national interests;

3. ensure that all works and undertakings planned for the use, diversion, storage or treatment of water are designed and constructed to acceptable engineering standards; and

4. establish and maintain the principle that rights to the use of water are dependent on the users accepting full responsibility for maintaining its quality or restoring its quality to acceptable standards before returning water to the natural environment.

The Water Board gives effect to these objectives through its regulatory authority to issue licences to water users.

In order to operate its proposed diamond mine, BHP required a Type A water licence. The process for obtaining this licence involved the review of BHP's application at public hearings before the Water Board and in meetings of the Board's Technical Advisory Committee (TAC). The Board then circulated a draft licence to interested parties for comments. The terms and conditions of the licence were finalized by the Water Board after receipt of these comments and the licence was sent to the Minister of DIAND for his approval. Four stages in the review of BHP's water licence application can be identified: the Water Board's September hearings, the TAC meetings following these hearings, the October hearings, and the finalization of the water licence.

3.7.1 The Water Board's September Hearings

BHP's application for a water licence was dated March 22, 1996 and the key stages of the licensing process occurred concurrently with the other regulatory and negotiated processes during the 60-day period following the Minister's announcement of August 8. The Water Board scheduled two days of hearings for September 9-10 and a variety of interested parties indicated their intention to participate. The parties with written briefs to present were DIAND, Environment Canada, DFO, the Northern Environmental Coalition and the Dogrib Treaty 11 Council. The Board also received notice of oral presentations from the Yellowknives Dene First Nation and the Kitikmeot Inuit Association.

It appears that Water Board hearings are generally conducted in a relatively informal manner, with no strict time limits on presentations and the Chair intervening when he considers it necessary to keep presenters on topic. Particular care is taken to give Elders an opportunity to state their views on water licence applications. In addition, the Board seeks to avoid what it perceives to be excessive judicialization of the process. Rules of evidence and courtroom procedures are not applied and formal cross-examination is not, in general, permitted.

As the BHP hearing unfolded on September 9 and 10, it became clear that the Water Board was faced with a number of serious challenges to its standard procedure and proposed timetable. Several parties were represented by lawyers and the tone of the hearing was adversarial from the outset. In particular, legal counsel for the Dogrib Treaty 11 Council conducted a detailed and critical examination of BHP's written application and presentation to the Board and subjected government officials to thorough questioning. The Dogrib Treaty 11 Council also presented its own detailed technical evidence regarding what it argued were deficiencies in BHP's application. Other Aboriginal groups and the intervenor from the Northern Environmental Coalition also made presentations and questioned representatives from BHP and the government. The Board's efforts to ensure that all parties would have an opportunity to be heard during

the two day hearing raised the possibility that some groups might not have time to present their arguments and evidence in full and ask all the questions that they wanted of other parties.

In addition, several of the Aboriginal groups requested that the Board grant an adjournment in order to allow adequate time for their legal and technical experts to review BHP's water licence application. This argument was based on the complexity of BHP's application and the fact at least one group received intervenor funding from DIAND only days before the hearing. There were thus real concerns regarding the fairness of the hearing and a risk that a decision to deny the request for an adjournment might have been challenged in court.

Finally, there is a consensus among most of the participants in the September hearing that BHP, government officials, and perhaps the Water Board itself, were not adequately prepared for the level of scrutiny that was brought to bear on the application. Interestingly, this view is shared not only by participants from Aboriginal and environmental groups but also by some DIAND officials who were involved in the BHP process. Furthermore, it is generally recognized that the Dogrib intervention raised significant questions regarding the adequacy of both BHP's application and supporting material, and the government response to that application. In light of these questions, there was a strong argument that it was inappropriate to conclude the hearings after two days and proceed to the final stages of the water licensing process.

All of these factors apparently contributed to the decision by the Water Board to convene a second phase of hearings on October 21. In announcing this decision, the Chair noted the difficulties experienced by members of the public in understanding the technical content of BHP's application. He also outlined a process to address unresolved issues prior to the hearings reconvening.

3.7.2 Technical Advisory Committee Meetings

The technical review of BHP's water licence application continued following the first phase of the Water Board hearings. The technical concerns raised at the hearings were referred to TAC, which was instructed to advise the Board of any issues that remained unresolved or unclear. TAC served as a forum for detailed discussions among BHP representatives, government officials and other interested parties. It provided a vehicle for narrowing the issues before the Water Board at the second phase of the hearings and advising the Board on the appropriate terms and conditions to be included in the water licence. The efficiency of this process was enhanced by the use of written interrogatories as a means for intervenors to ask questions and receive answers on the record from BHP or other intervenors. The Water Board also hired independent experts for the first time to advise it during the technical review process and the second phase of the hearings.

3.7.3 The Water Board's October Hearings

Hearings on BHP's application reconvened for two days on October 21 and 22. The hearings included presentations by the Treaty 11 Dogribs, the Yellowknives Dene First Nation, the ºutsel K'e First

Nation, DFO, DIAND, the Canadian Arctic Resources Committee, the Kitikmeot Inuit Association and BHP. The tone of the hearing reflected the discussions at the TAC meetings and, perhaps, the progress that had been made in other forums on the Environmental Agreement and certain of the IBAs. The Treaty 11 Dogribs, for example, stated that they were no longer opposed to the project, and their presentations focused on the terms and conditions for the water licence. Aboriginal groups also presented arguments regarding their entitlement to compensation under the *Northwest Territories Waters Act*. Government participation also differed from the first phase of hearings, as presentations were made by senior officials who were in a better position to answer questions regarding the BHP process as a whole. In particular, the Chair of the Water Board raised a number of concerns regarding the relationship between the water licence and the Environmental Agreement, notably in relation to security deposits and monitoring requirements.

3.7.4 Preparation of the Draft and Final Versions of the Water Licence

Following the October hearings, a meeting of TAC was convened to examine remaining technical issues and to consider the precise content of the water licence. The Chair of TAC also formed sub-committees to address effluent quality limits and the design of a water effects monitoring program and a surveillance network program. The Board's independent experts contributed to these discussions. Recommendations were then forwarded to the Water Board regarding the specific provisions to be included in the draft licence.

The draft licence was circulated to BHP and all intervenors on December 2, although provisions specifying the licence term, security deposits and compensation were not included. Detailed comments were received from a number of parties and the licence was then finalized by the Water Board and sent to the Minister of DIAND. The announcement that the Minister had approved the water licence was made on January 7, 1997. Reasons for the decision of the Water Board were issued on February 5, 1997.

3.7.5 Content of the Water Licence

The BHP water licence is generally recognized as the most comprehensive and detailed ever issued by the Water Board. The principal issues addressed in the licence include: the amount of water that may be used; conditions applying to the dewatering of lakes; control and treatment of waste water; conditions applying to waste disposal (e.g., tailings, acid/alkaline rock drainage, waste rock, sedimentation ponds, surface mine water settling ponds, and effluent discharge); abandonment and restoration requirements; a Water Effects Monitoring (WEM) Program; spill contingency plans; the security deposit; and general reporting requirements. In particular, the water licence requires
that:

- BHP submit to the Water Board for approval an abandonment and restoration plan that addresses a range of features of the mine site including open pits, waste rock storage areas, sediment ponds, mine tailings, and sewage areas;

- a security deposit be provided by BHP and maintained until such time as it is refunded by the Minister of DIAND and the security be available to be used by DIAND in the event that BHP fails to meet the obligations of the water licence;

- BHP undertake a WEM Program that identifies short-term and long-term cumulative changes in the water environment resulting from the project and provides a means of assessing the accuracy of BHP's impact predictions and the effects of mitigation measures taken by the company;

- BHP undertake water quality studies related to effluent treatment, reclamation of tailings slurries, and toxicity of kimberlite in the aquatic environment;

- BHP undertake a ground water study to monitor the impact of the project on ground water as development proceeds;

- BHP respond to any unauthorized discharge of waste water by following the appropriate contingency plan, which includes reporting the incident immediately to the 24-hour spill reporting line and submitting detailed reports to DIAND;

- BHP file an annual report on the quantities of water used that includes summaries of dewatering activities, construction activities involving water, waste management plans and the results of the WEM Program;

- BHP include in its annual report any revisions to the approved contingency plan, a list of unauthorized discharges and summaries of follow-up action, an outline of spill training and communications exercises carried out in relation to water, a summary of any abandonment and restoration work undertaken during the year, an outline of work anticipated for the next year, an updated estimate of current mine restoration liability, and any other information on water use or waste disposal requested by the Water Board; and

- BHP submit any modifications to any water supply and disposal plans to the Water Board for approval in order to ensure that such changes are consistent with the terms of the overall water licence.

The term of the licence runs from January 1, 1997 to December 31, 2004 (8 years).

The Board's reasons for decision for the water licence were issued on February 5, 1997 and dealt primarily with the issue of compensation to Aboriginal groups. The Board concluded that any losses suffered by these groups as a result of the issuance of the water licence were not of the type that would entitle these groups to compensation under the *Northwest Territories Waters Act*. In particular, the Board rejected claims for in-kind compensation and for compensation based on what the Board viewed as insufficient evidence of specific adverse effects on instream users. The Board also concluded that it lacked

the jurisdiction to provide the support requested by one Aboriginal group for the establishment of "an acceptable compensation process."

3.8 The Authorization under the *Fisheries Act*

BHP required an authorization from the Department of Fisheries and Oceans (DFO) under section 35(2) of the *Fisheries Act* because the proposed mining operations would result in the permanent alteration and destruction of fish habitat. The process for obtaining this authorization involved discussions with DFO regarding the application of the department's "no net loss" policy for fish habitat to the circumstances of BHP's project.

DFO's preference is for project proponents to meet the no net loss requirement by creating or enhancing fish habitat in the immediate vicinity of the project. Some creation of stream habitat was possible through the adaptation of BHP's water management plan for the project. The creation of new lake habitat was judged not to be feasible, however, in part because of the engineering and ecological problems with establishing new lakes in the arctic environment.

Since the no net loss requirement could not be satisfied through off-setting habitat creation, DFO and BHP entered discussions regarding cash compensation for habitat loss. DFO's policy in this respect was apparently not entirely clear to BHP. The principal issues to be resolved concerned the appropriate basis for calculating compensation and the use to which the compensation fund was to be put. Despite difficulties in the negotiations, a compensation agreement was eventually reached between BHP and DFO. It appears from DFO testimony at the Water Board hearing that the compensation amount agreed to was the estimated cost of creating an amount of lake habitat equivalent to that destroyed by the project, calculated on the basis of surface area and volume of water. This amount was to be paid into a compensation fund, the purpose of which was to support fish habitat enhancement projects in the Northwest Territories. In particular, DFO officials stated that the enhancement of fisheries used by Aboriginal people will be a priority. DFO's intention is to seek input from Aboriginal groups in identifying projects to be financed in this way. Some consideration is being given to administering this fund through, or in conjunction with, the Independent Environmental Monitoring Agency established under the Environmental Agreement.

The signing of the *Fisheries Act* authorization by DFO was announced on January 7, 1997 along with the other regulatory approvals for the project. As per the terms of the *Fisheries Act* authorization, the fish habitat compensation fund was established at that time. The arrangements governing the disbursement of money from this fund remained to be finalized.

3.9 The Land Leases

The final approval of the BHP project included the issuance of six land leases. These leases allow for open pit development and camp facilities, tailings disposal, and the development of an airstrip at the project site. They have a term of thirty years. Several provisions in these leases are particularly noteworthy.

The detailed environmental conditions that apply to the leased land are contained in the Environmental Agreement and that agreement is explicitly referred to in the leases. In particular, each lease contains a clause stating that:

> a breach of the Environmental Agreement, adversely affecting the lands granted hereunder, or resulting in an adverse impact to the adjacent lands as a result of the use of the lands granted, hereunder, shall be deemed to be a breach of the lease.

In the event of a breach of a lease by BHP, the Minister of DIAND may use the security deposited under the Environmental Agreement in order to remedy the breach. A significant breach of the Environmental Agreement can result in termination of the leases. In addition, each lease specifies that the Minister may suspend operations if BHP is conducting operations that are, in the opinion of the Minister, causing irreparable damage to the environment that is not inherent to an open pit mining project.

The leases permit the Minister of DIAND to grant rights of access to the leased land to persons other than the lessee. They also specify that any dispute arising out of the leases shall be resolved using the dispute resolution mechanisms established in the Environmental Agreement. The final provision of note states that the Minister will not consent to an assignment or sublease unless all of the other land leases, the Environmental Agreement and the water licence are sublet or assigned to the same party.

3.10 Future Regulatory Requirements

BHP received the necessary regulatory approvals for the project to become fully operational on January 7, 1997. Additional regulatory processes will apply, however, over the expected life of the project. Two types of processes can be identified at this time. First, BHP will be obliged to renew existing regulatory approvals that expire prior to the completion of its mining operations. Second, changes in project design and the scope of operations may require further project review and new regulatory approvals.

3.10.1 Renewal of the Water Licence

The water licence for the BHP project has a term of eight years. BHP will therefore be obliged to submit a new application for a water licence within that period of time if it wishes to continue

operations beyond eight years. This application may be for a renewal of all or part of the existing licence and it may also seek a modification of the licence to accommodate new operations. The renewal of BHP's fixed term water licence may well be affected by the evolving land claims situation and related institutional and regulatory changes. For example, passage of the *Mackenzie Valley Resource Management Act* (*MVRMA*) as it is now drafted would result in a combined land and water board having jurisdiction over the project, and specifically over the water licence and any application for its renewal.

It is difficult to predict what effect, if any, such a change might have on BHP's application to renew or amend its water licence. It is true that a land and water board under the *MVRMA* would largely be

applying the same provisions of the *Northwest Territories Waters Act* as the existing Water Board. However, the composition of the new board will be quite different, with provision made for representation of Aboriginal groups. The nature of this representation will depend to some degree on whether the governing board is the region-wide board or a regional board set up pursuant to the conclusion of a land claims agreement (as already exists for both the Gwich'in and Sahtu settlement areas, but which is not yet in place for the area where the BHP mine is located). Especially in the latter case, one may expect a particular focus on Aboriginal concerns at the time of a renewal of the licence.

Another issue that may arise in the event of an application for renewal of the water licence is the possibility of compensation to an Aboriginal group for damage as the result of an alteration to water quantity, quality or flow. Under the *MVRMA*, this is a possibility in both the Gwich'in and Sahtu settlement areas. Presumably, however, a similar provision would be a likely outcome of future land claims settlements. On the face of it, then, BHP could find itself in the position of incurring new compensation responsibilities at the time of licence renewal.

BHP's obligation to renew its water licence if it continues operations beyond eight years could have significant implications for the project and must therefore be viewed as an integral part of the regulatory and benefits package. In fact, the term of BHP's licence was addressed by a number of participants in the Water Board hearings. Aboriginal and environmental groups argued for a relatively short term (five to seven years) on the grounds that the renewal process is a means of verifying the effectiveness of environmental protection measures and ensuring that the company is performing its obligations. BHP argued that a longer licence term (eleven years) would be more appropriate given the need for sufficient time to compare predicted versus actual effects of the project. The water licence renewal process is therefore a direct and fully anticipated extension of an important component of the BHP process. At a minimum, the renewal process will provide another opportunity for interested parties to scrutinize the project. It may also result in the modification of certain regulatory provisions governing the design and operation of BHP's mine.

3.10.2 Alterations to Mining Plans and Project Expansion

A second type of future regulatory requirement may be triggered by changes in the design of the project. The possibility of minor, and perhaps major, changes in BHP's operational plans is by no means hypothetical. For example, BHP announced in early 1997 that it plans to substitute one mining location specified in the original application and EIS for another. This change in plans follows new and promising test results from the second location and will require construction of an additional road and associated infrastructure.

It is to be expected that a mining operation such as BHP's diamond mine will evolve over the course of its life, and BHP has signalled its intention to continue evaluating potential diamond deposits within its claims block. There is no doubt that significant changes in project design will require a new or amended water licence and new land leases. What is not so clear, however, is whether changes in project design and the eventual expansion of BHP's operations within its claims block will be handled entirely through the regulatory process or whether these changes might, at some point, constitute a new project and therefore

trigger EA requirements. These requirements would involve at least an initial screening of the project and could lead to a more extensive review. If BHP's eventual operations turn out to be significantly different from those described in the EIS, the question of whether a new EA is required may have to be answered. This question could prove to be an important loose end, left hanging by the BHP process and the regulatory and benefits package that it produced.

3.11 Ongoing Research and Monitoring Activities

The provisions made for ongoing monitoring and research activities are an important feature of the BHP process. As noted above, the Independent Environmental Monitoring Agency is established under the Environmental Agreement and monitoring requirements are contained in the water licence. The Socio-Economic Agreement also contains provisions for monitoring the social and economic consequences of the project.

A related research initiative is the West Kitikmeot/Slave Study (WKSS). Although this regional environmental study is not directly linked to the BHP project, it was initiated concurrently with the decision to refer BHP's application to an EA panel review and it clearly reflects a concern that BHP's diamond mine may be the first of a series of projects in the region. The EA panel acknowledged the importance of the WKSS, notably in light of deficiencies in baseline information on caribou and grizzly bears, and recommended that the study program be designed to provide the information necessary for regional decision making, including cumulative effects assessment of future development in the region. The study is a joint initiative of government, industry, Aboriginal groups and environmental groups. Its goal is to collect and make available information on the West Kitikmeot/Slave area in order to assist informed decision making by the partners in the study and to facilitate sustainable development. The WKSS will draw on both traditional and scientific knowledge and its scope includes both the natural and the socio-economic environment of the study region.

The first research projects approved by the management board of the WKSS were announced in May, 1996. The WKSS also released the first version of its Research Strategy and Project Proposal Guidelines at that time. Research findings from the WKSS were not available in time to be incorporated into the BHP process. This study may, nonetheless, contribute information to the project review and regulatory processes for future projects in the region. Its findings may also be relevant to BHP's applications for licence renewals and for the approvals required to expand the company's mining operations.

3.12 The Protected Areas Strategy

The establishment of protected areas was a major concern of certain environmental groups throughout the BHP process. The implications of the project for protected areas was one issue raised in the EIS guidelines and addressed by the Northern Environmental Coalition in the EA hearings. The World Wildlife Fund (WWF), in particular, argued that project approval should be contingent on government establishing a protected areas strategy for the region. The EA panel report reviewed these arguments and concluded that project approval would not compromise the development of protected areas in the region. It agreed,

however, that a protected areas strategy should be developed. The WWF's response to the EA panel report pushed this issue onto the BHP agenda in the summer and fall of 1996.

3.12.1 WWF Law Suit

On July 3, 1996, the WWF announced its intention to seek judicial review of the EA panel's report on the grounds of procedural unfairness and a failure to address adequately the issue of protected areas. In letters to the Prime Minister and to BHP, WWF signalled clearly that its objective in launching the law suit was to obtain a commitment to protected areas designation, not to stop the project. Nonetheless, the letter to BHP stated that litigation regarding the panel report could end up in the Supreme Court of Canada and that the result might be to delay project approval. Regardless of the legal merits of WWF's application for judicial review, the risk of protracted litigation was viewed with concern by BHP and prompted a direct response by government.

3.12.2 The Protected Areas Policy Initiative

The government's public response to the WWF's law suit was a promise in the Minister's announcement of August 8 to put in place a protected areas strategy in the Northwest Territories by the end of 1998. Following this announcement, WWF suspended its legal action pending clarification of the government's commitment to protected areas. Discussions on protected areas were carried on concurrently with the other negotiations during the 60-day period following the Minister's announcement and it was generally recognized that some progress in this area was effectively a precondition to project approval.

The GNWT took the lead on this issue and an initial discussion document was circulated in October. Discussions among government officials, Aboriginal representatives and environmental groups to develop a framework for the protected areas strategy yielded some progress during the 60-day period and the Minister's announcement of November 1 stated that priority would be placed on identifying sites in the West Kitikmeot/Slave Study Area and that there was "a clear commitment from all parties to continue work to address this initiative and implement the strategy once finalized". A final agreement was reached in mid-January. The key to this agreement was a commitment by the federal government and the GNWT to produce a protected areas strategy by the end of 1998 and to provide interim protection for high-priority sites. In addition, the federal government agreed that impacts on protected areas should be taken into consideration in the EA process for future industrial projects. This agreement resulted in an announcement on January 13 by the WWF that it was withdrawing its application for judicial review of the EA panel report.

Although the commitment by governments to develop a protected areas strategy is not, strictly speaking, part of the regulatory and benefits package relating to the BHP diamond mine, securing this commitment removed a potential obstacle to the project proceeding. The experience in this regard is relevant to the future application of the BHP model in that it shows how broad policy issues can be injected into a project-specific process by a determined intervenor.

3.13 Summary of the Regulatory and Benefits Package

The preceding sections describe the principal regulatory instruments and agreements that together represent the end products of the BHP process. The key elements of what is referred to in this report as the BHP regulatory and benefits package are:

- an Environmental Agreement between the federal government, GNWT and BHP and an Implementation Protocol that is signed by the above-mentioned parties and the Aboriginal groups that participated in the BHP process;
- a Socio-Economic Agreement signed by the GNWT and BHP;
- IBAs between BHP and each Aboriginal group (two of these have yet to be signed as of May 30, 1997);
- a water licence issued by the Northwest Territories Water Board;
- an authorization to destroy fish habitat issued by DFO, accompanied by a fish habitat compensation agreement between DFO and BHP; and
- land leases issued by DIAND to BHP.

3.14 Principal Themes of the BHP Experience

The BHP process was, of course, more than simply the sum of its individual components. Attention to the broader themes that emerged in the course of the project review, regulatory and negotiated stages is essential to a full understanding of what happened, why events unfolded as they did, and what implications the BHP experience has for future development in the North. This section briefly highlights several of the principal themes of the BHP process.

3.14.1 Political Relationships and Institutional Arrangements in Transition

One cannot understand the BHP experience without recognizing that it occurred in the context of a fluid and, in many respects, turbulent institutional and policy environment. The location of BHP's diamond property in an area of unsettled and overlapping land claims was a key factor contributing to uncertainty and unpredictability throughout the process. The fact that the project was passing through the review and regulatory process at the same time as Aboriginal groups in the region were engaged, to varying degrees and in various ways, in land claims negotiations was an important determinant of the issues that arose and the parties' positions. BHP, quite understandably, felt strongly that its project should be evaluated on its own merits and treated separately from the land claims process. Equally understandably, Aboriginal groups were very concerned about the implications for land claims negotiations of extensive mineral staking and a number of concrete development proposals in areas where their claims had yet to be resolved. In

particular, the government's policy of withdrawing land in an "advanced stage of exploration" from the land selection process under the claims meant that Aboriginal groups were confronted with the possibility of having the most valuable mineral properties within their traditional territories removed from the claims process. Added to this direct impact of development on land claims, Aboriginal groups saw in the project review and regulatory processes an opportunity to apply political pressure and state in a public forum their concerns relating to land claims. Although government might have been able to provide more assistance to the company or greater certainty to Aboriginal groups regarding their claims processes, the project could not have been completely insulated from the land claims context.

Changing legal regimes and institutional relationships affected the project in other ways as well. Expectations regarding Aboriginal involvement may have reflected impending institutional changes in the Western Arctic, notably the *Mackenzie Valley Resource Management Act*, and precedents established by settled claims such as the *Nunavut Agreement*. Undercurrents of devolution and down-sizing may also have had an impact on the role and capacity of government. The EA process reflected another set of legal and policy changes, as it was governed by the EARP Guidelines Order but was, according to the Minister of the Environment, to be conducted "in the spirit" of the *Canadian Environmental Assessment Act*.

The BHP process was therefore designed and implemented in a situation of considerable legal, institutional and political flux. This context explains in large measure the challenges and frustrations encountered by the parties throughout that process.

3.14.2 Problems of Public Confidence in Traditional Regulatory Mechanisms and Decision-Making Processes

A second important contextual theme is a lack of confidence among some non-governmental participants in traditional approaches to regulation and decision making. The experience of Aboriginal people with mining in the North appears not to have been a positive one and they had little confidence that government would protect their land or way of life. Added to this was frustration, alluded to above, with the pace and content of land claims negotiations. Environmental groups also questioned government's commitment to rigorous environmental regulation given the history of some mining and other projects in the North. These concerns were recognized and acknowledged to be valid by at least some government officials. In several interviews, government officials stated that in their view the record of development in the North justified some scepticism regarding the willingness or ability of government to take the measures required to protect adequately the environment and Aboriginal interests. Others pointed out that government officials had done their best in these areas given the regulatory instruments and resources at their disposal.

The generalized lack of confidence was also focused on particular processes and institutions. Although there was little recent experience with the EA process in the North, the BHP panel's report was a disappointment to some participants. The effectiveness of the Water Board as a regulatory tribunal was also questioned, at least in some quarters, and there appeared to be little confidence in use of land leases as

instruments of regulation. From the perspective of Aboriginal and environmental groups, there was neither recent experience with successful regulation of large-scale projects nor a fully developed statutory and regulatory regime to inspire confidence at the outset of the BHP process. Down-sizing in government raised further questions about regulatory capacity.

Finally, confidence in government as a regulator was undermined by the perception among some groups that both federal and territorial governments had taken a firm pro-development perspective from the outset and saw their roles throughout the BHP process as being project promoters as much as project regulators. This concern was borne out to some extent in interviews with participants both within and outside of government. There is clearly a perception) shared by some government officials) that the rigour of government's technical review and public scrutiny of the BHP project was in certain respects compromised as a result of explicit or implicit policy directives that the project was in the public interest and government should not be putting obstacles in the way of approval.

Important elements of the BHP process reflect this lack of confidence in both regulators and the regulatory regime. As noted above, a principal rationale for the Environmental Agreement was to address concerns and entrench obligations that did not have an obvious place in the formal regulatory framework. The importance attached by Aboriginal groups to the Independent Environmental Monitoring Agency also reflects the lack of confidence that government would provide adequate monitoring without their involvement and oversight. Had there been greater confidence in government among Aboriginal and other participants in the BHP process, the end result might have looked quite different.

3.14.3 Redefining the Role of Government

A third important theme of the BHP experience relates to the complex and multifaceted role of government in relation to this project. Government could be seen to be acting in the following capacities:

- project promoter and facilitator;
- significant beneficiary of a large revenue stream if the project proceeded and lived up to expectations;
- provider of infrastructure and public goods in the North, faced with significant financial constraints and an opportunity through this project to share funding and other responsibilities in this area with the company;
- provider of technical expertise and scrutiny regarding the project
    - in its own right (as decision-maker and intervenor in EA and regulatory processes); and
    - in the case of the Water Board, as a technical support group for an independent

quasi-judicial regulatory tribunal;

- project regulator, responsible for protecting the public interest in relation to environmental, socio-economic and other impacts;
- land owner and manager;
- public institution responsible for promoting the interests of Aboriginal people and ensuring that they received benefits from the project;
- fiduciary to Aboriginal peoples; and
- negotiator with Aboriginal people in ongoing and contentious land claims and self-government processes.

While government is not a monolithic institution and it is inevitable that it will deal with a project such as the BHP diamond mine in a variety of capacities, the complexity of its roles and potentially conflicting interests in this case is striking. As noted in the previous section, these potentially conflicting interests fuelled concern among some participants that government's position as a promoter and significant beneficiary of the project was colouring its role as regulator.

It is therefore significant that a major theme of the BHP process is a redefinition of the role of government in certain areas. This redefinition can be characterized as a withdrawal from certain functions and a transfer of responsibility to other participants in the process. One is tempted to refer to what occurred as a "privatization" of certain government functions, although this term is not entirely accurate to the extent that Aboriginal groups' involvement in the BHP process reflects a quasi-governmental status.

There are four principal examples of a redefined government role within the BHP process. The first concerns scrutiny of the application. Under a conventional model, government would have primary responsibility for assessing the project application, noting deficiencies and ensuring that all areas of concern are fully addressed before the project proceeds to regulatory approval. Even where regulatory agencies exercise arm's length authority, they may be in practice heavily reliant on government for technical scrutiny. In the case of BHP's application for a water licence, however, some participants are of the opinion that the most rigorous scrutiny of the application was supplied by the interventions of the Dogribs and their technical and legal advisors. The view of certain governmental and non-governmental participants in the process is that the Dogrib intervention at the Water Board was responsible for, as one person put it, "turning the tide" in terms of the detailed technical scrutiny of BHP's application. The implication is that intervenors and independent experts, not government, may be the most effective sources of scrutiny of project applications under certain circumstances.

The second example of a redefined government role concerned the negotiation of the Environmental Agreement. Instead of government establishing regulatory terms and conditions on its own or in confidential

discussions with the proponent, its role here was to initiate, facilitate and participate as a party in a negotiated process where non-governmental groups played a significant role. While government certainly did not drop out of the picture in the course of these negotiations, there is no doubt that the final product was significantly influenced by the direct involvement of Aboriginal groups and their legal and technical advisors. This approach to setting regulatory terms and conditions for a major project is a significant and some would say remarkable departure from the traditional regulatory model.

The third area where government's traditional role was significantly redefined by the BHP process concerns ongoing project monitoring. Although the Independent Environmental Monitoring Agency was established through the Environmental Agreement, it warrants individual attention because of its implications for government following project approval. The striking feature of this agency is that it will act as an independent body to oversee the monitoring and project management activities of both the company and government. Government is no longer solely responsible for ensuring effective monitoring during the life of the mine. Instead, a project-specific accountability mechanism, quite separate from the normal channels of political and legal accountability, has been established to reflect directly the concerns of Aboriginal groups. In addition, BHP bears primary responsibility for funding this agency over the life of the project. This component of project-specific monitoring is thus funded on a "user pay" model, rather than being provided as a public good by government.

Finally, government's traditional role is redefined or supplemented in two respects through the use of IBAs. First, this mechanism permits Aboriginal groups to secure socio-economic benefits directly from the project proponent, rather than relying on government to meet their needs in this area and funnel the necessary resources to them. This type of direct involvement by Aboriginal groups in securing socio-economic benefits through IBAs was not new, since IBAs had been negotiated for a number of earlier projects and were widely recognized as accepted practice for large-scale resource development in the North even before the BHP process. Nonetheless, the BHP process will further entrench IBAs as a direct means for Aboriginal groups to secure socio-economic benefits from development. Second, IBAs appear to be serving a direct redistributive function in parallel to royalty and taxation regimes operated by government. Through the BHP IBAs, a certain portion of the revenue from the project is extracted from the company and allocated to non-governmental (or quasi-governmental) organizations by means of private contracts.

The redefinition of government's role illustrated by these four facets of the BHP process has important implications that will be discussed in some detail later in this report. Perhaps the key general point, however, is that the changes in government's role have direct consequences for the roles of other participants and for the conditions necessary for effective project review and regulation. The conscious withdrawal by government in certain areas raises important questions about the nature of its residual role and the responsibilities that are explicitly or implicitly shifted to others. If the BHP model is to work properly, attention to the roles and requirements of other players is at least as important as recognition that government is acting in a new way.

3.14.4 Innovation in Process and Regulatory Instruments

A fourth theme of the BHP process is the importance of innovation. There was no precedent for the conditional approval and 60-day time frame imposed by the Minister's announcement of August 8 nor was there a pre-determined process for the complex and interrelated negotiations that followed. Parties also lacked a template for the final regulatory and benefits package that emerged at the end of that process. Although an environmental agreement had been used in the case of the Normal Wells pipeline, the BHP approach went well beyond that model in terms of substance, process and profile. The idea of an independent monitoring agency was also not entirely novel, but the form adopted in the BHP case was unique in important respects. The Socio-Economic Agreement also represented a significant innovation.

Government, BHP and the other participants were all obliged to be flexible and innovative throughout the process and the final regulatory and benefits package is a testament to the contributions of all parties in this respect. The theme of innovation is thus central to understanding and evaluating the BHP process. This theme also raises important issues regarding the implications of that process. What were the underlying factors that produced these innovative approaches? Were the innovations linked to particular circumstances and the involvement of key individuals, or do they have more general applicability? Can the positive aspects of the BHP process be replicated for future projects without requiring parties to re-invent the wheel? How can the desirable balance between innovation and certainty be achieved for other projects? These questions will be returned to in the analysis of the BHP process that follows.

3.14.5 The Challenge of Process Coordination

The need to coordinate different components of the project review and regulatory process is a fifth theme that emerges from the BHP experience. The relationships between the EA and regulatory stages and among certain regulatory processes appeared to be unclear to many participants in the BHP process. For example, the relationship among the Water Board's process, the negotiation of regulatory requirements through the Environmental Agreement and the discrete DFO process dealing with fish habitat was a matter of concern raised by the Water Board Chair during the public hearings. Where issues such as monitoring requirements, security deposits and reclamation plans are dealt with in separate processes, there is clearly a need for some coordination.

In the BHP process, coordination among the various components appeared to be somewhat *ad hoc*. In part, it was achieved because many of the same parties were involved in each component. Parties also recognized a certain precedence of processes, leaving the Environmental Agreement open until the water licence had been finalized so that provisions in the former could be more closely tailored to requirements in the latter if necessary. It appears likely, however, that given a longer time frame and more careful planning, the various components of the BHP process could have been better coordinated. Achieving this objective will be a challenge if the BHP model is applied in the future.

3.14.6 Achieving Consensus through Inclusive Processes

The sixth and final theme from the BHP process is the role of inclusive and participatory processes in the design and implementation of the final regulatory and benefits package. Whether as intervenors in hearings or participants in negotiations, Aboriginal groups and others were directly involved with government and with BHP in key elements of the process. The EA hearings provided a public forum for the company to present its project and for a broad range of interested parties to express their support or concerns. In the negotiated process leading to the Environmental Agreement, Aboriginal groups were at the table with BHP and government, presenting their interests directly and participating in setting terms and conditions. The IBA negotiations between BHP and Aboriginal groups can also be characterized as participatory and inclusive processes, although government was not a party to these negotiations. In addition, the Water Board provided important opportunities for involvement in the regulatory process. Aboriginal groups and other intervenors were effective participants in the hearings and contributed significantly to the final product through discussions in the TAC and comments on the draft water licence. Finally, through the Independent Environmental Monitoring Agency the model of participatory and inclusive processes is extended beyond the project review and regulatory stages into compliance and effects monitoring and project management.

Two points warrant particular emphasis. First, the involvement of interested parties went significantly beyond the traditional model of consultation. Second, participatory processes resulted in agreements that constituted integral components of the final regulatory and benefits package. This level of involvement goes a long way to explaining the substantive results of the BHP process and also contributed significantly to the consensus among most participants that the final results were satisfactory. It also has important implications for the application of the BHP model to future projects. These issues are discussed below in greater detail.

4 Evaluation of the BHP Process

This chapter sets out ten general evaluative criteria and then applies them to yield an overall assessment of the BHP process. A few comments on the legal and practical importance of the BHP model as a precedent are then presented.

4.1 Evaluative Criteria

The evaluation of the BHP process that follows is based on the following general criteria:

- **Effectiveness**) Was the process effective in achieving the purposes for which it was designed? Was the process effective in addressing the issues raised by the BHP project? Was the process effective in meeting the expectations of the participants?

- **Efficiency**) Did the process operate in an efficient manner in terms of time and resources expended and results produced? Were participants satisfied with the efficiency of the process? Was there evidence of unnecessary overlap and duplication between agencies

- **Predictability**) Were participants able to predict in advance the process to be followed? To what extent were elements of the process unanticipated by participants and what were the implications of these new developments?

- **Certainty**) Were the objectives and procedures for various components of the BHP process well established? Were the rights and obligations of the parties clearly defined? Was the allocation of roles and responsibilities clear and was it well understood by the participants?

- **Fairness**) Was the process perceived to be fair by the participants and did it meet criteria of procedural fairness as understood in administrative law and practice? Were any measures taken to address any perceived or potential unfairness in areas such as access to information, availability of financial and other resources to participate effectively, timing of various stages of the process, etc.?

- **Transparency**) Were project review and decision-making processes transparent in the sense of having established and clear objectives and procedures? Did participants understand the review and decision-making processes? Were the outcomes of these processes clearly explained and were these explanations intelligible to the participants and other interested parties?

- **Inclusiveness of interests**) Did all interested groups and individuals have access to the process? Were all interests and points of view given meaningful input and accorded respect in the process?

- **Inclusiveness of issues**) Were all relevant issues identified and considered in the process?

- **Cross-cultural sensitivity**) Was the process designed and implemented in a manner that accommodated and respected cultural differences among participants?

- **Promotion of consensus and dispute resolution**) Did the process promote consensus decision making and facilitate the resolution of disputes among participants?

Interviews with participants in the BHP process revealed, not surprisingly, a range of different views on the relative importance of criteria and on how certain criteria should be interpreted. In addition, there are widely divergent views on the strengths and weaknesses of certain aspects of the BHP process. The discussion that follows is explicit in identifying, and distinguishing between, perceptions of that process reported by participants in it and conclusions reached by the study's authors. It is inevitably selective, focusing on issues that the authors judge to be of greatest importance on the basis of their interviews with participants and their review of relevant documentation. This evaluation of the BHP process does not attempt to canvass the full spectrum of comments and perspectives on every aspect of that process.

4.2 Overall Assessment of the BHP Process

The appropriate starting point for evaluating the BHP experience as a whole is perhaps a theme repeated by a number of participants: "You can't argue with success". There seems little doubt that, in retrospect, most participants are generally satisfied with the end result, if not necessarily with all aspects of the process relied upon to get there. In fact, given the highly politicized nature of the project and the degree of controversy that it generated, the extent of consensus regarding the final outcome is remarkable. One participant noted that a measure of success is the fact that the project is proceeding without anyone attempting to block the access road and, it should be noted, without either ongoing legal actions or any evidence of organized political opposition.

That so many diverse interests and points of view were brought together at the end around a package of regulatory requirements and benefits provisions is a direct reflection of the dedication, flexibility, ingenuity and hard work of the participants from government, independent review and regulatory bodies, BHP, Aboriginal groups, and public interest groups. The final result was achieved through compromises on all sides and a willingness to bargain in good faith on matters of considerable complexity within a very compressed time frame. It may also reflect the fact that this extraordinary project is both relatively benign in environmental terms and relatively lucrative in financial terms, thereby providing considerable room to manoeuvre in satisfying a broad range of interests and concerns.

In many interviews regarding this project, however, the "You can't argue with success" theme was followed by a "but ...". Participants expressed a broad range of concerns about the process that, in the end, produced the BHP regulatory and benefits package and the green light for the project. A number of these concerns will be explored in more detail below in the chapter of this report focusing on the BHP model's applicability to future projects. In that context, means of addressing them will also be discussed. The objective in this chapter is to provide an overview of how participants, and this study's authors, evaluate the BHP process as a whole. This overview is organized around the evaluative criteria set out above.

4.2.1 Effectiveness

Effectiveness can be assessed in terms of expectations and end results. As noted above, most participants in the BHP process believe that it was effective in achieving an acceptable end product. Furthermore, a number of government officials and representatives from Aboriginal and environmental groups stated that the final regulatory and benefits package was better than they had expected when the process was under way. From BHP's perspective, the process was more effective than the company would have liked in extracting financial and other concessions and in imposing regulatory and monitoring requirements. Nonetheless, the package appears to be something that the company can live with, and the final result) project approval) is clearly the bottom line requirement for BHP. Furthermore, the fact that the process resulted in a measure of consensus in support of the project is likely to yield significant, if difficult to measure, benefits to BHP throughout the life of the project. One participant on the Aboriginal side noted that the fact that there was intense pressure to settle issues and get the regulatory and other provisions done properly may in fact have "saved the bacon" of BHP in the long run by avoiding conflict

that might have been channelled through political and other non-regulatory means.

Assessments of individual components of the BHP process are more varied. The effectiveness of the environmental assessment has been criticized by some, but by no means all, of the participants. This issue will be returned to in more detail below. Aboriginal and environmental intervenors and, it should be noted, government officials generally view the Water Board process as highly) and perhaps somewhat unexpectedly) effective in developing a comprehensive and detailed water licence. Virtually all participants agree that the imposition of the 60-day time limit following the Minister's announcement of August 8 was effective in focusing negotiations and securing agreements on the Environmental Agreement, the Socio-Economic Agreement, the Protected Areas Strategy and two of the impact and benefits agreements (IBAs). For those Aboriginal groups whose IBAs were not completed, the resulting loss of bargaining power may lead them to question the effectiveness of the Minister's approach in securing their interests.

The BHP process thus rates well in terms of the effectiveness criterion. The project received approval, the company's main objective, and a package of regulatory and benefits provisions was assembled that was accepted by most of the other principal participants. The process thus succeeded in producing generally satisfactory end results, although it was perhaps not uniformly effective in meeting the expectations of all participants.

4.2.2 Efficiency

Measuring the efficiency of the process is more difficult than evaluating its effectiveness. Certainly BHP felt that the process was long and costly. In particular, BHP was frustrated with the slow and somewhat sporadic pace of its negotiations with Aboriginal groups and felt that its considerable efforts in this area yielded few results over a long period of time. Aboriginal groups, it should be noted, also expressed frustration with what they perceived to be a lack of commitment on the part of the company to negotiate seriously in the early stages. It appears that the efficiency of these negotiations was hampered by the divergence between the parties' positions, their differing expectations of what was to be achieved, and the absence of a firm time frame for reaching agreement. There is general agreement on both sides that the negotiations that occurred within the 60-day time frame were more focused and efficient.

There was general frustration with the *ad hoc* and rushed nature of the multiple negotiations that occurred after the Minister's August 8 announcement. Inefficiency in this process was probably inevitable given the absence of a clear template or fully developed plan for achieving the final objectives. For example, there was a measure of uncertainty throughout some of this period about which set of negotiations was the appropriate forum for resolving certain issues. There is little point in attempting to allocate blame for any inefficiencies at this stage and, in fact, it appears that all parties did their best under very difficult circumstances. Nonetheless, careful planning and the availability of a template for agreements would undoubtedly contribute to a more efficient negotiation process should the BHP model be applied in the future.

Instances of efficiency gains achieved through the BHP process can also be identified. For example,

licence. There also appears to be some measure of agreement that the involvement of Peter Nixon as the Minister's emissary was an efficient way of securing ministerial involvement in the negotiated processes. Some efficiency losses may also have resulted, however, in that Nixon's involvement required additional effort to ensure a coordinated and consistent government approach in a rapidly changing environment.

Overall, the efficiency of the BHP process was clearly hampered by differing expectations among some of the parties to negotiations, at least at the outset, and by the fact that much of what occurred was innovative and not fully planned. High transactions costs can be expected when a process is implemented for the first time. With improved planning and predictability, subsequent implementation of the BHP model should prove to be more efficient.

4.2.3 Predictability

There is not a single participant in the BHP process who would rate it highly in terms of predictability. This problem was most acute following the Minister's announcement of August 8. The conditional approval was, it appears, largely unanticipated and at the time of the announcement virtually nobody had a good idea of what the requirement of an environmental agreement or independent monitoring agency would entail. The Minister's intervention was something of a surprise to DIAND officials, resulting in some delay in formulating a strategy and getting the negotiated processes under way. The company, which was apparently expecting an endorsement of the environmental assessment (EA) panel's report and recommendations, was also surprised at the new agenda and additional requirements that were imposed by the Minister's announcement. Furthermore, the 60-day time frame imposed unexpected and, as it turned out, impossible demands on the IBA negotiations that were not far advanced. The key components of the BHP package, therefore, emerged in a largely unplanned and unexpected manner between August 8 and November 1.

From BHP's perspective, however, problems of predictability went back to the beginning of the project. The company felt that government let it down on a number of occasions by providing what turned out to be inaccurate or incomplete advice regarding general context or specific requirements. One example concerned the appropriate Aboriginal groups that should be contacted. The company was advised at the outset that it should deal with the Dogribs, and did so at least as early as 1994. By the time the process was over, however, three additional Aboriginal groups were major participants and, in the case of one, considerable uncertainty persisted for some time as to which organization was the legitimate point of contact.

BHP also viewed the relationship between the EA and subsequent regulatory processes as a significant source of unpredictability. For whatever reason, it appears that the company believed that the project's progress through the regulatory stages would raise few problems in light of the level of scrutiny received at the EA hearings and the panel's conclusion that the project was acceptable. Given this assumption, the close scrutiny of the Water Board hearing caught the company by surprise, as it did some government officials. As timing concerns became more acute for the company, the unexpected adjournment of the Water Board hearings for a period of six weeks was also a matter of considerable concern.

Finally, it should be noted that the emergence of the protected areas issue caught most parties by surprise. The fact that the World Wildlife Fund (WWF) chose this forum to push for the development of a protected areas strategy and found the leverage to force this issue onto the agenda underlines the inherent uncertainty associated with major projects and perhaps a failure of government officials to survey fully the policy context. It also shows again that the risk of legal challenge should not be underestimated in the context of regulatory proceedings. More generally, it demonstrates the difficulties that a project-review process can encounter when key elements of the policy framework) in this case land-use planning and a strategy for assessing and dealing with cumulative effects) are not in place.

One element of the BHP process that did display reasonable predictability in terms of timing was the work of the EA panel. Most participants in the process agree that the panel adhered closely to its schedule and completed its work within the projected time frame and as expeditiously as could reasonably be expected. In fact, there is criticism from some quarters that the panel was too rushed and applied time limits too rigidly. Nonetheless, the panel did demonstrate its determination to complete its component of the EA process in a predictable and timely fashion.

In all, predictability was not a hallmark of the BHP process. From industry's perspective, this is a serious deficiency given the costs associated with unexpected delay. Criticism of regulation from industry generally focuses at least as much on unpredictability as on the substantive requirements, and the BHP experience may well be cited in industry circles as a textbook example of regulatory unpredictability. The consequences of unpredictability were also felt by other participants, notably the government officials responsible for administering the regulatory processes and the Aboriginal groups that found themselves suddenly thrust into multiple negotiations with short time lines. Significant improvement in this area is essential if the BHP model is to have more general applicability.

4.2.4 Certainty

Perhaps the largest source of uncertainty in the BHP process was the absence of settled land claims. The company identifies this situation as the single most important source of difficulties throughout the process. The location of the project in an area where the rights of Aboriginal groups have not been resolved and their claims are overlapping produced uncertainty at a number of critical junctures in the process. While the settlement of land claims will not remove all areas of uncertainty for a project such as BHP's diamond mine, it would likely provide a clearer definition of certain rights and obligations of the proponent and Aboriginal parties. This issue is returned to below.

More specific problems of uncertainty were evident at a number of stages in the BHP process. These issues related primarily to the objectives and procedures for various components of the process. They are generally part and parcel of the unpredictability discussed above and so can be highlighted briefly here.

To begin, there was considerable uncertainty regarding the purpose of the EA. This problem was reflected both in the frustration experienced by some intervenors at the hearings and by a number of criticisms levelled at the panel report. Uncertainty in this respect also manifested itself in the

interface between the EA and regulatory processes. These issues are discussed in greater detail below.

As noted above, there was also considerable uncertainty surrounding the company-Aboriginal group negotiations. At the outset, the company was uncertain which Aboriginal groups it should deal with, and as negotiations progressed there appears to have been little clarity on what should be agreed upon. Uncertainty therefore surrounded both the structure and the substance of these negotiations for a significant period of time.

Overall, uncertainty appears endemic in areas of the North where land claims are unresolved and overlapping. Companies that operate in these areas will have to develop a tolerance in this regard until the claims are settled and new institutional arrangements are put in place. In some components of the BHP process, however, problems of uncertainty were more specific and may be easier to address in the short term.

4.2.5 Fairness

Assessing the fairness of the BHP process as a whole requires, of course, a subjective judgement. Concerns about procedural fairness were raised directly at several points in the process. These concerns were most notable at the EA panel hearings and formed one of the grounds advanced in the WWF's application for judicial review. The merit of these claims and the conduct of the EA hearings are not matters directly relevant to this report, except insofar as they relate to the overall purpose of the EA within the broader planning and regulatory process. This matter is discussed below.

Issues of procedural fairness were also raised at the first Water Board hearing. These issues centred on the availability of sufficient time to present evidence and question witnesses and the adequacy and timeliness of intervenor funding for certain Aboriginal groups. Both areas of concern were addressed by the Chair's decision to adjourn the hearings until later in October and the process that he established to address technical issues between the two hearings.

A more general concern with fairness from the perspective of Aboriginal groups and other intervenors was the availability and adequacy of funding and human resources to participate in both quasi-judicial and negotiated processes. This issue is discussed below. In addition, one Aboriginal group commented that, in its view, BHP enjoyed unfair access to senior government officials during the BHP process. Government officials maintain that they dealt with all participants in an even-handed fashion.

BHP felt that certain aspects of the process lacked fairness in that demands upon it were, in its view, progressively ratchetted up. In addition, it did not feel that what it saw to be an exemplary performance at the EA stage received adequate recognition in subsequent regulatory processes. Whether or not these constituted instances of unfairness or simply disappointed expectations depends how they are characterized. Clearly, however, adequate predictability and certainty are defining features of a fair regulatory process from a proponent's perspective. Both were lacking in the BHP process.

The fairness of the BHP process thus depends to some degree on one's particular point of view. From the company's perspective, clearer guidance as to what was expected of it would have enhanced fairness. For Aboriginal and other non-governmental participants, perhaps the greatest risk of unfairness in this type of process is the absence of a level playing field in terms of resources, expertise and bargaining power. This issue was addressed in an *ad hoc* way throughout much of the BHP process and the outcome was clearly not equally satisfactory for all groups.

While there are legitimate concerns with the fairness of aspects of the BHP process, it should be remembered that the process as a whole provided extensive opportunities for interested parties to participate. Access to the process) the fundamental requirement of procedural fairness) was therefore provided. Furthermore, government took steps at various points to level the playing field among participants, notably through financial assistance to Aboriginal groups and through the discretionary decisions that created incentives for compromise by all parties. Finally, it is significant that a number of negotiated and regulatory processes were successful in producing results that appear to be satisfactory to many, if not all, of the participants. The BHP process as a whole, therefore, appears to have met a reasonable standard of fairness. Its fairness to certain parties might, however, have been improved in some respects.

4.2.6 Transparency

Transparency in decision making is generally recognized as having been achieved in important elements of the BHP process. In particular, the setting of regulatory and monitoring requirements through the multi-party negotiation of the Environmental Agreement achieved a level of transparency that far surpassed the traditional practice of addressing these issue through the negotiation of a land lease. In addition, the combination of public hearings, written interrogatories, Technical Advisory Committee meetings and an opportunity for comment on the draft water licence made the Water Board proceedings a model of transparency for a quasi-judicial regulatory process.

From the public perspective, the IBA negotiations were much less transparent since they occurred bilaterally between individual Aboriginal groups and the company. Whether or not this is viewed as a problem depends on the extent to which IBAs have consequences for the public interest, an issue discussed below.

One component of the regulatory process that was generally regarded as lacking transparency is the authorization to destroy fish habitat under the *Fisheries Act* and the associated compensation agreement between the Department of Fisheries and Oceans (DFO) and the company. Both the policy and the process were criticized on transparency grounds.

Finally, there was some concern regarding transparency between parallel elements of the BHP process during the regulatory phase. Most notably, the Water Board expressed concern that it was not fully informed about progress on the Environmental Agreement and that it was addressing certain issues, such as security deposits, without knowing how they were being dealt with elsewhere.

Overall, the BHP model represents a significant improvement over traditional regulatory approaches in terms of transparency. Negotiation of the Environmental Agreement is perhaps the clearest contrast with the more closed decision-making processes that have been criticized in other contexts.

4.2.7 Inclusiveness of Interests

Reaching conclusions about inclusiveness of interests on the basis of interviews with key participants in the process is potentially problematic since those who were not included in the process would, by definition, also be excluded from the interviews. Nonetheless, the interviews and review of documents conducted for this report did not reveal any significant interests to be systematically excluded from the BHP process. There was a wide range of interventions at the EA hearings and a number of the principal intervenors also appeared at the Water Board hearings and participated in that process. Not all interested groups participated on an equal footing, of course, and some inequality in this respect is probably inevitable and desirable.

Aboriginal groups were clearly the most directly involved, participating in the EA and Water Board hearings and also through the negotiated processes. Some funding was provided to assist Aboriginal groups in participating in all of these components of the BHP process. Aboriginal intervention was particularly decisive at the Water Board hearings, and Aboriginal groups were in effect full parties in the Environmental Agreement negotiations and addressed benefits issues directly with the company through the IBAs. Whether the involvement of these different groups should have been more or less equal is a matter of contention among them and an unavoidable problem for processes occurring in areas of overlapping and unsettled claims in the highly politicized atmosphere of the North.

To the extent that it can be characterized as an interest in the context of a federal review and regulatory process, the GNWT was actively involved in certain aspects of the BHP process. It intervened in the EA process and was a party to the Environmental Agreement. In addition, the Socio-Economic Agreement provided it with a direct role in employment, training and benefits issues and progress on this agreement was made a condition in the Minister's 60-day process. The GNWT also took the lead on the protected areas strategy. In other parts of the process, notably the Water Board hearings, the GNWT chose not to participate.

Environmental groups were particularly active at the EA stage and followed the process closely through to its conclusion. A coalition of these groups received intervenor funding and brought legal counsel and expert witnesses to the EA hearings. The absence of intervenor funding was an obstacle to the involvement of these groups in the Water Board process and they were not invited to participate in the negotiation of the Environmental Agreement. Nonetheless, one of the principal participants in the BHP process from the environmental side was involved in negotiating the Environmental Agreement as an advisor to an Aboriginal group. The World Wildlife Fund carved out a special niche for itself in the process by initiating legal action to challenge the EA panel report in order to promote its protected areas agenda. This strategy proved successful to the extent that the requirement of progress in this area was rolled into the 60-day process. WWF later withdrew its law suit, apparently satisfied that its concerns were being addressed.

Finally, it appears that the BHP process included the expected lobbying, meetings and letter-writing from a range of interests. The usual political and bureaucratic channels of influence appear to have operated normally throughout the BHP process.

The process as a whole thus appears to have been suitably inclusive of the affected interests. Issues in this respect relate to the level playing field among various interests, as affected by the availability of participant funding and the question of direct access to negotiated processes, notably the Environmental Agreement.

4.2.8 Inclusiveness of Issues

Given the inclusiveness of interests discussed above, it is not surprising that the major issues raised by the project appear to have been at least referred to and in many cases addressed by the end of the BHP process. Many of these issues were raised, although not resolved, at the EA. In this sense, the EA process and the EA panel report set the stage for the regulatory and negotiated processes that followed. The relatively open format of negotiations and the level of scrutiny provided by the Water Board appear to have allowed the participants considerable scope to raise the full range of their concerns. The measure of agreement on the final regulatory and benefits package provides some evidence that most of the principal issues were addressed.

The most important caveat regarding inclusiveness of issues concerns matters such as the cumulative effects of future projects and land-use planning within the Slave Geological Province. While a project-specific process is arguably not the appropriate forum to address issues of this type, it naturally becomes a focal point for them in the absence of more general policy and planning processes. Furthermore, it is clear that the BHP project has potentially important implications both for long-run cumulative impacts within the region and for future flexibility in land-use planning. The project itself and its associated transportation infrastructure will be an important component of a complex of human impacts in this area if other development proceeds. There is room for debate as to whether the BHP process should have been more forward-looking in terms of addressing these other issues. For example, it may be that the EA panel report could have been more directive in laying the groundwork for the assessments of future developments and the management of cumulative effects. The key point is that important issues relating the BHP project to the broader context were not fully addressed in the BHP process. Even if this exclusion is appropriate from a project-review and regulatory perspective, it highlights potential problems at the level of land-use planning and environmental management.

4.2.9 Cross-Cultural Sensitivity

Cross-cultural sensitivity is a continuing challenge for project proponents, regulatory processes and Aboriginal peoples in the North. Attempts to address this issue in the BHP process included the formal reference to traditional knowledge in the EA process. The incorporation of traditional knowledge into EA and regulatory processes raises a host of problems that go beyond the scope of this report.

There is general recognition that BHP made significant efforts to establish what it terms a "good neighbour" relationship with Aboriginal people affected by the project. These efforts included an extensive public information and consultation program, initiation of the Community Mobilization project, and the provision of opportunities for Aboriginal people to visit its exploration facilities at Lac de Gras and its mining operations elsewhere in North America. Some Aboriginal participants in the BHP process are of the view that the precedent set by that process has already resulted in more open lines of communication between the mining industry and Aboriginal groups in the Northwest Territories.

The negotiations that were central to the BHP process can themselves be expected to contribute to cross-cultural sensitivity. Although they resulted in frustration on both sides at different times, the end result of this process of face-to-face interaction should be greater sensitivity on each side to the priorities, objectives and world view of the other.

Finally, the end products of the BHP process indicate progress in terms of cross-cultural sensitivity. The IBAs appear to be a useful mechanism for tailoring specific socio-economic benefits to the social and cultural needs of communities and Aboriginal groups. In addition, direct Aboriginal involvement in the Independent Environmental Monitoring Agency should be a means of ensuring ongoing input regarding environmental and closely related cultural concerns.

Ultimately, cross-cultural sensitivity is a two-way street when industrial mining operations take place in the traditional territory of Aboriginal people who still have close ties to the land and wish to maintain their cultural values and participate in a mixed land-based and wage economy. While the challenges in this regard were certainly not fully met in the BHP process, there appears reason to believe that some progress was made. It is too early to tell whether the Aboriginal peoples, the company and government will be successful in narrowing or bridging the cultural gap over the life of the project.

4.2.10 Promotion of Consensus and Dispute Resolution

Proof of the success of the BHP process in building consensus and resolving disputes is found in the general satisfaction among participants regarding the final regulatory and benefits package. This success, it appears, was a direct result of the inclusive and participatory processes that produced the most important elements of that package. Later sections of this report will consider in more detail the factors contributing to achieving a good measure of consensus at the end of the day.

It should also be noted that the BHP process set in place certain mechanisms and incentives for ongoing efforts to achieve agreement and resolve disputes. There are, of course, formal mechanisms for dispute resolution contained in the Environmental Agreement. More importantly, the Independent Environmental Monitoring Agency has the potential to provide an ongoing means of identifying and addressing issues of concern in a cooperative manner. Finally, the prospect of an application to renew and in all probability amend the water licence provides both an opportunity and strong incentives for affected interests to work together to ensure that the project operates in a mutually acceptable manner.

4.3 The BHP Model as a Precedent for Northern Mineral Development

Given the overall evaluation of the BHP process presented above, how significant is this process as a precedent for future mining projects in the North? Five principal factors should be considered in answering this question: the distinction between the various components of the process and its end results; the underlying factors that explain the BHP process; the legal and policy context for future projects; the expectations that the BHP process has produced; and the principal problems and risks that will be encountered in applying the BHP model in the future.

4.3.1 Process versus Product

The evaluation presented above highlights a variety of perspectives on the BHP experience. There is no doubt, however, that satisfaction with the end result is significantly more widespread than is satisfaction with the process. Furthermore, certain components of the process were more highly rated than others. When considering the BHP model as a precedent, therefore, it is important to be specific regarding the different components of the process and, more importantly, regarding the distinction between process and product. The authors of this report take the view that the principal elements of the final regulatory and benefits package arrived at through the BHP process are sufficiently well received to merit serious consideration as precedents for future projects. While certain reservations regarding specific components will be discussed below, the package as a whole is a useful model. As for the process, there are also elements that represent very useful additions or modifications to the regulatory framework in the North. In applying the BHP model in the future, however, it is in the area of process that most work appears to be needed.

4.3.2 Underlying Factors

The value of the BHP experience as a precedent is related to the underlying factors that explain its emergence in this particular case. Perhaps the most significant of these was the land claims situation in the area where BHP's claims block is located. Key elements of the BHP process reflect problems and define solutions relating to unresolved and overlapping land claims. Future projects proposed for areas of the North outside of settled claims will face pressures similar to those that shaped the BHP process. These pressures relate both to uncertainty regarding the rights of Aboriginal people and to perceived deficiencies in the existing legislative framework and regulatory processes in the North. As a means of addressing these pressures, the BHP model will inevitably stand as an important precedent.

What, then, is the precedential value of the BHP process for projects located in areas where land claims are settled? It appears likely that, for these projects, almost all facets of project review and regulation will be altered. However, these alterations are unlikely to remove all of the difficulties encountered over the course of the BHP process. While planned new regulatory processes and institutions may represent significant improvements over existing ones in some respects, there will also be a period of uncertainty following their implementation. It is likely, moreover, that some of the fundamental issues relating to process implementation and coordination will remain. A detailed examination of the

emerging institutions of governance in the North would be required to determine precisely how they will affect projects such as BHP's diamond mine. Furthermore, some practical experience with these arrangements may be required before it can be determined with some precision how they will operate. Nonetheless, there can be little doubt that many important lessons from the BHP experience will be applicable to projects undertaken in areas of settled land claims.

While the land claims situation was clearly a major determinant, the BHP process also reflects general trends and values relating to socio-economic, cultural and environmental considerations. There seems to be virtually unanimous agreement among interested parties that future mineral and other development in the North must at least have the following characteristics: (1) significant benefits must accrue to Northerners; (2) the environment must be protected; (3) the cultural values and aspirations of Aboriginal people must be respected and accommodated; and (4) Northerners must have a significant role in the project review and regulatory processes and have ongoing input into project management, notably through monitoring and public accountability mechanisms. Quite apart from land claims and other institutional factors, mining projects undertaken in the North will have to conform to the fundamental values and objectives of Northerners if this type of development is to be acceptable. There is a clear determination in the North to avoid repeating the experience with past development whereby benefits flowed south and Northerners were left with the social disruption and long term environmental and other costs. Furthermore, Northerners are not willing to be bystanders in regulatory processes, relying exclusively on the federal government to protect their interests. The general approval of the BHP model reflects the fact that it represents a significant advance in terms of Northerners' priorities for economic development and environmental protection. As a result, it is an important precedent regardless of changes in the details of legal regimes, regulatory instruments and institutions of governance.

4.3.3 The Legal and Policy Basis

If the BHP model appears solidly grounded in terms of underlying social and political developments, the same cannot be said for its basis in law and policy. Much of the BHP process does not reflect legal requirements and some of what happened is arguably beyond the scope of what is explicitly anticipated by law. The adequacy of the legal basis for the regulatory requirements developed in the BHP process will be returned to below. The point here is simply that there is currently no legislative or policy framework in place that requires future projects to go through a similar process. The Environmental Agreement, the Socio-Economic Agreement and the IBAs are without explicit statutory basis. Furthermore, the Minister's conditional approval linking these aspects of the process to regulatory requirements and the 60-day time limit which resulted in such focused effort and ultimate success on a number of fronts were entirely the product of ministerial discretion.

The value of the BHP process as a precedent is in important respects uncertain so long as it remains without a firm basis in law and policy. This situation is unsatisfactory for all parties. From a project proponent's perspective, the result is considerable uncertainty about what will be required. This uncertainty renders project planning difficult at the outset and is compounded by the risk that the rules of the game will be changed, apparently arbitrarily, over the course of the process. There is no doubt that BHP felt that it

was frequently blind-sided by changes in policies, procedures and time frames and that future project proponents would take a very negative view of this degree of uncertainty. From the perspective of other parties, the lack of legal and policy guidance is equally unsettling. It is widely recognized that the impetus to conclude the Environmental Agreement, the Socio-Economic Agreement and certain IBAs prior to project approval was provided by direct ministerial intervention. That significant components of the process hang on the slender thread of the exercise of discretion at the ministerial level is a source of considerable concern to those who would like to see the end results, if not necessarily the identical process, replicated in the case of future projects.

If the BHP model is to serve as a precedent, it is therefore essential that the legal and policy framework catch up to the process. This theme will be reiterated and expanded upon in the section of this report that discusses the application of the BHP model in the future.

4.3.4 Expectations Following the BHP Experience

The fourth general consideration regarding the BHP process as a precedent concerns the expectations that it produced. In important respects, the BHP process has established a number of standards that future projects will be expected to meet. These standards, it should be noted, are not simply a product of the particular characteristics of BHP's project or the circumstances that surrounded it. As the first new mine in the Northwest Territories in approximately a decade, the BHP project crystallized changes in public expectations and in public policy that have been occurring for some time. These changes are reflected elsewhere in land claims agreements, other evolving institutional arrangements and in the norms of behaviour that are increasingly accepted as common practice by government, private sector developers and Aboriginal groups.

It is generally recognized, for example, that BHP made significant efforts to reach out to Aboriginal people through its community relations and consultation processes. BHP also displayed considerable flexibility throughout the entire process. Furthermore, a number of participants described the company as "generous" in terms of its willingness to commit resources to meeting the needs of other parties. While this latter characteristic, in particular, may relate in part to the significant financial returns that apparently can be expected from diamond mines, there is no doubt that BHP made a concerted effort to establish good relations with its neighbours in the North. Other project proponents will be expected to make similar efforts.

Expectations of direct involvement in establishing regulatory and benefits provisions were also created by the BHP process. Given Aboriginal participation in the Environmental Agreement, it would appear difficult to go back to a model where terms and conditions are worked out in secret between the company and government officials and then attached to the land lease, a document whose availability to the public has been a matter of some uncertainty. The level of participation of interested parties in the Water Board process has also raised expectations in a way that seems unlikely to be rolled back. Finally, the negotiation of IBAs with individual Aboriginal groups has reinforced the already widely-accepted practice of using these agreements in connection with major resource developments in the North. The pressure on project proponents to negotiate IBAs will likely be impossible to ignore in the future, even if such agreements are

not formally required by legislation or land claims agreements.

As a very practical matter, therefore, the BHP process appears to have been an educative and empowering experience for many people in the North. Even for those who may feel that their interests were not fully addressed, the lessons of the BHP process will not be lost, and both the positive and negative aspects of that experience will be reflected in demands and expectations regarding future projects. While there is a recognition that some projects may not be able to meet all of the standards set by the BHP process, it will likely be necessary to offer a reasonable explanation of why those standards cannot be met if future projects are to be acceptable.

4.3.5 Principal Problems and Risks

The BHP process is therefore a precedent that cannot easily be ignored in the North and elsewhere in Canada where large projects raise a similar constellation of issues. There are, however, a number of significant problems and risks associated with using this process as a template. The key issues that need to be addressed are: (1) reducing the uncertainty that was created by a highly *ad hoc* process; (2) improving the coordination among the various components of the process; (3) ensuring that the preconditions for success are put in place for future projects; and (4) addressing certain specific concerns raised in relation to individual components of the process. Without attention to these matters, the application of the BHP model to future projects could recreate its disadvantages as well as its advantages. Even worse, it is possible that the constellation of circumstances and individuals that contributed to the generally satisfactory outcome of the BHP process might not be replicated and the whole effort could end in failure. The following chapter of this report examines the principal issues that need to be addressed should the BHP model be applied to future projects.

5 Recommendations for Applying the BHP Model in the Future

This chapter analyses in more detail the principal issues raised by the BHP process and provides a series of specific recommendations regarding the application of that model in the future. The analysis and recommendations that follow reflect the authors' view that, while there is much of value in the BHP model, there is also much to be done if it is to be transformed into a template for the review and regulation of mining projects in the North.

5.1 Implications of the Land Claims Situation

Looking back on the approval process for the BHP mine, it becomes very clear that the situation in regards to unsettled land claims strongly influenced both the process and its final outcome. This perception is confirmed by many of the participants, including the project proponent, the Aboriginal groups, government officials and environmental groups. In assessing the implications of the BHP process for future mine developments, it is therefore important to understand the extent to which, and the manner in which, the uncertainty surrounding the land claims situation influenced the decision-making process and resulted in a discrete regulatory and benefits package designed to address the particular situation at hand.

The necessity to settle the land claims *before* allowing any development to proceed has been expressed on numerous occasions by the Aboriginal groups involved in ongoing land claim negotiations. After the breakdown of the Dene/Metis land claim agreement in 1990, Aboriginal concerns grew as the staking rush began in the early 1990s, following the discovery of diamonds in the North Slave region. Faced with the immediate prospect of the BHP mining development on their traditional lands in the absence of a settlement of their claims, the Dogribs and Treaty 8 bands had the option of either opposing the mine by legal, political or other means, or participating in the project review and regulatory processes in order to advance their cause and protect their rights and interests to the greatest extent possible. The various Aboriginal groups chose to participate in all stages of project review and regulation, including the final negotiation of the Environmental Agreement. Nevertheless, the option of resorting to legal action or civil disobedience to oppose the project was never completely renounced.

Throughout the project review and regulatory processes, every opportunity was seized to affirm that Aboriginal title to the lands in question had not been extinguished, to voice concerns about the impacts of the project on Aboriginal lands and peoples, and to remind the regulators that approval of mining developments was prejudicial to the land claims negotiation process. The land claims issue was raised with most insistence at the environmental assessment (EA) stage. The EA panel acknowledged that the issue was of vital concern to the Aboriginal peoples and others. However, the panel members accepted DIAND's position that the panel review and the negotiation of land claims were not directly related, stating that it was beyond their mandate to provide recommendations regarding the settlement of land claims. On the very contentious issues raised by the overlapping claims of the Dogribs and the Treaty 8 Yellowknives and by DIAND's policy regarding land selection, the panel took a neutral stand and did not provide specific recommendations to the federal government, other than to highlight the need to clarify the status of lands under exploration in areas of unsettled land claims. Likewise, the panel's acknowledgement that Aboriginal concerns over land claim settlement were heightened by the prospect of further mining developments following closely upon the BHP project did not result in anything more specific than a general recommendation to DIAND to resolve quickly the land claims. The option of recommending against the approval of the diamond mine until land claims were settled does not appear to have been seriously considered as a possible option by the panel, as it had been twenty years ago in the Mackenzie Valley Pipeline Inquiry by Justice Thomas Berger.

Land claims were again brought up during the Water Board hearings, particularly in connection with a discussion of potential impacts of the project on instream water users and requests for compensation. During both sets of hearings, the Dogribs, Yellowknives and ᵒutsel K'e discussed their traditional use and occupation of the Lac de Gras area in an attempt to establish their entitlement to compensation.

The uncertainty regarding Aboriginal rights and the situation of the various groups also led to a perception of uneven treatment of the groups throughout the process, fuelling rancour and conflict among them and creating confusion and delays. According to some Aboriginal participants, a *de facto* hierarchy was established by the federal government between the Aboriginal groups, based on government's perception of the greater or lesser legitimacy of their rights or claims to the lands in question. This perceived hierarchy appeared to have been largely determined by progress achieved in settling the land claims and

by physical proximity to the site. The Dogribs, being recognized as the most directly affected group and being most advanced in their negotiations with the federal government, were seen to be in the strongest position and influenced greatly the final outcome of the process. Nevertheless, all four groups benefitted from the final regulatory package, each being entitled to negotiate an IBA and to participate in the negotiation of the Environmental Agreement. Each group has also been offered a seat on the Independent Environmental Monitoring Agency.

In addition to influencing the entire BHP process, unsettled land claims also resulted in a unique regulatory and benefits package designed to address Aboriginal concerns and secure their support for the project. Comprehensive land claims settlements define mechanisms for Aboriginal control over and participation in land and resource development and settle critical issues of land and resource ownership and resource royalty sharing between the federal government and Aboriginal groups. For its part, the Treaty Land Entitlement Process is designed to resolve issues of land and resource allocation, jurisdiction and economic benefits. Further, self-government negotiations address outstanding issues of Aboriginal jurisdiction over matters such as environmental protection and resource management.

In the BHP case, the lack of resolution of critical land and resource ownership and jurisdictional issues necessitated the creation of *ad hoc* mechanisms, some of which may ultimately be included in future land claims agreements. The linking of progress on impact and benefits agreements (IBAs) to project approval helped to ensure the provision of social and economic benefits to Aboriginal communities that had unsettled land claims or areas of traditional land use in the vicinity of the project. Similarly, the requirement to negotiate an Environmental Agreement, and the participation of the Aboriginal groups in the negotiation of this agreement, provided a mechanism for their direct involvement in the design and implementation of environmental controls. Had the land claims been settled, such negotiations may still have taken place between the proponent and the Aboriginal groups, but within a different and more secure legal framework. The issue here is one of certainty and negotiating power for the parties involved. The lack of a clear legal basis for the negotiation of IBAs also resulted in delays and an apparent lack of commitment to the conclusion of the IBAs until the imposition by the Minister of the 60-day period.

While the land claims context undeniably had a pervasive influence on the BHP process, the BHP process may also have an impact on land claims negotiations. For all of the principal parties, the BHP process has underlined the importance of resolving land claims in the North. From the Aboriginal perspective, approval of the BHP diamond mine demonstrates the risk that continued exploration and project development will erode the land base available for selection through the claims process. This risk is formalized in the government's policy of removing land in the "advanced stage of exploration" from eligibility for selection. Furthermore, the *ad hoc* nature of much of the BHP process demonstrates clearly the need for a more secure basis for protecting Aboriginal interests in the context of large scale development in traditional territories. These lessons, highlighted by the BHP process, are of course added to the other significant incentives for Aboriginal groups to settle land claims.

From BHP's perspective, uncertainty resulting from unsettled and overlapping land claims was the principal source of problems throughout the entire process, from initial project planning through to final

regulatory approvals. Above all, industry is looking for as much certainty as possible when making decisions on project development and when navigating project review and regulatory processes. As long as land claims remain unsettled, a significant degree of uncertainty appears to be unavoidable. The BHP process may therefore motivate industry to encourage government and Aboriginal groups to work towards a rapid settlement of land claims in areas where mineral or other development is likely to occur. Industry will also be concerned, of course, with the content of claims settlements. These concerns relate to the general financial and regulatory implications of land claims agreements for exploration and development. Industry will be interested in both the substantive content of claims in these areas and also in the degree of certainty regarding the new institutional arrangements and regulatory processes that are created through land claims agreements and related legislation.

Finally, the BHP process also appears to underline for government the importance of settling claims. As just noted, government can expect pressure from both Aboriginal groups and industry to settle claims. In addition, the BHP process demonstrates that problems related to unsettled claims have the potential to impede economic development and complicate regulatory processes. Unsettled land claims thus appear to have negative implications for the economic, social and environmental objectives of government. The *ad hoc* nature of much of the BHP process is probably also a concern within government and it is clear that the need for this type of response could be significantly reduced in the context of settled claims. The BHP experience may thus lead to even greater awareness within government of the need to reach agreement on land claims in an expeditious manner.

An assessment of the complex legal, political and economic issues surrounding the settlement of land claims is, of course, beyond the scope of this report. Nonetheless, the land claims situation was manifestly central to the BHP process. Much of what happened in that process can be traced to the land claims context and the BHP experience reinforces the arguments of those who support a rapid and equitable resolution of outstanding land claims in the North.

Recommendation #1:

Government and Aboriginal groups should work together to settle land claims in an expeditious manner with a view to reducing the current unacceptable level of uncertainty regarding:

- **the rights of Aboriginal people when resource development is proposed for their traditional territories; and**

- **the procedural and substantive obligations of project proponents in connection with project review, regulation, and the provision of benefits.**

Without the settlement of land claims, many of the problems encountered in the BHP process seem likely to recur for subsequent projects regardless of what other improvements are made in that process.

5.2 Determining the Purpose of Environmental Assessment

The EA is the element of the BHP process that has been subject to the most criticism. While a thorough evaluation of this EA is beyond the scope of this report, there is a significant theme in the criticisms that have been expressed that is directly relevant to the focus here. That theme concerns the purpose of the EA and its treatment of the range of issues raised in relation to BHP's proposed diamond mine. It is clear that some, but by no means all, of the participants in the EA process felt that the panel report did not meet their expectations. This discrepancy is reflected in criticism of both the panel's overall evaluation of the project and its specific recommendations. In the view of certain participants, the disappointing results of the EA had negative consequences for the subsequent regulatory processes. The key question from the perspective of applying the BHP model to future projects is whether it is the expectations or the EA that require modification.

The criticisms of the EA panel report can be grouped into two broad categories. The first focuses on the "big picture" issues that, it is argued, were inadequately addressed. For example, some Aboriginal groups felt that the panel did not deal satisfactorily with the unresolved land claims and the implications of this project and others for ongoing claims negotiations, land selection and

related matters. It appears that a significant amount of time at the EA hearings was devoted to presentations that focused primarily on issues relating to land claims. In addition, the World Wildlife Fund clearly felt that the panel should have had more to say about protected areas, particularly in light of the potential for future development in the Slave Geological Province. Environmental groups also argued that issues of cumulative effects were inadequately dealt with in the EA. Another issue raised by intervenors was the stability of the world diamond market, and it was suggested that the panel should have examined both the economic and marketing assumptions underlying the company's plans and the appropriateness of the diamond cartel as a matter of public policy. The common thread in these comments is that the EA panel did not adequately consider the broad issues raised by the BHP project.

The second category of criticism directed at the panel is that it failed to submit the proponent's plans for the project and its predictions regarding likely environmental effects to adequate scrutiny. A number of participants felt that there were significant deficiencies in BHP's environmental impact statement (EIS) and that the company should have been required to provide better information in these areas before receiving a positive recommendation from the panel. Critics of the panel's performance on technical issues argue that there was insufficient time for presentations and questioning at the technical sessions and that the panel should have retained independent expertise to assist it in reviewing the mass of complex information that was put before it by BHP and the intervenors. While it is difficult to determine in the abstract what level of scrutiny should be expected at the panel review stage, one observer said that if an EA panel does its job properly there should be "no surprises" at the regulatory stage and another went so far as to say that regulatory approvals, such as the water licence, should be little more that a "rubber stamp" if the EA does what it should. A widely-held view is that the panel's recommendations were too general to be very helpful and, in particular, that they provided insufficient direction regarding both preconditions for final approval and the specific terms and conditions to be included in licences and permits.

These two categories of criticism raise fundamental questions about the role of the EA and its relationship both to the broader policy context for the project and to the regulatory processes that follow it. In particular, is EA intended to be a comprehensive process that attempts to address the entire spectrum of issues related to a particular project or is it a much more limited undertaking, the purpose of which is to determine whether the likely environmental and other effects of a project are sufficiently adverse or unpredictable that the project should not be allowed to proceed? If the former role is set out for EA, how should it address both broad policy and complex technical issues in a manner that is fair, efficient and effective? If the latter role is adopted, what information is required for the panel to reach its decision and what types of conclusions and recommendations should be included in its report? These questions are critically important for EA in particular and for the entire project planning and regulatory process in general. They warrant careful attention when considering the lessons from the BHP process and the desirability of applying that model to future projects.

The view that EA should be all things to all people is well reflected in the critique of the BHP panel report. There is, perhaps, some benefit in setting out briefly the competing argument. On this view, EA is simply one stage on a continuum of decision making that begins with broad policy choices regarding such issues as institutions of governance, economic development, land use, and environmental priorities and ends with detailed technical provisions that govern the specifics of project design and standards for compliance and monitoring. EA has a relatively well-defined place within that spectrum, but it is neither realistic nor appropriate for it to attempt to cover the whole array of issues. For EA to do its job properly, it must recognize its role and its limitations. For the system as a whole to work, the general policy context for EA must be established and there must be confidence that the subsequent regulatory stages will operate effectively to address matters of detail not picked up in the EA. Finally, for the EA and the system as a whole to be publicly acceptable, EA must be understood to operate in this manner, expectations must be adjusted accordingly, and the system as a whole must have credibility.

If this is the broad picture, what is the specific niche for EA? On this theory, EA is both a planning tool and a filter to screen out projects that are fundamentally unacceptable. As a planning tool, EA must take place early enough in the process to enable it to influence such issues as project location, design, and operation. The trade-off is that, when the EA is conducted, certain specifics regarding the project may not be fully settled. As a filter, EA is intended to determine if the significant effects of the project are either sufficiently adverse or sufficiently uncertain that the project should not go ahead. In other words, the EA is charged with determining whether the project's significant effects are predictable or can be mitigated to an acceptable level and, in the case of remaining uncertainty, whether adequate monitoring combined with additional mitigation measures if necessary can reduce to an acceptable level the risk of significant adverse effects. In playing this filtering role, it is important that EA strike a balance in timing between having a concrete project to evaluate and waiting until the final stages of project design.

If this general theory of the role of EA is accepted, important implications follow for the responsibilities of an EA panel. First, it cannot be expected to address the broad policy context in any significant detail. Clearly, deficiencies at the policy level place a panel in an awkward and, in some cases, virtually impossible position. Furthermore, it is entirely predictable that intervenors will seize

upon the EA as an opportunity to raise broader policy issues. This inclination is particularly understandable given that their interests in this regard may be directly and adversely affected by the project in question. Nonetheless, an EA panel is arguably an inappropriate forum to resolve broader policy issues, and perhaps the best that can be expected of a panel is that it identify the problems at this level and recommend that they be addressed. In exceptional cases where the impacts of the project are sufficiently adverse, the panel would be justified in recommending that it not proceed until matters of general policy are satisfactorily resolved.

The second implication of this theory is that the panel must be selective in its treatment of technical matters. The focus must be on that information which the panel requires to decide whether the project is likely to have such significant or unpredictable adverse effects that it should not proceed further. If this is the question to be answered, the amount of technical information required by the panel depends on the issue before it. It requires only such information as is necessary to reach a general conclusion as to the magnitude of effects. If it can determine that effects are minimal or mitigable on the basis of very little information, then it need go no further even if there remain issues to be resolved at the level of project design. However, if the panel identifies an area where significant effects may occur, it may require a large amount of relatively detailed information before it can reach a judgement about project acceptability. The objective is for the panel to be in a position to determine if more information is required in specified areas, not for it to conduct a detailed technical scrutiny of all aspects of the project.

This theory of the role of EA also has important implications for both the evaluation of the BHP panel and the role of EA if the BHP process is to serve as a model for the future. There is wide consensus that the BHP diamond mine is relatively benign environmentally when compared with most other mining projects. Furthermore, many of the environmental concerns with this project focused on its importance as a precedent and the possibility that it represents the first in a series of significant mineral projects for the region. There appears to be little support for the view that this project, in itself, will cause significant and irreparable environmental harm. Furthermore, the panel's conclusions that the effects were largely predictable and mitigable and that areas of uncertainty could be addressed adequately at the regulatory stage seem to have been borne out by the results of the regulatory processes. There is a remarkably broad consensus among government regulators, Aboriginal groups and other intervenors that the water licence, the Environmental Agreement, the land lease and the other instruments constitute a satisfactory regulatory package. Viewed in this light, the BHP panel report appears to be in line with what could reasonably be expected of the EA process.

More specifically, this analysis provides some context for the failure of the panel to address fully the host of technical issues in areas such as water and wildlife management that were of obvious and legitimate concern to intervenors. The panel's role, on this theory, is not to evaluate the quality of every aspect of the EIS but merely to determine if there are any areas where concerns are so significant as to justify a "no-go" decision. Its attention to deficiencies must therefore be adjusted accordingly. If the panel was correct in concluding that the project itself was unlikely to have a significant impact on caribou given its relatively small footprint and its particular location within the home range of the Bathurst caribou herd, perhaps it was right to defer specific details of caribou management to the appropriate regulatory authorities. Similarly, if it

concluded that no insurmountable water management problems appeared likely, the panel was perhaps correct in leaving specific issues regarding matters such as frozen core dams and kimberlite toxicity to be addressed by the Water Board, knowing that this Board retains authority not only to set the terms and conditions of the water licence but also to refuse to issue a licence in the event that it is not satisfied with project design, the likelihood of compliance or the monitoring arrangements. In fact, many of the issues that were so effectively raised by intervenors at the Water Board were identified (but not resolved) in the EA panel report. As noted above, there is a broad consensus that these issues were in fact adequately addressed in the water licence.

The acceptability of the theory that the EA process should confine itself to addressing potential "no-go" issues and leave other matters to the regulatory processes depends, of course, on the reliability of regulatory instruments. As the BHP process illustrates, there may be significant differences among regulatory processes. Water impacts were addressed by the Water Board, a quasi-judicial tribunal that holds public hearings and operates under a strong statutory mandate. None of these characteristics apply to the other regulatory processes. There is currently no processes equivalent to the Water Board in place for wildlife management, land-based impacts and reclamation, and air quality. Furthermore, the attachment of environmental conditions to the land lease is a matter of discretion, without statutory guidelines. In the BHP process, some of the weaknesses in regulatory processes were addressed through the Environmental Agreement.

The distinction between the water regulation process and the processes that apply to other environmental impacts may change with passage of the *Mackenzie Valley Resource Management Act* and the establishment of combined land and water boards. The regulation of mineral development in the portion of the Northwest Territories subject to that Act may resemble more closely the integrated approach made possible by regulatory tribunals such as the National Energy Board and Alberta's Energy and Utilities Board. If the result is to strengthen the regulatory process, pressure on EA to delve into details of project design and regulation may be reduced.

It is not the intention of this report to evaluate the quality of the work done by the BHP EA panel, the seriousness of the technical issues left unanswered by the panel report, or the legitimacy of various criticisms that have been levelled at the EA process both during the BHP EA and subsequently. The objective here is simply to note that there are different theories of the role of EA within the overall project review and regulatory process. Some clarity in this area is highly desirable in order both to ensure that EA does what it is intended to do in an effective and efficient manner and to attempt to achieve a better match between the expectations of participants in the EA process and the results which it can be expected to deliver.

The BHP experience illustrates clearly the strains that can result when there is a significant divergence between expectations and results. In CIRL's view, there is at least a reasonable argument that, in this case, the expectations were unrealistic and were a reflection of considerable confusion regarding the role of the EA within the overall regulatory process. This confusion is fully understandable given the general lack of clarity regarding the role of EA in Canada. In the case of the BHP project, the standard background level of uncertainty regarding the role of EA was amplified by the highly charged political context, the significant

implications for Aboriginal people of mineral development in an area of unsettled claims, the absence of adequate land-use planning in the area, deficiencies in baseline environmental data, an inadequate policy and regulatory framework for addressing the cumulative effects of future development, and a general lack of confidence in the regulatory processes operating in the Northwest Territories. Given this context, the challenge facing the panel was clearly an unenviable one and it is hardly surprising that it met with significant criticism.

It should be noted that the uncertainty regarding the role of the EA appears also to have been shared by the project proponent. Having survived the EA relatively unscathed, BHP apparently felt that the worst was behind it. The company was therefore surprised when it was subject to what it clearly saw as an ambush at the Water Board hearing. Had the company understood that the broad-brush approach of the EA panel was not a substitute for detailed scrutiny at the regulatory level, it might have been better prepared for the questions that were raised by intervenors at the Water Board hearing and subsequent technical discussions.

The BHP experience therefore underlines the need for greater certainty regarding the role of EA in the context of a broader project review and regulatory process. At the most general level, a decision should be made and clearly conveyed to all interested parties whether the EA process is intended to undertake a comprehensive review that ranges from broad policy issues to a detailed technical scrutiny of all aspects of the EIS or whether it is intended to have a more limited mandate of playing a planning and filtering role as part of a spectrum of related, but distinct, stages of decision making. If the former option is adopted, it has obvious implications regarding the cost of EA, the amount of time required, and the degree of technical expertise that should be available to the panel and reflected in its report. It also suggests that adjustments may be required in subsequent regulatory processes, to avoid unnecessary overlap with the EA. This issue will be returned to
below.

If the second option is the preferable one, the inherent limitations of the process must be recognized and intervenors should be given both reasonable guidance regarding the type of information and argument that will be relevant to the panel's decision and some assurance that they will have the opportunity to raise matters of technical detail at the regulatory stage, should the project proceed that far. For the second option to be satisfactory, confidence in the regulatory process is essential. Similarly, the second option places an obligation on government to provide greater certainty regarding the policy framework within which project decisions are made. For a project similar in scope and location to the BHP diamond mine, policy certainty would be greatly enhanced by the settlement of land claims and the establishment of land-use planning, including but not limited to a protected areas strategy.

Recommendation #2:

> **Government should determine the appropriate role for EA in relation to the broad spectrum of policy and regulatory issues raised by projects such as BHP's diamond mine and that role should be made clear to project proponents and intervenors alike**

in order to promote a greater congruence between their expectations of the EA process and the results that it is able to deliver.

5.3 Defining the Relationship Between Environmental Assessment and the Regulatory Processes

The relationship between EA and regulatory processes is a complex and at times problematic one, and these problems were evident in the BHP process. An important first step in addressing this issue is greater clarity regarding the purpose and scope of EA, a topic addressed in the previous section. The details of the relationship between EA and regulation will clearly differ depending on whether EA is intended simply to answer the general question of project acceptability or instead provide a forum for detailed public scrutiny of all aspects of project design.

EA and regulatory processes will work together best if they operate as separate but related elements of a decision-making continuum. Problems of inefficiency, uncertainty, and possibly

incompatibility in terms of results are likely to arise where there is a significant degree of overlap between the two or where there is confusion on the part of the project proponent, government or intervenors as to the respective roles of the EA and regulation. These problems may be particularly visible and problematic where the regulatory process itself involves a public hearing component, as in the case of the Northwest Territories Water Board.

Furthermore, there are clearly different schools of thought regarding the role of EA recommendations as they apply to regulatory decision makers. Some regulators apparently prefer that EA recommendations remain at a general level, leaving them free to exercise their regulatory authority as they see fit. This tension has been evident in the Yukon, for example, where the Water Board has on occasion seen fit to ignore relatively specific recommendations produced by the EA process. There was support for the BHP EA panel's report among regulators who felt that it did not unduly hinder them in the exercise of their responsibilities. On the other hand, some environmental managers in the BHP process felt that the EA was not sufficiently specific and provided little direction or assistance in fulfilling their regulatory responsibilities. It is also true that regulatory processes are sometimes relatively narrow in scope, whereas the EA is charged with looking at the project as a whole. EA recommendations may, as a result, reflect different trade-offs than those which a regulatory process would come to on its own. The general nature of the EA may also result in recommendations that do not fit easily within the ambit of specific regulatory processes. One reason for negotiating the BHP Environmental Agreement was to address issues of this type.

The BHP process highlighted the contrasting but at times overlapping roles and processes at the EA and regulatory stages, most notably in the case of the Water Board hearings. The EA had broad terms of reference, operated (at least in the technical sessions) on a fairly rigid format regarding time for interventions, and resulted in a series of recommendations that had no direct regulatory authority. In contrast, the Water Board had a much narrower focus, operated under somewhat looser procedural rules regarding time allocations for participants, and produced a regulatory instrument containing binding terms

and conditions. Furthermore, the EA process had a formal mechanism for intervenor funding whereas there is no provision for funding interventions before the Water Board. Water issues were prominent at both EA and Water Board hearings, with technical information being submitted at the former, in some cases by funded intervenors who were unable to participate as effectively at the Water Board in the absence of funding. Finally, despite the overlap in terms of issues and intervenors, there was no formal or informal coordination in the BHP process between the EA panel and the Water Board. Similarly, the links between the EA and the other regulatory processes were neither clear nor direct. A key issue for the future of the BHP model is whether these two elements can work together in a more compatible and mutually complementary manner. Two options should be considered to achieve this objective: (1) clarify the respective roles and requirements of the EA and regulatory processes; and (2) improve formal and informal coordination where overlap is desirable or inevitable.

5.3.1 Clarifying the Requirements for the Proponent and other Parties

Uncertainty regarding the difference in requirements of the EA and regulatory stages was a problem in the BHP process. It appears that BHP was surprised by the level of scrutiny that its application received at the Water Board hearing. The company apparently took the view that it had been subjected to a high level of environmental scrutiny at the EA stage and that subsequent regulatory stages would be correspondingly easier. Faced with a sustained attack on the adequacy of its application at the Water Board hearing, the company's view is that it received little or no credit for performing well at the EA.

The perspective of a number of government and non-government participants in the Water Board process is somewhat different. They expressed the view that important issues for water licensing were inadequately addressed in BHP's application to the Water Board, which was, it appears, in some respects a reconfigured and updated version of the EIS. Among regulators, managers and intervenors there is a widely shared view that BHP was unprepared for a rigorous regulatory process and that it had not taken sufficiently seriously the need to follow up on issues signalled by the EA panel as areas of concern. According to one observer, BHP did not understand the need to take the work completed for the EIS to a further level of detail for the regulatory process.

BHP was also caught off guard by the treatment of the EA recommendations in other regulatory areas. In particular, the requirement of an independent monitoring agency was not part of the panel's recommendations but was attached by the Minister to the 60-day process. Similarly, the EA panel recommended best efforts to complete IBAs before the project became operational, whereas the Minister's announcement of August 8 specified satisfactory progress on IBAs before final regulatory approvals would be granted. As with the Water Board process, BHP apparently felt that it had already been through an intensive process resulting in the EA panel's recommendations, only to find additional requirements placed upon it at the regulatory stage.

In applying the BHP model to future projects, greater certainty would be achieved if the project proponent understands from the outset the respective requirements of the EA and regulatory stages. BHP might well have been spared considerable grief at the Water Board hearing had it known that it would be

subject to a higher level of scrutiny than had occurred at the EA and that the panel's recommendation to proceed with the project was, in reality as well as in form, contingent on subsequent regulatory approvals. Successfully navigating the EA process should not entitle a proponent to a free ride in regulatory proceedings, particularly if the EA panel refrains, as it arguably should do, from a full technical scrutiny of all aspects of the project application. Government has an obligation to proponents to make this clear to them from the outset, so that they can anticipate and address concerns at a level of detail appropriate for each stage of the project review and regulatory process. Frustration and risk of unexpected delay should thereby be reduced. In particular, companies should be aware that the setting of licensing and compliance requirements will require a greater level of detail than that demanded by the EA and that panel recommendations are not the last word on regulatory matters. If intervenors understand this relationship as well, they should be able to allocate their resources more effectively between EA and regulatory stages,

assuming that adequate funding is available at each stage. Hopefully, they too would then experience less frustration in the course of the process as a whole.

5.3.2 Formal and Informal Coordination Between Environmental Assessment and Regulatory Processes

Greater regulatory efficiency and certainty could also be achieved by developing formal or informal mechanisms for coordinating EA and regulatory processes in certain circumstances. In the BHP process, water issues were raised at both the EA and Water Board hearings. Intervenors who made detailed submissions at the former were disappointed by the time restrictions imposed by the panel in its technical hearings and by the lack of specificity in the panel report. The panel referred many of these issues to the Water Board, which also held public hearings. While Aboriginal groups obtained funding from DIAND to participate, other interviews in the EA were at a disadvantage given the absence of a formal process for funding interventions before the Water Board. Not surprisingly, these groups were frustrated at having, in effect, made their technical submissions to what turned out to be the wrong body. From a more general perspective of process efficiency, the handling of water issues by both sets of hearings raises at least the possibility of considerable duplication of effort.

To some extent, this duplication may be reduced if the respective roles of the EA and the regulatory processes are better defined. If the EA operates at the level of significant adverse effects only, it can perhaps restrict its inquiry so as to avoid getting into the type of technical analysis to be covered later on by the Water Board. Alternatively, if the EA is to conduct a full technical examination of the application, then perhaps the issues will be sufficiently narrowed by the time the project comes before the Water Board that this latter process can be abridged. This second option has an important limitation, however, in that the Water Board is a quasi-judicial body with an independent statutory mandate to fulfil. It could not therefore fetter its discretion by explicitly relying on the EA panel in reaching its decisions.

Even if the respective roles are more clearly defined, however, the risk of overlap is considerable. It may be that the EA panel in fact requires considerable technical information in certain areas in order to reach a decision on overall project acceptability. For example, if a mining project raised serious potential

issues of acid mine drainage, the panel could hardly defer to the Water Board as the BHP panel did in relation to the relatively less severe environmental risks posed by the diamond operation. Where the EA panel has conducted detailed hearings on matters directly germane to regulatory approvals, there may be little value in repeating the exercise at regulatory hearings.

One means of addressing this issue would be to allow for simultaneous EA and regulatory hearings for certain issues. While the EA panel's mandate is obviously broader than the regulatory one, it could schedule a portion of its hearings to focus on water issues, for example, and conduct those hearings jointly with the Water Board. This model is not unprecedented, as demonstrated by three joint hearings conducted in Alberta in recent years. In the case of the Express Pipeline application, the federal EA process was consolidated with hearings by the National Energy Board, a regulatory body. Similarly, joint federal-provincial hearings for the Pine Coulee water project and the Cheviot coal mine combined quasi-judicial provincial regulatory processes with the federal EA process. In each case, the hearings resulted in EA recommendations and regulatory decisions by the respective processes.

A consolidated hearing would improve process efficiency for the proponent, regulators and intervenors. It would also provide a formal mechanism for the EA panel to understand the regulatory requirements and evaluate the extent to which concerns with the project constitute either potential reasons for a "no-go" recommendation at the EA stage or matters safely deferred to the regulatory process.

There are, however, two possible disadvantages to this approach. First, joint hearings may effectively require the EA panel to participate in a detailed level of review that would not otherwise be required of it. Second, the company may be forced to a level of detail at the EA stage that it would prefer to leave until later. Both of these concerns might be addressed to some extent through a procedure whereby certain issues would be deferred to a subsequent hearing conducted by the Water Board only. In this way, certain matters of detail that are determined to be beyond the scope of the EA could be deferred to the Water Board's own hearing. In addition, the company could commit itself to clarifying certain issues at the Water Board stage where these are more appropriately handled there. Although the prospect of a separate Water Board hearing detracts in some respects from the efficiency gains of a consolidated hearing, a partial solution that is consistent with the requirements of due process would be for the Water Board to establish relatively tight scoping guidelines for the second hearing. It could thereby structure that hearing and the associated technical discussions to build on, rather than duplicate, the consolidated hearing stage.

In addition to formal coordination through consolidated hearings, there may be advantages to greater informal linkages between the EA and regulatory processes. These links could include, at a minimum, meetings or exchanges of correspondence between the EA panel and the Water Board so that each clearly understands the function of the other. Contacts could also serve to identify areas of mutual concern regarding the project that have arisen, or are likely to arise, before one body or the other. While a quasi-judicial regulator such as the Water Board must be careful to avoid appearances of bias or fettering its discretion, the lack of contact between the EA panel and the Water Board in the BHP process is somewhat surprising. The work of both processes might well benefit from some cross-fertilization in the future.

Recommendation #3:

Government should clarify the relationship between the EA and regulatory processes, particularly with a view to:

- **providing guidance to project proponents and intervenors regarding the distinctive roles and requirements of these processes; and**
- **ensuring formal or informal coordination of these processes where overlap is either desirable or inevitable.**

5.4 Ensuring Effective Regulatory Processes: The Quasi-Judicial Model

The water licence is a key element of the BHP regulatory package and is the only component that was the product of a quasi-judicial process. It is generally recognized that the BHP water licence is a comprehensive and detailed document, surpassing in both respects previous water licences issued in the Northwest Territories. From the perspective of applying the BHP model to future projects, however, the impact of the BHP application on the Water Board may be as significant as the impact of the water licence on the project. The apparently transformative effect of the BHP experience on the Water Board was noted by a number of participants. Both the tone and format of standard Water Board proceedings were altered in the course of the BHP application. The lessons from the Water Board process are thus an important consideration when evaluating whether the "rules of the game" that emerged from the BHP experience should be applied to future projects. The distinctive features of the Water Board process have been summarized above in the descriptive section of this report. This section highlights the six key lessons to be drawn from this process.

5.4.1 The Role of Formal Proceedings

First, the Water Board hearings demonstrated the value of the formal hearing process in providing an opportunity for intervenors to present technical evidence and question both company and government representatives on the details of project design and regulation. There is a widely-held view among participants in the BHP process that the project received some of its closest scrutiny through the Water Board process and that important elements of this scrutiny were a direct result of effective intervention in the process by the Dogribs. That intervention took a form that was, it appears, more detailed, adversarial and time-consuming than has been customary to date for Water Board hearings in the Northwest Territories. Furthermore, the requests for an adjournment of the hearing by several Aboriginal groups) backed with the implicit threat of legal action if the proceedings went ahead as scheduled) resulted in both an unexpected delay in the process and in the opportunity for detailed discussion among the parties before the hearings resumed. Once again, a more adversarial and legalistic approach arguably had an effect on the Water Board's standard practice.

The risk of excessive legalization of administrative proceedings is well recognized and there is clearly

value in the Water Board adopting a somewhat informal style of hearings, particularly when witnesses are Elders and other members of the general public. The BHP experience demonstrated, however, that there is also value in a more structured and adversarial model. The Water Board and its successor regulatory tribunals in the North may therefore be obliged to reflect these two styles of hearings in subsequent regulatory proceedings. Perhaps, like the EA panel, these tribunals will choose to hold separate hearings for community representatives and technical experts. In any case, it is likely that future Water Board hearings for important industrial water licences will be pushed in a more formal direction by the BHP experience. While attention will be necessary to avoid over-judicialization of the proceedings, it appears that on balance this will be a change for the better.

5.4.2 Technical Meetings and Written Interrogatories

A second lesson from the Water Board process concerns the value of technical discussions and the written interrogatory process that occurred following the September hearing. This process appeared to be successful in focusing attention on key issues and allowing the parties to work together on resolving technical questions. According to several participants, the exchange of information and meetings that occurred after the first hearing laid the basis for a more successful second hearing in October. In addition, the Technical Advisory Committee played an active and valuable role in preparing the draft water licence following the October hearing. The role of the Technical Advisory Committee in the BHP process constituted, in certain respects, a marked departure from previous practice and appears to have contributed to the comprehensiveness and coherence of the water licence.

The value of written interrogatories and multi-party technical meetings in the BHP process suggests that this element of the model should be applied in future quasi-judicial processes. In fact, establishing a more structured pre-hearing process, including both written interrogatories and perhaps a pre-hearing meeting of parties to narrow the issues, could be considered for future projects. This approach has been successfully used by quasi-judicial regulatory tribunals elsewhere in Canada.

5.4.3 Commentary on the Draft Water Licence

A third and related lesson from the Water Board process was the value of circulating the draft licence for comment. Although this is standard practice of the Water Board, several participants noted its particular usefulness for the BHP application. The value of participatory and transparent decision making, an important theme throughout the BHP process, was reaffirmed by this final stage in the Water Board proceedings.

5.4.4 Policy and Process for Intervenor Funding

The need for a systematic approach to intervenor funding is a fourth lesson from the Water Board. The importance of providing adequate resources to intervenors if they are to contribute effectively to any participatory process, whether quasi-judicial or negotiated, is discussed elsewhere in this report and need only be mentioned in passing here. The particular problem highlighted by the Water Board hearing was the

real risk to the fairness and predictability of the process posed by the absence of a systematic means of allocating intervenor funding. Since there was no formal process in place for assisting intervenors in the Water Board process and such assistance was manifestly necessary to address an application of the size and complexity of BHP's, funding of Aboriginal groups was handled on an *ad hoc* basis by DIAND. It appears that the Dogribs received adequate and timely funding but that, for whatever reason, some other Aboriginal groups felt that they did not. The fact that some funding was received literally at the last minute was a basis for requests for an adjournment and undoubtedly contributed to the Board's decision to reconvene the hearings in October.

It should be underlined that it was not only Aboriginal groups that stood to be adversely affected by the lack of a formal policy or process for intervenor funding. Other interested parties without access to *ad hoc* funding from DIAND were effectively precluded from full participation. For example, the environmental coalition that had been very active before the EA panel was restricted to a relatively minor role at the Water Board hearings. The contrast with the position of intervenors in quasi-judicial regulatory processes in other jurisdictions should be noted. For example, the Energy and Utilities Board and Natural Resources Conservation Board in Alberta have procedures for intervenor funding that are established by statute and regulation. Through these mechanisms, money may be made available to a range of interested parties, including public interest environmental groups, that meet the intervenor funding criteria. This money may be used to prepare and present arguments and evidence, including the hiring of legal and technical expertise.

The *ad hoc* arrangements for intervenor funding also had significant negative consequences for BHP. The delay in the Water Board process, which was in part attributable to the appearance of unfairness in the allocation of intervenor funding, was unexpected and had potentially serious implications for the project time line. In the company's view, government had jeopardized the timeliness of the regulatory process by failing to establish a proper funding mechanism. The need for a better approach in this area is a key lesson from the BHP process.

5.4.5 Coordination on Regulatory Issues

The fifth lesson from the Water Board is the need for coordination between various components of the BHP model when related issues are dealt with in different places. The Water Board expressed particular concern regarding provisions for security deposits, reclamation plans and fisheries compensation that were being handled through separate negotiations. These aspects of process coordination are addressed later in this report.

5.4.6 Overall Process Coordination

Finally, the Water Board process illustrates the importance of coordination at a more general level. Although it is difficult to document, the perception of a number of participants in the BHP process was that the highly adversarial stance of certain intervenors at the first Water Board hearing reflected frustrations at the pace of negotiations in other components of the BHP process. A more conciliatory approach at the

second phase of hearings, it is suggested, reflected the fact that the Environmental Agreement and certain IBAs had been completed by that time. The point is simply that frustration experienced in one component of the BHP process was very likely to spill into others. Furthermore, a quasi-judicial process like that administered by the Water Board may have offered a public forum and legal leverage (in the form of requests for delay) that could be used to advantage in other processes.

The potential for formal or strategic linkages between components of the BHP model may provide opportunities for log-rolling and moving issues to more appropriate forums, which could be beneficial in meeting the parties' needs and achieving a satisfactory result. There are, however, significant risks for all parties in these linkages and these risks should be anticipated and managed where possible. Perhaps the best way to achieve this objective is to attempt to keep the different components in step with each other as they move forward towards the final regulatory and benefits package. Government officials or special advisors) such as Peter Nixon in the BHP case) may be best suited to play this overall coordination role. Where progress is uneven, effort will be required to keep problems in one area from impeding progress in others.

5.4.7 Implications for Future Institutional Arrangements in the North

Impending legal and institutional changes in the North, notably the *Mackenzie Valley Resource Management Act*, will have significant implications for the role of the Northwest Territories Water Board. With the passage of that Act and the settlement of land claims, the Water Board seems destined to disappear or play a much reduced role. It appears likely, however, that the quasi-judicial model for regulation will be carried over to the new institutions. The lessons from the Water Board component of the BHP process will therefore remain relevant in the context of new arrangements. In fact, it would be unfortunate if the emerging institutions do not build on the experience of the Water Board, particularly in light of its response to the BHP application.

Recommendation #4:

The efficiency and effectiveness of quasi-judicial regulatory processes should be promoted in a variety of ways including:

- **the use of both formal and informal hearing procedures, depending on the type of issue being addressed and whether intervenors are members of the public or technical experts;**
- **the use of technical meetings and written interrogatories as adjuncts to the formal hearing process;**
- **the provision of opportunities for the project proponent and intervenors to comment on draft regulatory instruments;**

- **the establishment of a formal procedure for allocating intervenor funding to Aboriginal groups, environmental groups and other interested parties;**

- **the coordination of regulatory processes that address related issues; and**

- **the assignment to a government official or independent consultant of the responsibility for coordinating the processes leading to the different components of the regulatory and benefits package in order to capitalize on opportunities and minimize risks resulting from strategic linkages and spill-over effects among processes.**

5.5 Ensuring Effective Regulatory Processes: The Negotiated Model

Arguably the most innovative feature of the BHP process was the use of multi-party and bilateral negotiations to establish key elements of the regulatory and benefits package, notably the Environmental Agreement and the Socio-Economic Agreement. As noted above, this approach appears to have contributed significantly to both the substance of the final package and the degree of consensus that surrounds it. The IBA negotiations were perhaps less novel, in that similar agreements had been used for other projects in the North. The negotiation of IBAs was, however, an integral part of the BHP process, particularly following the Minister's announcement of August 8. Lessons from the negotiated processes are therefore an important consideration in determining whether, and to what extent, the BHP model should be applied in the future. The key features of the Environmental Agreement, the Socio-Economic Agreement and the IBAs are described above. This section discusses five lessons that emerge from the negotiated components of the BHP regulatory and benefits package.

5.5.1 Establishing the Balance of Power Among Participants

The first lesson is the importance of establishing an incentive structure conducive to balanced and results-oriented bargaining. The balance of bargaining power among the parties is obviously a principal determinant of any negotiations. In the case of a project that is subject to regulatory approvals, tipping the balance one way or the other can have significant implications. If project approval is contingent on signed agreements between the company and Aboriginal groups, the result would be to grant an effective veto to those groups and give them significant leverage to extract concessions. On the other hand, if there is only a good faith obligation on parties to attempt to reach an agreement and it is understood that project approvals will be granted in any event, the company is clearly in the stronger position as it can afford to take a relatively inflexible position or stall on negotiations, knowing that the bargaining power of Aboriginal groups will be weakened with each stage in project approval.

There are, of course, incentives operating on both sides to reach an agreement regardless of the precise bargaining power. BHP evidently appreciated the value of good relations with its neighbours and recognized the need to demonstrate that the project would benefit Northerners and protect their environment. Equally, certain Aboriginal groups made it clear that they were not opposed to the project

in principle, but rather sought to ensure that they secured tangible benefits and avoided bearing long-term environmental costs. Nonetheless, it would be naive to think that the course of negotiations and the end products would not be significantly influenced by the parties' views of their respective bargaining power.

As with much else in the BHP process, the incentive structure for negotiations was addressed in an *ad hoc* manner. The key point was the Minister's announcement of August 8 that final approval of the project was contingent on "satisfactory progress" on certain negotiated processes. The precise language used in this announcement was quoted earlier in this report. It indicates clearly that the Minister intended to review progress on the Environmental Agreement and IBAs before issuing major licences and permits, notably the water licence. The announcement leaves some doubt, however, as to the precise message that was transmitted to the various parties in the BHP process. It seems likely that the message to both the company and the Aboriginal groups was that a failure to negotiate in good faith could result in a ministerial decision adverse to their interests. In particular, a failure by BHP to make reasonable concessions in IBA and environmental negotiations could lead to a delay in project approval. On the other hand, unreasonable demands by Aboriginal groups could result in final project approval without completion of the agreements. While each side thus had some bargaining power, the company could not proceed unilaterally and the Aboriginal groups did not have a veto over the project. In this very effective and highly subjective process, the Minister was the ultimate judge of the extent of progress and whether or not the parties were negotiating in good faith.

Most parties recognize that the Minister's announcement represented a turning point in IBA negotiations. Both the company and the Aboriginal groups report that they observed significantly greater focus and commitment on the other side of the bargaining table after August 8. There is also general agreement that rapid progress on reaching the Environmental Agreement was made possible by the dynamic set in place on August 8. The key lesson is therefore that a timely, focused and ultimately successful negotiation process requires an understanding by the parties of their respective bargaining power. That balance of power was established in an *ad hoc* manner relatively late in the BHP process. An important question for the future application of the BHP model is whether this approach is the best way to create the incentive structure needed for successful negotiations.

5.5.2 Establishing End Points

The second lesson from the BHP negotiations is the value of an end point for the process. In addition to giving the parties an idea of their bargaining power, the Minister's announcement of August 8 set a time limit on the bargaining process. It also established, at least by implication, a deadlock-breaking mechanism) ministerial discretion. Although in the end there was some flexibility on the 60-day time limit, there is no doubt that this time frame was a principal determinant of the pace of negotiations; if a longer time frame had been allowed, negotiations would have taken longer.

One end point that was left unclear by the Minister's announcement was the nature of "satisfactory progress". One participant observed that "satisfactory progress" meant whatever the Minister decided it would mean. Other parties, however, set a more precise standard. According to the Dogribs, satisfactory

progress required signed agreements because, in their view, anything less meant that there were no firm commitments and therefore nothing of substance had been accomplished. The Dogribs' determination to stick with this definition of what was required, along with the state of their IBA negotiations when the 60-day period began and their access to resources to fund effective participation in the negotiated processes, may explain why they were able to complete their IBA and sign off on the Environmental Agreement within the allotted time period.

The BHP process thus makes clear the value of end points for negotiations. In the case of a time-sensitive project, end points are also a critical factor in the overall balance of bargaining power since the costs of delay may be significantly greater for one side than the other. If the BHP model is to be applied in the future, careful consideration should be given to whether end points to the negotiated process should be established in a less *ad hoc* manner.

In terms of setting the time frame for negotiated processes, the principal objective from the project proponent's perspective is predictability. The need for a timely and predictable process was particularly pressing for BHP given the relatively narrow windows for certain operations. A major concern of BHP throughout the process was that even a fairly short delay at certain critical periods could have set the project time line back by a full year. Setting firm end points for future projects could be achieved by formally linking negotiated components with other regulatory processes. For example, completion of the negotiated processes might be linked either to the start of the Water Board hearings or to the issuance of the water licence, both of which could be set with some certainty in advance. Alternatively, the ministerial discretion to establish a time frame for negotiated processes could be more clearly established as a matter of law or policy.

The other important end point is a deadlock-breaking mechanism. Since parties cannot be forced to agree, consideration should be given to mechanisms for settling unresolved issues if negotiated agreements are to become a precondition for project approval. The alternatives to a deadlock-breaking mechanism are either to indicate that the project will go ahead without agreement, thereby strengthening significantly the hand of the project proponent, or to make project approval hostage to open-ended negotiations, the result of which is to grant an effective veto over the project to any party that makes unreasonable demands or chooses not to bargain in good faith. Various options for breaking deadlocks could be considered, including mediation, independent arbitration, ministerial discretion, or some combination of the three. Whatever the mechanism or set of principles, the importance of certainty and timeliness in negotiations on regulatory and benefits issues suggests the need for some attention to end points if the BHP model is to be used in the future.

5.5.3 Facilitating Negotiations and Reducing Bargaining Costs

The third important lesson from the BHP process is the value of focusing negotiations and narrowing the differences between the parties. It appears that in the months prior to the 60-day period, the company and certain Aboriginal groups were relatively far apart in the IBA negotiations. There was also continuing uncertainty going into that period regarding the appropriate forum for dealing with particular issues. For

example, it was unclear whether some environmental protection and monitoring issues should be dealt with through the Environmental Agreement, the IBAs, or the land lease. Success in the negotiations depended on bringing the parties closer together and sorting out what issues should be dealt with where. The time and effort required to achieve these objectives can be characterized as the bargaining or transactions costs of the negotiated model. Measures to reduce these costs result in a more effective and efficient process and increase the likelihood of success.

In the BHP process, several measures were taken to address bargaining costs. DIAND officials had a critically important role in managing the negotiated processes. This role included an initial evaluation of the EA panel recommendations and other issues with a view to determining where they could best be addressed in the regulatory and benefits package. DIAND also convened negotiations and took primary responsibility, in the case of the Environmental Agreement, for the drafting process.

Another key player in the negotiations was Peter Nixon, the Minister's special envoy. By all accounts Mr. Nixon played a valuable role in facilitating some aspects of negotiations and bringing the parties' positions closer together, particularly in the case of IBA negotiations. Mr. Nixon's involvement was seen by some parties as particularly useful given the tight time frame and simultaneous negotiations. Two caveats should, however, be noted in respect of this evaluation of his role. First, one participant questioned whether the intervention of Mr. Nixon would have been necessary if the time frame for negotiations had been less compressed. Second, Mr. Nixon's involvement apparently increased some of the transactions costs for government officials in that he was in certain respects both an independent agent and a representative of government. Coordination between his initiatives and those of the rest of government was therefore essential.

Mr. Nixon's role in facilitating the negotiations was particularly valuable since, as noted above, the whole process hinged almost entirely on ministerial discretion. The trigger for serious discussions was the Minister's conditional approval, and the end points, both timing and deadlock-resolution, lay entirely in the Minister's hands. By serving as the Minister's eyes and ears, Mr. Nixon was able to assist in keeping the process on track and serving, if necessary, as a direct conduit between participants and the Minister. His connection with the Minister allowed him to police, in a sense, whether parties were negotiating in good faith. In addition, Mr. Nixon's authority to reinforce messages regarding timeliness and the reasonableness of expectations may have made his presence a catalyst for what one official referred to as the "deal making" stage of negotiations.

Whether or not this approach to facilitating negotiations is appropriate for a future process will depend in large measure on the Minister's personal style and his or her relationship with departmental officials. It is also possible that if a future process is more structured and less dependent on ministerial discretion, there would be less need for a personal emissary from the Minister. The contribution that a neutral facilitator can make to complex and contentious negotiations should not, however, be discounted. Whether the facilitator role is filled by department officials, a ministerial emissary or an independent consultant, it may well be of assistance to parties in negotiated processes.

Some of the bargaining costs and uncertainty experienced in the BHP process could also be reduced if the BHP regulatory and benefits package becomes a template for future projects. For example, the basic terms and structure of the Environmental Agreement and the Independent Environmental Monitoring Agency may be readily adaptable to other projects and a generally-accepted pattern for IBAs may emerge. Government could hasten this process by establishing either policy guidelines or legal requirements regarding these components of the process. If model agreements are readily available and parties' expectations reflect experiences with past projects or established guidelines, the transactions costs of implementing the BHP model for negotiated processes could be reduced significantly in the future. The extent of these savings in time and effort will depend on the degree to which a general template has to be adapted to the specific characteristics of new projects and to the needs of the particular parties. It will also depend on whether the implementation of the BHP model is successful.

5.5.4 Linking Bargained Outcomes Within the Overall Regulatory Process

The importance of coordinating aspects of the regulatory and benefits package is a fourth general lesson that will only be mentioned in passing here. The need to ensure coordination between the Water Board process and the Environmental Agreement was noted above. Coordination is complicated in the case of IBAs since these agreements are negotiated without either formal guidelines or active government involvement and are governed by a confidentiality clause. The possibility of overlap is recognized by a clause in the Socio-Economic Agreement that accords paramountcy to IBAs in the event of a conflict. In terms of the cash component of IBAs, there appears to be no formal mechanism for coordination with the overall regulatory and fiscal regime. This issue will be returned to in the section of this report on IBAs, and general issues of process coordination will be dealt with in more detail in a subsequent section.

5.5.5 Determining the Role of Government

The final lesson from the negotiated components of the BHP process is that government plays a critically important two-fold role in this regulatory model. First, government has an indispensable role in setting the parameters for negotiations between the company and other interested parties. The efficiency, effectiveness, fairness and timeliness of the negotiation process depends on the establishment of appropriate incentives and end points for bargaining and can be greatly enhanced by government action to reduce bargaining costs and ensure adequate linkages with other components of the regulatory and benefits package. Even if the negotiations are primarily or exclusively between the project proponent and other parties, as was the case for IBAs in the BHP process, government cannot simply stand back and treat discussions as a business transaction or private contract. Government has a responsibility to all parties to ensure a reasonably level playing field and to assist in bringing negotiations to a timely and satisfactory conclusion.

The second role of government is to safeguard the public interest. In negotiations to which it is a party, such as those leading to the Environmental Agreement, government is at the table to see that the public interest is not overlooked by the other parties. In the case of bilateral IBA agreements, the public interest raises more complex problems. This issue will be returned to below. The key point here is that participatory

and inclusive processes must ultimately be measured against both the needs and expectations of the parties and against the public interest. The government's responsibility to protect the latter should not be overlooked in the course of its role as a facilitator of negotiations between particular interests.

To return to a theme of the BHP process discussed earlier in the report, the negotiated approach to regulatory and benefits issues implies a redefinition of government's role but it does not by any means eliminate that role. In fact, the success of this approach depends critically on government establishing the framework for negotiations and ensuring that the public interest is protected. If the BHP process is to serve as a model for the future, government should take a more systematic and carefully planned approach to this matter.

Recommendation #5:

Government action to ensure the efficiency, effectiveness and fairness of negotiated processes should include:

- **establishing an incentive structure conducive to focused and results-oriented bargaining, with particular attention to the balance of bargaining power among the participants;**
- **establishing end points for negotiated processes, notably time frames and deadlock-breaking mechanisms;**
- **taking measures to facilitate negotiations and reduce bargaining costs;**
- **ensuring linkages between bargained outcomes and other components of the regulatory and benefits package where identical or related issues are addressed in different forums; and**
- **exercising its responsibilities both to set the parameters for negotiations and to ensure that the public interest is protected.**

5.6 Making Participatory and Inclusive Processes Work

One of the strengths of the BHP process was the inclusiveness of affected interests and their direct participation in decision making. This feature was particularly evident in the negotiated processes, notably the Environmental Agreement and the IBAs. In both cases, directly affected Aboriginal groups and BHP were parties to the setting of terms and conditions relating to environmental protection and socio-economic benefits. In addition, the more formal regulatory proceedings of the Water Board benefitted from active intervenor involvement at both the public hearings and technical consultations. This involvement included opportunities to present evidence and question other parties in the hearings, discussions regarding terms and conditions for the licence in the Technical Advisory Committee, and opportunities to comment on the

draft water licence. Inclusiveness and effective participation clearly improved the quality of the final regulatory package in that good ideas were brought to the table by all parties and improved through the give and take of negotiations. The legitimacy and acceptability of the regulatory package was also enhanced by the direct involvement of Aboriginal, governmental and company representatives.

The effectiveness, efficiency and fairness of participatory processes depends on certain preconditions, the importance of which is underlined by the BHP experience. For this model to work: (1) there should be some certainty regarding who should participate and the appropriate parties must be at the table; (2) active participation in decision making should be distinguished from traditional consultation; (3) a balance must be struck between imposing deadlines and allowing time for processes to proceed in a planned and manageable fashion; and (4) parties must have adequate financial resources to participate effectively. Making sure that these preconditions are satisfied will be essential if the BHP model is to be built on and improved and the same satisfactory results achieved for future projects.

5.6.1 Determining the Appropriate Parties

The effectiveness and efficiency of participatory processes will be improved if the appropriate parties are identified and involved as early as possible. The BHP process gave rise to particular problems in this respect given the context of unsettled and overlapping land claims. These problems can be analyzed in several ways.

From the company's perspective, government officials provided inadequate guidance at the early stages of project planning in identifying which Aboriginal groups it should deal with. BHP would have preferred a clear decision at the outset to identify which groups were in and which were out of IBA and other negotiations, and evidence of government resolve to stick to this decision throughout the process in the face of demands from other groups for inclusion. Furthermore, the company experienced problems when political conflicts within Aboriginal groups resulted in uncertainty as to who was the legitimate bargaining partner. In one case, this problem resulted in a significant delay in IBA negotiations. It appears unreasonable to expect a company to sort out the conflicting land claims and contentious politics of the North without assistance from government, particularly when consultation and reaching negotiated agreements with Aboriginal groups is effectively a precondition for project approval.

Determining who should be at the table was also a concern of Aboriginal groups. From the perspective of at least one group, the legitimate interests of all Aboriginal groups should not have been treated identically and some distinction should have been made among them depending on the strength of their respective interests in the project area. Since the company can hardly be expected to undertake the unenviable task of evaluating the merits of competing claims, if this function is to be done it must be the responsibility of government or of Aboriginal groups themselves. Other Aboriginal groups felt that in certain processes they were involved too late or their concerns were overlooked. There is little doubt, for example, that the 60-day time limit following August 8 put those groups whose IBA negotiations were not well advanced at a significant disadvantage.

The settlement of land claims would undoubtedly add clarity in terms of defining the participants. Nonetheless, even a project within one claim area may potentially affect the legitimate interests of other Aboriginal groups, as was the case with the BHP project where the Inuit within the Coppermine River basin expressed concerns regarding downstream effects and losses to wildlife harvesting on lands that they had traditionally used but were outside of their claim area. In the event that projects proceed in areas where claims are not settled, the involvement of multiple parties that complicated the BHP process may well be replicated. Demands to participate will be strengthened if the precedent is established that bilateral IBAs are a principal means whereby individual communities or Aboriginal groups can obtain cash and in-kind benefits from mineral development in the North.

Some of the problems of identifying and involving Aboriginal groups may be addressed by changes within the DIAND regional office that have occurred following the BHP process. In particular, the establishment of a separate Claims Directorate at the regional office and the closer cooperation between those responsible for land claims and resource management within DIAND may improve the quality of information available to project proponents regarding who should be involved in consultations and negotiations. Furthermore, the BHP experience has underlined to the mining industry in the North the importance of establishing effective lines of communication with Aboriginal groups from the early stages of project planning. One of the Aboriginal groups indicated that it has observed a significant increase in communication from mining companies operating within its traditional territory.

Nonetheless, implementation of the BHP model in the future will require continued effort to ensure both that relevant parties are identified and involved in participatory processes early in project development and that the list of participants is limited to those with legitimate interests. Government, industry and Aboriginal groups should all work together in this area to provide greater certainty for future projects.

5.6.2 Distinguishing Consultation from Participation

The important distinction between the traditional consultation model and direct participation in decision making was underlined by one of the Aboriginal groups involved in the BHP process and echoed in the comments of many other participants. This distinction was particularly important in the case of the Environmental Agreement, which was unprecedented in its direct involvement of Aboriginal representatives in the setting of environmental requirements for the project. Several participants in that process stated their view that the Environmental Agreement would have been significantly different) and from their perspective much less satisfactory) had it been negotiated between BHP and government in a bilateral or trilateral forum with others having only the opportunity to submit comments on successive drafts.

The IBAs also provided Aboriginal groups with an opportunity to address issues of mutual concern directly with the company. Once again, rather than merely being consulted on socio-economic issues they had a direct hand in shaping how benefits from the project would be shared with local communities.

Although the Water Board process differed from the Environmental Agreement in that the final terms and conditions in the water licence were not the result of negotiation, the involvement of interested parties

through the Technical Advisory Committee also appears to have gone beyond traditional consultation. It appears that the submission of written interrogatories and the detailed discussions at the Technical Advisory Committee provided a real opportunity for input by those with an interest in the water licence.

It is well understood that "public participation" covers a spectrum from the provision of information with an opportunity to comment to direct involvement in the process of making decisions. Much of the success of the BHP model in achieving both innovative substantive results and a broad measure of consensus among the affected parties can be attributed to shifting important issues towards the direct involvement end of the spectrum. As one participant observed, it would have been impossible to achieve the same outcome using the traditional model where Aboriginal groups were consulted, but not directly involved.

5.6.3 Balancing Real Deadlines with Adequate Time for Effective Participation

The intense pressure created by the Minister's decision to impose a 60-day deadline for significant progress on the Environmental Agreement, IBAs, the Socio-Economic Agreement and the Protected Areas Strategy was felt by all participants in the BHP process. This pressure was accentuated by the concurrent Water Board process. Although the burden in this respect fell most heavily on the Aboriginal leaders, it was recognized that both DIAND and BHP were also stretched to the limit during this period. Parties generally recognize that the imposition of a real deadline was effective in focusing negotiations and driving them to conclusion, but few if any would seem to relish the prospect of going through another process of this type. As one participant commented, some pressure is a good thing but in this case it was extreme. For Aboriginal groups with limited human resources, the combination of a short deadline and simultaneous processes made it difficult or, in some cases, impossible to participate effectively.

Although a longer time frame might not have yielded better results in this case, it would clearly have permitted a more manageable process and might well have allowed for improved planning and coordination. It also appears that while the 60-day time frame was realistic for IBAs where negotiations were well under way, it was not possible for Aboriginal groups at an earlier stage in discussions with the company to reach closure within that period. As a result, these groups may have suffered a loss of bargaining power in subsequent discussions.

A strong argument can be made that the 60-day time limit proved the value of clear deadlines and pressure to reach agreements. IBA negotiations that had been stalled suddenly moved towards conclusion and a complex multiparty negotiation on environmental issues produced a final document agreed to by all parties. As noted elsewhere in this report, tying negotiated processes to firm end points is probably essential if they are to fit within a workable regulatory framework. Nonetheless, if the BHP process is established as a model for future projects it should be possible to avoid the highly compressed time frame for multiple negotiations that occurred following the Minister's announcement of August 8.

Adequate time for preparation is also important for participation in quasi-judicial regulatory processes. The operative issues are likely to be the notice periods for various stages of the proceedings, the adequacy

of the time allowed to review relevant information, and the timeliness of intervenor funding. As discussed above, certain Aboriginal groups felt that they obtained intervenor funding too late to allow them to use it effectively to prepare for the first stage of Water Board hearings. Since these factors contributed to the decision to hold a second phase of hearings in October, the absence of a clear procedure to allow parties sufficient time to prepare early on resulted in an unanticipated delay in the process.

In both negotiated and quasi-judicial processes, therefore, effectiveness of intervenor participation requires adequate time to prepare. Balancing this requirement against the risk that opportunities for delay may be used for strategic purposes and thereby undermine process efficiency and predictability is likely to be one of the principal challenges if the BHP model is applied in the future.

5.6.4 Providing Adequate Resources for Aboriginal and other Participants in Quasi-Judicial and Negotiated Processes

An absolutely essential precondition for effective participatory processes is the provision of adequate financial resources. Lessons in this regard can be learned from several components of the BHP process.

As discussed above, a notable feature of this process was that certain functions that government might traditionally have undertaken were transferred to, or shared with, Aboriginal and other participants. Environmental requirements were developed through multilateral negotiations, socio-economic benefits were worked out in bilateral IBA negotiations, and some of the closest scrutiny of BHP's water licence application clearly came from intervenors. In all cases, the active participation of non-governmental participants was critical to establishing key elements of the overall regulatory and benefits package governing the project.

There is no doubt that expert assistance is required by Aboriginal groups and others if they are to play an effective role in the participatory processes that were so central to the BHP process. The need for intervenor funding is clear at the project review stage, where careful scrutiny of the voluminous and often technical EIS cannot be undertaken without specialist expertise. In recognition of this need, a process for funding interventions is established under Canada's EA legislation.

Intervenor assistance is also essential at the regulatory stage. The Dogribs' interventions before the Water Board underlined the value of the public hearing process and the fact that interventions on complex industrial licences cannot be effective without technical assistance and expert representation. Remarkably, there is no formal process for intervenor funding at Water Board hearings. As a result, Aboriginal intervenor groups were obliged to approach DIAND on an *ad hoc* basis for financial assistance. To DIAND's credit, some money was provided in this way to support Aboriginal participation in the Water Board process. However, non-Aboriginal groups that participated in the EA panel hearings and were told that their technical concerns with the project would be addressed by the Water Board were unable to secure funding for interventions at that
stage.

One disadvantage of an *ad hoc* funding procedure for certain classes of intervenors is the risk that it will lack consistency and transparency. Another consequence may be unexpected delay. The fact that certain Aboriginal groups did not secure funding until shortly before the Water Board hearing in September contributed to the decision to adjourn these proceedings until October. This delay was of considerable concern to the project proponent and added yet another element of uncertainty to the regulatory process.

Needless to say, the need for expert assistance is no less pressing in the context of negotiated processes such as those leading to the Environmental Agreement and the IBAs. Legal, socio-economic and environmental expertise are all essential if Aboriginal groups are to participate on a level playing field with government and industry, articulate and defend their interests, and contribute fully to the development of innovative and effective agreements.

If the BHP model is to operate effectively in the future, there is a pressing need to establish a fair and systematic procedure for funding participation in quasi-judicial and negotiated processes. This procedure should determine which parties are eligible for funding, what quantum of funding is appropriate, who should provide the money, and how a measure of accountability in the use of participant funding should be ensured. Participants would thus have a better idea of their entitlement to assistance and of the conditions, both procedural and substantive, that attach to such funding. A well defined procedure would also benefit government and the project proponent when, for example, a participant group fails to take advantage of available funding and subsequently complains about unfair treatment or inadequate resources. Certainty regarding the rules of the game for participant funding should therefore increase the predictability of quasi-judicial and negotiated processes for all parties.

It appears that some of the issues relating to participant funding were addressed in a reasonably satisfactory manner in the BHP process through *ad hoc* decisions. As noted above, DIAND did provide funding to Aboriginal groups on several occasions. The authors of this report are not in a position to evaluate the adequacy of the amount of funding that was available from DIAND or from other sources, or the details of the administrative procedures through which funding was provided. Nonetheless, the disadvantages of an *ad hoc* approach to participant funding are clear and problems in this area could pose a real threat to the usefulness of the BHP model in the future. Without adequate funding, the promise of full participation is an empty one which can only breed frustration and cynicism about the process as a whole.

Recommendation #6:

In order to ensure that participatory and inclusive processes operate in an effective, efficient and fair manner, government should:

- **ensure that the appropriate parties are identified and involved in the processes as early as possible and limit participation to those groups having legitimate interests in the project;**

- **recognize the critically important distinction between traditional models of**

consultation and the direct involvement of interested parties in decision making, and promote the latter approach where possible;

- **balance the need for real deadlines with the requirement that parties have adequate time for effective participation; and**

- **ensure that the Aboriginal and other participants in quasi-judicial and negotiated processes have the financial assistance that is absolutely essential if their involvement is to be effective and if cynicism and frustration are to be minimized.**

5.7 Clarifying the Role of IBAs

The IBAs negotiated between Aboriginal groups and the company were an integral part of the BHP process. They differ from most other components of the regulatory and benefits package, however, in being private contracts between non-governmental parties, negotiated largely behind closed doors and subject to a confidentiality provision. While this provision has not prevented the general issues addressed in the IBAs from becoming widely known, it has restricted access to the details of the IBAs and has cast something of a shroud of secrecy over the whole IBA process.

There appears to be widespread agreement among participants in the BHP process that IBAs are an important and useful component of the regulatory and benefits package. Furthermore, IBAs appear to be an accepted feature of development in the North, having been used in earlier projects. Specific provisions requiring these agreements are found in certain land claims agreements and some legislation governing oil and gas development. In the BHP process, however, there was no legislative or claims-based requirement for IBAs, nor were there any formal guidelines regarding the content of these agreements. As discussed above, the requirement of satisfactory progress on IBAs as a precondition to final project approval was an entirely discretionary decision by the Minister.

The principle that Aboriginal people should share in the benefits from resource development in the North is widely accepted and IBAs are clearly a means of tailoring those benefits to the specific needs of communities and Aboriginal groups. IBAs are therefore likely to remain part of the regulatory and benefits package if the BHP model is applied to future projects. The use of IBAs in the BHP process raises, however, some important issues regarding the legal and policy framework for these agreements and the relationship between IBAs and other components of the regulatory process. IBAs also raise questions regarding the public policy implications of addressing important components of the regulatory and benefits package through private contracts. The following sections discuss these general issues.

As noted earlier in this report, the authors were not able to review signed IBAs nor were they given a detailed account of the negotiation processes that produced these agreements. Nonetheless, a number of participants in the BHP process were willing to talk in general terms about the content and implications of IBAs. The discussion that follows is based on these general comments and the authors' own analysis of the issues raised by IBAs.

5.7.1 Providing a Legislative Basis for IBAs

If the IBA component of the BHP process becomes a precedent for future projects, consideration should be given to establishing a specific legislative or policy requirement and associated guidelines. This legal basis could be provided through land claims or through legislation. Although some participants in the BHP process expressed the view that IBAs should be entirely a matter between the project proponent and Aboriginal groups, there are several reasons why this approach is likely to be both unrealistic and unsatisfactory.

The first set of reasons was discussed above in the section on negotiated processes. The fairness, efficiency and effectiveness of negotiated components of a project's regulatory process depends on the balance of bargaining power between the parties and the provision of end points, notably time lines and deadlock-breaking mechanisms. These negotiations do not occur in a vacuum and government cannot simply wash its hands of IBAs and declare them to be a private contractual matter. The BHP process provides ample evidence that the establishment of a clear link between IBAs and regulatory approvals may be essential if these agreements are to proceed expeditiously to a satisfactory conclusion. Furthermore, a decision by government not to intervene would itself be a significant development if it implies that regulatory approvals will be granted whether or not IBAs are signed. This type of non-action by government tips the balance of bargaining power clearly in favour of the project proponent. Once it is acknowledged that government decisions will inevitably have an effect on IBA negotiations, the question to be answered is whether these decisions should be *ad hoc* and without firm legal foundations, as in the BHP case, or grounded in a clearer legal and policy framework.

The second reason for considering a formal IBA requirement relates to certainty and process predictability. Even if companies recognize, as did BHP, that IBA negotiations are required as a practical matter in the North and serve as a useful means of establishing a good neighbour relationship with Aboriginal groups, the absence of a formal requirement is likely to be a source of uncertainty. In particular, the role of IBAs within the overall regulatory and benefits package is not well defined and it is not certain whether a failure to conclude agreements with some or all of the Aboriginal groups claiming an entitlement to benefits will result in project delay or even a refusal of government to issue approvals. Certainty and predictability would thus be enhanced by a legal and policy link between IBAs and the process for project review and approval.

Finally, IBAs arguably touch on important matters of public policy. Legislative parameters or policy direction may be appropriate to address aspects of IBAs that affect the public interest in general and the regulatory process in particular.

5.7.2 Addressing the Public Interest Implications of IBAs

A full review of the implications of IBAs for the public interest is impossible in the absence of direct access to signed agreements. The discussion that follows is thus intended primarily to highlight two potential areas of concern. First, IBAs may have direct or indirect effects on the role of Aboriginal groups in other

regulatory processes. Second, the cash component of IBAs raises a number of important policy issues.

5.7.2.1 IBAs and the Role of Aboriginal Groups in Regulatory Processes

IBAs are intended, on their face, to establish a basis for the involvement of Aboriginal people in projects and, more generally, to provide them with opportunities to share in the benefits of industrial development occurring within their traditional territories. These agreements may, however, have incidental effects that should be carefully assessed.

The most obvious of these is that IBAs may attempt to constrain directly the participation of Aboriginal groups in other aspects of project regulation. Several participants in the BHP process confirmed to the authors of this report that the company's initial IBA proposal contained a covenant on the part of the Aboriginal signatory not to object to the issuance of regulatory licences or approvals relating to the project. It appears that this covenant was phrased as being "consideration" for the company entering into the IBA. The implication of this term in non-legal language is that the covenant was presented as being part of the Aboriginal side of the bargain, in exchange for which benefits were granted by the company. Whether or not this clause appeared in the final agreements is not, of course, a matter of public record. Nonetheless, the fact that it was on the table is worthy of note. Four general comments are in order.

First, if IBAs reflect an underlying entitlement of Aboriginal groups to direct benefits from projects, it is not clear why these groups should be asked to constrain their participation in the regulatory process as a condition for receiving those benefits. In the absence of a well defined understanding of the underlying purpose of IBAs and without a legal foundation for these agreements, opportunities will arise for this type of arguably inappropriate linkage.

Second, if Aboriginal groups are dependent on IBAs as the principal vehicle for obtaining cash and in-kind benefits from projects, project proponents may have considerable leverage to press for the inclusion of provisions such as that noted above. Is it appropriate that Aboriginal groups should be confronted with a situation where they may, in effect, be asked to choose between their right to participate freely in regulatory processes and their right to benefit from projects occurring within their territories?

Third, is it appropriate as a general matter of public policy that groups should fetter their legal rights in this manner through private contract? This question has particular importance if one takes the view that an important feature of the BHP model was the development of inclusive and participatory approaches to decision making. The argument was developed above that the BHP process can be interpreted as signalling an implicit or explicit public policy decision to shift significant responsibility for the effectiveness of the regulatory process onto the shoulders of non-governmental participants. This shift is evident in the role accorded to these participants in both quasi-judicial and negotiated processes. If this is the policy direction implicit in the BHP model, any components of the regulatory and benefits package that may constrain the ability of Aboriginal groups to participate in the process as a whole should be viewed with concern.

The importance of this issue is underlined if one considers the possibility that IBAs may be concluded

even before a project enters the regulatory process. What would be the implications for the regulatory model developed in the BHP context if, in the case of a future project, Aboriginal groups were offered a significant benefits package, including an up-front cash component, at the early stages of project development and if this offer were contingent on a covenant not to oppose the project in regulatory proceedings? The risk that IBAs may provide a mechanism for companies with deep pockets to in effect buy off opponents to projects cannot be completely discounted. While there is absolutely no evidence of this type of behaviour in the case of the BHP process, other companies might not measure up to the high standard set by BHP.

In response to these concerns, one might argue that Aboriginal groups are in the best position to protect their own interests and that they are quite capable of deciding whether or not to refrain from certain types of activity in exchange for benefits. Furthermore, there is no obligation on them to agree to these types of conditions. One key Aboriginal participant in the BHP process stated clearly to the authors of this report that, in his view, companies must satisfy his people's environmental concerns regarding projects before the benefits issues will even be considered.

It is difficult to be certain in the abstract whether all Aboriginal groups will be equally able to resist pressure, particularly in a context where IBAs are not legally required and the relative bargaining power of parties to these negotiations is unclear. The promise of cash or in-kind benefits may, however, constitute a significant temptation to accept restrictions on regulatory or other activities, particularly if there is no certainty regarding the Aboriginal group's general entitlement to benefits or its right to secure an IBA prior to project approval. The fundamental point is that government action may be required in order to address issues of this type in IBA negotiations. One alternative would be to specify the content of IBAs to some degree, clearly prohibiting clauses of the type discussed above. Another alternative would be to ensure that Aboriginal groups have sufficient bargaining power in IBA negotiations so that they can effectively resist pressure to include provisions of this type without jeopardizing their entitlement to reasonable benefits.

A final point on this issue concerns the leverage that IBAs may provide a company even in the absence of a specific clause precluding Aboriginal groups from intervening in regulatory processes to oppose project approvals. The authors of this report were not, of course, able to review the substantive obligations or dispute-resolution provisions contained in IBAs. It is nonetheless possible that these agreements could provide opportunities for project proponents to suspend cash payments and other benefits for a variety of reasons. While some of these reasons may be fully justified, the exercise of this discretion through the mechanism of a confidential agreement could provide unscrupulous proponents with an opportunity to exert pressure on Aboriginal groups in the context of ongoing regulatory proceedings. One would hope that IBAs will be structured so as to minimize the risk of this type of unconscionable behaviour. In the absence of legal guidelines or direct government involvement, however, there is no public means of addressing this risk directly.

5.7.2.2 Ensuring Appropriate Mechanisms for Fiscal Transfers from the Company to Others

The second important set of public policy issues relating to IBAs concerns their cash component. Once again, this area is shrouded in mystery given the confidentiality of these agreements. Nonetheless, the authors of this report were told by several sources that the cash payments included in the BHP IBAs were in the multi-million dollar range. These amounts are, it appears, significant from the perspective of Aboriginal groups and the company.

It seems that these payments are most accurately characterized as a revenue-sharing or profit-sharing arrangement, although they may not be contingent in any way on the project's profitability. They could also conceivably be viewed as a form of compensation, although there is no indication that they are linked to any specific loss suffered by Aboriginal people. Since the BHP project is located in an area of unsettled claims, cash transfers to Aboriginal groups likely reflect an underlying entitlement to a share of the profits of development that is based on some measure of ownership, or at least traditional occupation, of the land where the development occurs. The characterization and quantum of the cash component of the IBAs raise two issues: the place of IBAs in the overall fiscal regime and the appropriations of IBAs as redistributive mechanisms.

5.7.2.2.1 IBAs and the Overall Fiscal Regime

The first issue concerns the position of IBAs within the broader fiscal framework. One would generally expect to see the public benefit from resource development to be obtained through a coordinated taxation and royalty system that is created with a view to the needs of both the public as resource owner and industry as project developer and risk taker. In broad terms, the royalty and taxation regime should ensure a fair share of project revenue to the public without being either so onerous or so unpredictable that it constitutes a deterrent to development. One would expect a measure of coordination to ensure that the total public claim on project revenue is consistent with a reasonable rate of return on the project. To achieve this objective, attention must be paid to the cumulative fiscal impact of various taxation and royalty regimes and it may be desirable to tie these regimes directly to profitability, so as not to unduly penalize less lucrative but nonetheless viable projects. Furthermore, there is a need to be conscious of the overall fiscal burden on the proponent when the direct and in-kind costs associated with other components of the regulatory and benefits package are added to the taxation and royalty obligations.

The problem with the IBA model for redistribution is that it appears to be inconsistent with these basic goals of the overall taxation and royalty regime. This inconsistency probably does not matter much if the cash component of IBAs is relatively small. It will become a major concern, however, if the cash transfers contained in IBAs are significant in terms of project profitability. This problem will be particularly serious if expectations regarding cash payments are ratchetted up by relatively lucrative projects like BHP's diamond mine. Subsequent projects may simply be unable to deliver cash transfers in line with expectations and the result may be to squeeze smaller players and more marginal projects out of the development game.

incentives to accept lower cash transfers rather than risk rendering projects uneconomic. Furthermore, there may be a rationale for excluding small or marginal projects that are unable to deliver a significant cash payment to Aboriginal groups in addition to other benefits. In this context it should be noted, however, that the benefits of development to non-Aboriginal people should also enter into the equation when determining if it is in the public interest for projects to proceed. Even if it is desirable to set a threshold for IBA transfers that would have the effect of excluding some otherwise viable projects, this result should arguably be the result of an explicit policy choice as opposed to being the unintended consequence of the *ad hoc* negotiation of IBAs.

The fiscal problems associated with IBAs will be accentuated if cash payments, unlike taxes and royalties, are not related to profitability. Aboriginal people may, of course, be reluctant to link their entire benefits package to the ups and downs of resource-based industries. Nonetheless, an argument can be made that some degree of profit sensitivity is appropriate if IBA payments are large dollar amounts and reflect an ownership-based entitlement to share in the benefits of resource development. Consideration might be given to a payment formula based on a guaranteed minimum payment, with additional amounts to be determined according to project profitability. Once such a structure is proposed, however, the arguments for integration with the overall taxation and royalty regime would appear to be even stronger.

If the BHP model is to become the norm for future projects and if the cash component of IBAs is significant, some coordination with the overall fiscal regime will likely be required. This coordination may be achieved through mechanisms in land claims agreements. In the absence of settled claims, however, other options should be considered. One way to address this issue would be to separate IBAs and cash transfers completely. IBAs would then focus exclusively on customizing socio-economic benefits in areas such as employment, training and business opportunities to the particular needs of communities or Aboriginal groups. Any Aboriginal entitlement to a revenue stream in the form of royalties or profit-sharing would be addressed as an integral component of the overall fiscal arrangements. In short, the total public sector claim on project revenues would be set at a reasonable amount and then the various governmental and Aboriginal claimants would divide up the pie among themselves. In this way, the company would not be faced with an unstructured negotiated process of redistribution in addition to, and uncoordinated with, the fixed taxation and royalty regime. Another alternative would be to allow IBA payments to offset tax and royalty payments, thus stabilizing the total fiscal take while allowing negotiations or pre-established guidelines to determine the precise allocation among government or Aboriginal groups. Other means of ensuring a sensible overall fiscal regime could undoubtedly be developed, but all will require some modification of the unstructured approach to IBAs that occurred in the BHP process.

5.7.2.2.2 IBAs as Redistributive Mechanisms

A second fiscal issue raised by IBAs is whether private bilateral agreements are an appropriate mechanism for redistributing a significant portion of the benefits from projects in the form of cash transfers. An evaluation of the advantages and disadvantages of significant cash transfers from social and economic perspectives is beyond the scope of this report. Suffice it to say that it is unclear what mechanisms, if any, are contained in IBAs to ensure financial safeguards and accountability. Furthermore, it is unclear whether

cash transferred in this fashion is to be kept in trust, invested in infrastructure, used for program funding and other current expenses, or distributed on a per capita basis to Aboriginal people.

A related issue concerns the effect of individual IBAs on broader redistributive goals. The Gwich'in and Sahtu land claims agreements, for example, include a mechanism for royalty sharing. It is at least worth considering whether cash payments to individual groups or communities through IBAs would undercut a more general redistributive regime of this type. As with other aspects of the BHP process, certain issues relating to the cash component of IBAs may be resolved by the settlement of land claims but other problems may remain.

It may be that Aboriginal institutions have adequate mechanisms in place to ensure that the significant cash payments apparently included in IBAs are used to maximum advantage and are shared equitably. Transparency and public oversight may be limited, however, by the fact that IBAs are private contracts that include a confidentiality clause. One participant in the BHP process indicated that this restriction did not fit well with the public nature of these agreements from the Aboriginal perspective and with the transparent and consultative nature of Aboriginal institutions.

One could take the view that what happens to this money is entirely up to the parties to these negotiations. As underlined in the earlier discussion of negotiated processes, however, government cannot avoid some measure of involvement and responsibility. At least in cases where land claims are not settled, it will likely have a role in identifying which Aboriginal groups, and which particular organizations, are entitled to negotiate IBAs for a given project. Furthermore, the incentive structure created by government will have a significant impact on the ability of Aboriginal parties to IBA negotiations to extract cash payments from project proponents. Application of the BHP model in the future will therefore require government to turn its attention to the cash components of IBAs.

5.7.3 Requirements for Successful Implementation of IBAs

A final and critically important issue regarding the role of IBAs in the BHP process concerns the challenge of implementing these agreements and meeting the expectations that they have generated. Employment and business opportunities and promises of assistance with education and training will mean little if Aboriginal people are unable to take advantage of these provisions in the IBAs.

The Socio-Economic Agreement is intended to assist Aboriginal people, and Northerners in general, in benefiting from the BHP project. Another potentially promising initiative in this respect is the Community Mobilization program. Although BHP played a key role at the early stages of this program, the leadership has now shifted to a partnership of industry and others. Some funding was provided by government, and significant in-kind contributions have been made by the partner companies. The purpose of this project is to assist Aboriginal communities in understanding the needs of industry and equipping themselves to take advantage of opportunities associated with development in the North.

This kind of initiative appears to be necessary if the expected socio-economic benefits from the BHP

diamond mine and other mineral development in the North are to be achieved. Success in involving Aboriginal people directly in these projects will also, according to one participant in this program, be essential if support for development is to be sustained. Furthermore, the BHP precedent for IBAs will be an important bench mark for future projects. There is a risk that a failure of the BHP IBAs to deliver concrete benefits to Aboriginal people will undermine confidence in this mechanism and make it much more difficult for subsequent project proponents to secure mutually satisfactory agreements with Aboriginal groups.

It is generally recognized that employment and contracting objectives contained in IBAs will not be achieved instantaneously. There is reason to be concerned, however, that insufficient attention may be devoted to the preconditions for delivering on IBAs. Finding government resources to address this issue may not be easy and the Community Mobilization program illustrates the potential for the private sector to fill at least part of the gap. Having devoted so much effort to securing the regulatory and benefits package for the project, however, it would be unfortunate if government could not make the necessary commitment to ensuring successful implementation. Attention to this matter is important since the degree to which the BHP IBAs are successful will likely have implications which go well beyond that project. The ability of the IBAs to deliver on expectations will be a major determinant of whether the BHP model will be viable over the long
term.

Recommendation #7:

Government should take the following actions in order to define more clearly the role of IBAs, address the implications of these agreements for the public interest and increase the likelihood that the expectations generated by IBAs will be met:

- **ensure that a clear legal and policy basis is established for IBAs, either through legislation or the land claims process;**
- **prohibit the inclusion in IBAs of provisions that would restrict the ability of Aboriginal groups to participate fully and freely in regulatory processes and establish guidelines or legal safeguards to reduce the risk that IBAs will be used to exert undue pressure on Aboriginal groups;**
- **address the implications of the cash component of IBAs for the overall fiscal regime applicable to projects;**
- **play a more active role in overseeing the use of IBAs as redistributive mechanisms; and**
- **work closely with project proponents, Aboriginal organizations, local communities, private sector partners, educational institutions and other**

interested parties to maximize the likelihood that the intended beneficiaries of IBAs will be able to take advantage of the opportunities made available to them.

5.8 Providing for Compensation

Compensation became an issue at several points in the BHP process because of the known and potential impacts of the project on land, resources and the interests of those people engaged in land-based subsistence or commercial activities. Discussions focused on both the establishment of a suitable compensation process, to be used in the event that unexpected harm occurs, and on the quantum and allocation of compensation payments for the inevitable destruction of fish habitat by the project. The most detailed discussions of compensation occurred in the EA and Water Board processes and in connection with the Department of Fisheries and Oceans (DFO) authorization under the *Fisheries Act*.

The EA panel identified compensation as an important issue early in its process. The panel's request for additional information from BHP following its review of the EIS included a question regarding the company's plan to compensate both commercial and subsistence users of the land and resources for any interference with their livelihood resulting from the project. BHP's response set out a framework for addressing compensation claims made by commercial land users that involved discussion of the type of interference with commercial activities, the extent to which that interference is attributable to BHP's activities, possible mitigation measures, and the financial loss suffered by the claimant. BHP's proposed approach placed the burden on the claimant to demonstrate clearly the basis of the loss and committed the company to negotiate in good faith. If agreement is not reached, an independent auditor or mediator may be used to review the information presented. In relation to subsistence land users, BHP stated that it expected that any long-term concerns would be raised during the impact and benefits discussions. Otherwise, BHP indicated that it contemplated a process similar to that proposed for commercial users.

The EA panel's report included a section on compensation that reviewed BHP's proposal and the arguments put forward by various intervenors. The panel acknowledged the concerns of subsistence users, but noted that these concerns focused more on cumulative regional effects of increased land use than on the impact of BHP's particular project. It also agreed with a submission from the GNWT that the strict legal burden of proof may be too demanding a test for compensation issues in relation to the project, although it cautioned that BHP should only be expected to compensate land users for effects that can reasonably be shown to result from its project.

The panel concluded by endorsing BHP's proposed approach but noting that it is merely a voluntary measure without a binding mechanism to ensure that compensation claims are resolved. It also stated that compensation issues would likely be addressed in IBAs. Finally, it observed that BHP's project is located in an area of unresolved land claims and that compensation provisions may be included in land claims agreements. On this basis, the panel made two recommendations:

26. The Panel recommends that the Government of Canada make BHP's compensation

policy a condition of approval for the Project. In addition, the compensation policy should set out firm procedures for seeing disputes through to resolution. The Panel also recommends that the Government of Canada ensure that land-users have access to resources to pursue compensation claims.

27. The Panel recommends that DIAND work closely with the GNWT to develop an enforceable compensation policy that addresses the issues of burden of proof, access to resources and means to ensure resolution, in relation to future development in this region. Once developed, the compensation policy should also be applied to this Project.

The government's response to these recommendations was equivocal. It agreed that BHP should develop a compensation policy with firm dispute-resolution procedures and it advised BHP that requirements relating to compensation would likely be part of an environmental agreement. The government declined, however, to commit itself to providing resources to land users to pursue compensation claims. In addition, DIAND undertook simply to work with the GNWT to review its existing compensation policy, in consultation with industry and other land users.

In light of this discussion at the EA stage, it is noteworthy that the issue of compensation for losses suffered by land users was not addressed in the Environmental Agreement. While the agreement does, of course, provide for security deposits, these can be drawn upon only by government and are intended to be applied to carry out work necessary to cure defaults. Security deposits under the Environmental Agreement are not accessible directly by Aboriginal groups or other land users, nor do they provide a fund for direct compensation for any losses suffered by those engaged in commercial or subsistence activities.

The extent to which compensation is addressed in IBAs is not entirely clear to the authors of this report. Participants in the BHP process gave no indication that compensation mechanisms to deal with specific losses suffered by Aboriginal land users were part of the basic IBA model under discussion, although it appears that at least one Aboriginal group sought compensation provisions in its IBA. As noted above, the secrecy of these agreements makes it difficult to determine their impact on the parties or on the public interest. It thus remains unclear whether they constitute a systematic and enforceable approach to compensation for Aboriginal land users. There is no doubt, however, that any compensation provisions found within these agreements would not benefit other land users.

Two other places where compensation was raised in the BHP process should be briefly noted. First, Aboriginal groups made arguments regarding compensation to the Water Board. These arguments are summarized in the Board's reasons for decision: the Dogrib Treaty 11 Council sought compensation-in-kind; the Kitikmeot Inuit Association stated that it could not give the Board a dollar estimate of the losses that might be suffered by Inuit instream users, but sought support from the Board "in ensuring that BHP establish an acceptable compensation process"; and the Yellowknives Dene First Nation argued that it was entitled to compensation on the basis of traditional use of the area where the BHP mine is located. The Board refused to consider compensation arguments by the ᵒutsel K'e Dene First Nation on the grounds that they had failed to provide sufficient notice.

The *Northwest Territories Waters Act* explicitly provides for compensation in the event that a person is adversely affected as a result of the issuance of a licence. In the reasons for its decision on the BHP water licence, the Water Board stated that "the party seeking compensation must establish on the balance of probabilities, through the introduction of evidence, its entitlement to compensation and a basis for quantifying the compensation." The Water Board then rejected, in turn, each of the claims relating to compensation that had been advanced by the Aboriginal intervenors. With regard to arguments for compensation-in-kind and support for a compensation process, the Board concluded that these matters were outside of its jurisdiction. The claim of the Yellowknives Dene First Nation was rejected on the grounds that sufficient evidence to support that claim had not been provided. Although the water licence, like the Environmental Agreement, does require a security deposit, this deposit is not intended as a mechanism for compensating water users for losses suffered as a result of the project.

Second, as discussed in the following section, implementation of DFO's "no net loss" policy for fisheries habitat resulted in discussions between DFO and BHP regarding the appropriate dollar amount to compensate for the destruction of lake and stream habitat caused by the project. This issue was settled through a bilateral agreement, with money to be paid into a compensation fund. The compensation amount was based, however, on the cost of replacing the habitat destroyed by the project, not on any losses that might be suffered by present or future users of the fishery. Furthermore, the compensation fund will be available for fish habitat enhancement, not disbursement to commercial or subsistence users of the fishery in the event that losses related to fish habitat destruction can be shown.

In the end, then, compensation provisions are included at several places in the BHP model; however, the EA panel's recommendations that BHP's general compensation policy be a condition of project approval and that firm dispute-resolution procedures be included in it were not formally addressed in the BHP regulatory and benefits package. The result is that there appears to be no binding process for handling certain types of compensation claims that may arise in connection with BHP's project, notably claims alleging land-related losses. Furthermore, as noted by the EA panel, compensation claims relating to losses suffered due to the cumulative impacts of several projects within the Slave Geological Province could raise difficult issues.

It remains to be seen whether non-negligible losses will in fact be sustained by land users as a result of BHP's project alone, or following more extensive development within the Slave Geological Province. If there are no such losses, compensation will remain a moot point. Nonetheless, the absence of binding procedures within the BHP model to address certain types of compensation claims creates a risk that this issue could become a contentious one should losses occur. In this respect, the contrast with explicit compensation provisions under certain legislation governing oil and gas activities and in some land claims agreements should be noted. Some attention to these issues is desirable if the BHP model is to be applied in the future.

Recommendation #8:

Government should consider how best to ensure that fair, transparent and legally

binding mechanisms, including dispute-resolution procedures, are in place to address all types of compensation claims that may be made by land and resource users for losses related to specific projects or to the cumulative effects of development within the Slave Geological Province.

5.9 Coordinating DFO's Fish Habitat Compensation Policy with other Components of the Regulatory Process

A number of concerns regarding the fish habitat compensation process were raised during the course of the BHP process. These issues related to the appropriateness of DFO's no net loss policy, the transparency of the process for reaching a compensation agreement where direct habitat replacement is not feasible, and the capacity of DFO to play an effective regulatory role in the North in light of severe cut-backs in staff and resources. An evaluation of DFO's policy and its implementation is beyond the scope of this report, except to note that the BHP model as a whole will be improved where each individual component operates in a predictable and transparent manner.

Two areas can be noted, however, where improved coordination between DFO's policy and other components of the BHP process might be achieved. First, elements of DFO's fish compensation agreement and its authorization for the destruction of fish habitat might usefully be coordinated with the water licence and Environmental Agreement. Second, administration of the fish habitat compensation fund through the Independent Environmental Monitoring Agency could be an efficient way of obtaining input from Aboriginal groups and others on how best to use these funds. The latter possibility was raised at the Water Board hearing and DFO agreed that input from Aboriginal people would be sought in selecting projects to be financed by the fish habitat compensation fund.

DFO has a clear statutory mandate relating to fisheries and fish habitat, and there may well be advantages to having a specialist agency with responsibility in this area. Nonetheless, it appears from the BHP process that DFO's activities were largely unconnected to the rest of the regulatory and benefits package. Given the obvious relationship between fisheries and water management, and the contribution of DFO's compensation requirement to the company's total financial obligations resulting from the regulatory and benefits package, greater transparency and coordination would be desirable.

Recommendation #9:

The fish habitat compensation policy administered by the Department of Fisheries and Oceans should be better coordinated with other regulatory processes and the Independent Environmental Monitoring Agency should be seriously considered as a mechanism for identifying habitat enhancement projects.

5.10 Ensuring Effective and Efficient Monitoring and Follow-up

The Independent Environmental Monitoring Agency is a key component of the BHP regulatory package. Views on this agency are divided, with some seeing it as another layer of bureaucracy applied to an already heavily regulated project and others arguing that it is a useful means of addressing the lack of confidence of Aboriginal and environmental groups in government regulation and monitoring. It is clear that among Aboriginal groups this agency is viewed as integral to ensuring the effectiveness of the environmental components of the BHP regulatory package. Another point of view, expressed by one government official, is that it may become superfluous over time if government monitoring programs prove themselves to be effective and gain confidence. This view is not uniformly held throughout government, however, and other officials argued that the Independent Environmental Monitoring Agency is likely to continue to function as an important public watchdog on government's regulatory and monitoring responsibilities. The ultimate verdict on the usefulness of the Independent Environmental Monitoring Agency will depend on the efficiency and effectiveness with which it conducts itself and the perceived need for an independent agency over the long term. Three points regarding the role of this agency can, however, be noted at this time.

5.10.1 Providing Ongoing Aboriginal Involvement in Monitoring and Regulatory Follow-up

The first point is that the role of this agency may well evolve beyond a technical oversight function into a mechanism for involving Aboriginal groups in ongoing project management and regulation. From the Aboriginal perspective, this agency provides an independent source of information and a voice on regulatory issues over the life of the project. It therefore addresses a concern that both information and input might otherwise be restricted after the final regulatory approvals are issued. It might also be able to assist with early issue identification and conflict resolution between Aboriginal groups and the company. The value of the Independent Environmental Monitoring Agency will likely be increased significantly if it is successful in playing this broader role in an efficient manner and to the satisfaction of all the parties.

The possibility that the Independent Environmental Monitoring Agency may play this broader role is related to ongoing debate about the type of people who are best suited to make up its Board of Directors. A number of participants in the process raised the issue of whether the Board would be made up of technical experts or people with less specialized backgrounds. There was general agreement, however, that the ultimate role of the agency would reflect the type of people nominated to serve on the Board and the role for it envisaged by the various parties to the Environmental Agreement. Depending on how the agency evolves, membership on the Board may need to reflect both the agency's technical oversight role and its operation as vehicle for Aboriginal involvement, issue identification, and conflict resolution.

5.10.2 Addressing Monitoring Requirements for Future Projects

The monitoring requirements of future projects raise a second point regarding the role of the BHP Independent Environmental Monitoring Agency. If other projects are proposed for the same region as

it a regional or multi-project mandate. It is too early to assess the relative merits of these options in detail. Experience with the Independent Environmental Monitoring Agency established for BHP's project, more details about subsequent projects and, of course, the regulatory decision whether or not to apply the BHP model in the future will all have a direct bearing on this issue. Nonetheless, there may be some economies of scale in coordinating, if not fully integrating, the independent monitoring functions for projects operating in close proximity to each other.

A number of participants in the BHP process expressed a general concern with the proliferation of boards, regulatory processes and other institutional arrangements in the Northwest Territories and recommended that opportunities for streamlining and rationalization should be sought. Limited human and financial resources and the risk of an overly complex and bureaucratic system were the principal reasons given for this recommendation. If the BHP model is adopted for future projects in the Slave Geological Province, the effectiveness and efficiency of independent monitoring may be improved by a coordinated approach among projects. This coordination will be particularly important if the monitoring function considers ecosystem-wide and cumulative effects.

5.10.3 Consolidating and Applying Baseline Data and Cumulative Effects Analysis

The issues of ecosystem management and cumulative effects monitoring raise a third point regarding the role of the Independent Environmental Monitoring Agency in the BHP model. There is an obvious potential for complementarity between its function and the role of the West Kitikmeot/Slave Study (WKSS). The Independent Environmental Monitoring Agency and the WKSS both have potentially important roles to play in terms of overall environmental management in the Slave Geological Province and in providing the information required for the review and regulation of future projects. They both have a mandate to ensure that the traditional knowledge and experience of Aboriginal peoples are fully integrated into data collection and environmental management. They could make major contributions in the area of cumulative effects assessment, for example) an issue that is likely to become increasingly important with each successive project. In considering a broader regional role for the Independent Environmental Monitoring Agency, it should be kept in mind that this body is funded largely by BHP and that its mandate is specific to one project. If it is to play a broader role, with the WKSS, in regional environmental management, it may be necessary to consider a consortium approach to funding. An opportunity to move in this direction may arise if, as noted above, some effort is made to coordinate or integrate the independent monitoring function among several projects.

Recommendation #10:

The effectiveness and efficiency of monitoring arrangements and regulatory follow-up may be enhanced by:

- **recognizing that the Independent Environmental Monitoring Agency may be a useful vehicle for ongoing Aboriginal involvement in the project, contributing to**

issue identification and conflict resolution in addition to playing a technical oversight role;

- **exploring opportunities for the coordination or integration of monitoring programs and agencies if several projects are developed in the same region; and**

- **promoting complementarity between project-specific monitoring agencies and the West Kitikmeot/Slave Study.**

5.11 Coordinating Regulatory and Benefits Requirements

The need for coordination among the elements of the regulatory and benefits package developed for the BHP project has been a recurring theme in this report. The risk of overlap and inconsistency among the different components was particularly acute in the BHP process because of four factors: (1) initial uncertainty regarding the appropriate forum for resolving certain issues; (2) the absence of a generally accepted template for the Environmental Agreement and the Socio-Economic Agreement; (3) the highly compressed time frame for the final negotiations on these agreements and the IBAs; and (4) the simultaneous negotiation of agreements and consideration of BHP's application for a water licence by the Water Board. If the BHP model is adopted for future projects, some or all of these factors may be addressed so as to reduce significantly the risk of overlap or inconsistency. Nonetheless, there appear to be at least three areas where some degree of formal coordination is desirable: security deposits; monitoring and reporting requirements; and socio-economic benefits.

5.11.1 Security Deposits

The concern that the company would be facing dual and possibly uncoordinated security deposit obligations was raised by the Chair of the Water Board in the second phase of hearings. Mr. Wray expressed concern about what he perceived to be a change in DIAND's policy regarding the requirement of a security deposit through the land lease. In addition, he was concerned that the Water Board was faced with setting the security deposit under the water licence without full knowledge of the security deposit requirements under the Environmental Agreement. It appears that these matters were resolved through interventions before the Water Board and in an informal

manner in the BHP process; in particular, the Environmental Agreement was not finalized until after the issuance of the water licence. A subsequent exchange of correspondence between the Chair of the Water Board and the Minister has also clarified the respective roles of the Board and DIAND in requiring security deposits.

Determining the required security deposit is an area where formal coordination is desirable, particularly given the difficulty in predicting reclamation costs in advance of a formal reclamation plan and the somewhat arbitrary distinction between land- and water-related reclamation in the case of a project such as BHP's diamond mine. The fairness and predictability of the BHP model would be enhanced by a

clear procedure for coordinating the determination of security deposit requirements by the Water Board and through the Environmental Agreement and land lease.

5.11.2 Monitoring and Reporting Requirements

Monitoring and reporting requirements are another area of potential overlap between the Environmental Agreement and the water licence. In addition, there may be some reporting requirements under laws of general application. Harmonizing these requirements to avoid duplication or inconsistency in areas such as data collection protocols, timing of monitoring programs and the format and timing of reporting obligations would ensure maximum efficiency in these areas.

This issue is referred to in section 15.12 of the Environmental Agreement, which deals with the review or approval of environmental plans and programs having aspects within the jurisdiction of two or more government authorities or regulatory agencies. The Minister is required to "facilitate procedures for such authorities and agencies to deal with these matters in an integrated or complementary manner", and the Independent Environmental Monitoring Agency is to be invited to participate in these procedures as appropriate. Coordination could be achieved by requiring the Water Board and the parties to an environmental agreement to develop identical or mutually consistent requirements in this area. Alternatively, priority could be accorded to one process and the other would then be obliged to ensure that its monitoring and reporting requirements are compatible.

This issue may be further complicated in the event that a number of projects are located in close geographical proximity or within a single watershed. The efficiency and effectiveness of monitoring and reporting may be enhanced if the requirements for the projects are coordinated. While this coordination is easy to achieve if these requirements are set by general statutes or by a single regulatory agency, it may be more difficult if they are the product of different regulatory agencies or of negotiated processes, as in the case of the Environmental Agreement. If development proceeds at a rapid pace in the Slave Geological Province, coordination among projects could be achieved through the adoption of a common template for monitoring and reporting requirements to be incorporated in the project-specific Environmental Agreements or by integrating monitoring and reporting in a single region-wide program. The latter approach may be particularly appropriate where monitoring extends to base-line data collection and attempts to measure cumulative effects.

5.11.3 Socio-Economic Benefits

The provision of socio-economic benefits is a third aspect of the BHP process where coordination appears to be desirable. These benefits are addressed in both the Socio-Economic Agreement and the IBAs, and the former provides that in the event of an inconsistency the IBAs prevail. Since the IBAs are not in the public domain, it is impossible to determine the likelihood of inconsistencies arising. It is also impossible to determine whether this paramountcy provision combined with whatever informal coordination occurred between the negotiations of IBAs and the Socio-Economic Agreement constitutes the optimal way of ensuring coordination.

A second area where coordination in relation to socio-economic benefits is desirable relates to implementation. As discussed above, there is a risk that certain Aboriginal groups may not be in a position to take full advantage of the benefits opportunities provided through the BHP process. Coordination among the Community Mobilization initiative, government programs, education and training facilities and Aboriginal communities is desirable if the expectations for socio-economic benefits from the BHP project are to be met. Sustained effort and the allocation of resources in this area will help to ensure that the BHP diamond mine and subsequent industrial projects deliver on the promise of significant socio-economic benefits to Aboriginal people and other Northerners.

Recommendation #11:

Formal mechanisms should be established to coordinate regulatory and benefits requirements relating to:

- **security deposits;**
- **monitoring and reporting; and**
- **socio-economic benefits.**

5.12 Establishing a Statutory Basis for Regulatory Requirements

One notable feature of the BHP process is the absence of clear legal requirements regarding certain elements of the final regulatory and benefits package. The Environmental Agreement, the Socio-Economic Agreement and the IBAs are without explicit statutory basis, although the government's power to attach terms and conditions to the issuance of land leases appears to be sufficiently broad to support the regulatory requirements contained in the Environmental Agreement. Furthermore, the 60-day time limit which resulted in such focused effort and ultimate success on a number of fronts was entirely the product of ministerial discretion.

In the BHP case, these legal issues did not prove to be an obstacle to the conclusion of agreements and the assembling of a regulatory and benefits package that is satisfactory from the perspective of most participants. The incentives for resolving outstanding issues, the company's willingness and ability to adapt to a fluid regulatory and policy environment, the availability of adequate revenue from the project to address a wide range of claims, and the dynamics among the parties were such that everyone focused their attention on getting the job done. The uncertain legal foundations for key components of the BHP model may, however, be a cause of concern in relation to subsequent projects for four reasons.

First, the absence of legal guidance regarding both the requirement that these agreements be reached and the matters that are appropriately addressed by them is a potential source of uncertainty for project proponents and other parties. Even if proponents are notified informally that these elements are in effect required by regulators, questions may remain about who is entitled to be at the table and in what capacity.

For example, the original intent in the BHP process was that the Environmental Agreement be a bilateral (BHP-federal government) or trilateral (BHP-federal government-GNWT) agreement. The four Aboriginal groups were then invited to participate fully at an early stage in the negotiations, although there was ongoing uncertainty about whether or not they would be signatories. This issue may have to be revisited for future projects and, depending on the criteria for involvement, environmental groups and other intervenors in the EA process may also seek direct participation at some level, perhaps as official observers. Finally, there was considerable room for debate about which issues should be dealt with in which forum. For example, Aboriginal groups in the BHP process argued that IBAs should include environmental components and this position is still maintained, it appears, by at least one group. An explicit statutory basis for these negotiated elements of the regulatory and benefits package) or at least some clear policy direction regarding process issues and their substantive content) would provide significant advantages in terms of certainty of requirements and predictability of the regulatory process.

A second reason for concern with the lack of a clear statutory basis for important components of the BHP model is the precariousness of that model in political terms. The political risk is that, in the absence of the public profile and direct ministerial intervention that characterized the BHP process, the desired results may not be achieved for subsequent developments. There is little doubt that the Minister's conditional approval of August 8 and his imposition of a 60-day time frame provided the catalyst for focused and ultimately successful negotiations on the Environmental Agreement, two of the IBAs and the Socio-Economic Agreement. Those who believe that this package should be the template for future projects in the North can justifiably be concerned that the dynamic that brought it into being appears to be so dependent on discretion at the ministerial level. Absent legal direction, there can be little certainty that a new minister, having different priorities and subject to different pressures, would take the decisions necessary to set this process in motion.

The third reason for concern is that the absence of clear statutory foundations makes certain parts of the BHP model precarious from a legal perspective. The Minister's statement that regulatory approvals would not be issued without satisfactory progress on negotiated elements of the package was an important factor in bringing these negotiations to a successful conclusion. It is at least an open question, however, whether a refusal to issue a water licence or land lease because of the failure of the applicant to complete an IBA would withstand legal scrutiny. However wide ministerial discretion appears to be, courts may well be reluctant to conclude that it is unlimited and that it can be exercised in ways that are not anticipated in) and appear unrelated to) the statutory basis for decision making.

An analogy might be drawn with a more common-place exercise of regulatory authority. Suppose that a municipality received an application for a building permit for a project that complied with all formal zoning and safety requirements and then wrote to the developer saying that issuance of the permit was contingent on the developer making cash payments to residents of the neighbourhood or offering them employment in the construction of the building. Absent a clear basis in law, it is not hard to see why such an exercise of discretion might well be vulnerable to legal challenge. A ministerial decision that the issuance of a water licence to a mining company is contingent on it signing an IBA with a local Aboriginal community might attract similar scrutiny.

The point here is not that making such a connection is objectionable in principle. Clearly, linking IBAs to regulatory approvals is one way of adding teeth to a policy decision that the completion of IBAs should be a precondition to the project proceeding. The risk, however, is that without an explicit legislative basis for making this link, government might find itself unable to deliver on the implicit threat of withholding regulatory approvals that underlay the 60-day process in the case of BHP. If government is serious about applying the BHP model to future mineral projects, it would seem imprudent to leave itself vulnerable to this type of challenge by a company that may be, for whatever reason, less cooperative than BHP.

The lack of an explicit statutory basis for the Environmental Agreement may also be a concern, although less so than is the case for IBAs. The requirement that an environmental agreement be negotiated might be linked to general grants of ministerial discretion, notably in relation to the issuance of land leases.

Finally, the adoption of a contractual mechanism for establishing regulatory requirements in the BHP model may raise issues regarding the enforcement of these requirements by non-parties to the agreement. Provision is made for the enforcement of the Environmental Agreement by government through access to BHP's security deposit and through enforcement mechanisms under the land lease. It is not entirely clear, however, whether third parties would have any rights to initiate enforcement measures under the Environmental Agreement. The answer to this question could depend in large part on whether the agreement is construed as embodying public duties. While effective enforcement by government could make this a purely hypothetical issue, some participants in the BHP process raised concerns about whether government will have either the political will or the resources to enforce the Environmental Agreement and other regulatory requirements imposed on BHP. Lack of effective enforcement can therefore be expected to attract attention from Aboriginal groups and others who are relying on the Environmental Agreement as an important component of the regulatory regime.

A full discussion of the enforcement issue is beyond the scope of this report. Nonetheless, two questions can be identified that could usefully be examined when considering the applicability of the BHP model in the future. First, does the Environmental Agreement in fact create the possibility of enforcement by third parties? Second, is it desirable to create regulatory requirements through contractual arrangements as opposed to relying on legislation, regulations and their attendant enforcement mechanisms?

Recommendation #12:

> **A clear statutory basis should be established for the negotiated components of the regulatory and benefits package, notably the Environmental Agreement and the IBAs, and for the processes that are essential to their successful conclusion and implementation.**

5.13 The BHP Model and the Evolving Institutional Context

As noted earlier in the report, the BHP process took place against the backdrop of an evolving institutional context in the Northwest Territories. This context includes the creation of a new territory in the

Eastern Arctic (Nunavut) and ongoing claims negotiations in the Western Arctic. The devolution of significant responsibilities from the federal government to the GNWT is also a possibility.

With respect to the creation of Nunavut, the various resource management institutions that will be put in place in the new territory are tied very directly to the Nunavut land claims agreement. As such, there will be a significantly greater role for Aboriginal representatives in institutions of public governance in Nunavut than is now the case in the Northwest Territories. Many of the steps taken on an *ad hoc* basis to ensure adequate consideration of Aboriginal interests in the BHP process might therefore prove unnecessary in the future in the Nunavut Territory. To take only one aspect of the BHP process that would be affected by this development, the possibility of IBAs is explicitly contemplated under the *Nunavut Agreement*, and thus would be a normal expectation of any resource developer.

In the Western Arctic, the situation is more fluid, with three land claims settled, and several others still under negotiation. With the exception of the Inuvialuit Settlement Region, however, the regime that seems to be contemplated for the Western Arctic is that set out in the *Mackenzie Valley Resource Management Act* (*MVRMA*), referred to at a number of points earlier in this report. That Act could have far-reaching effects on how mining developments such as the BHP project proceed in the future. Although it is beyond the scope of this report to analyze the full implications of the Act, a number of the more important features with specific relevance to the BHP situation should be noted.

First, the Act anticipates the development by land-use planning boards of land-use plans for settlement areas. In the present draft legislation, there are only two such boards established, for the Sahtu and Gwich'in areas, respectively; however, the intent is clearly that, as other claims become settled, there will be similar boards established in other areas. The land-use plans are subject to the approval of Aboriginal, territorial and federal authorities. Similarly, any authorization by these three levels for land or water use must be in compliance with the land use plan. Presumably then, this mechanism could address some of the deficiencies at the level of general land-use policy and planning that created problems for the BHP process.

Second, as discussed earlier, there is also provision for the creation of land and water boards that will deal with both land use permits and water licences. Although, at least with respect to water, such boards will essentially be exercising the same statutory authority as the Northwest Territories Water Board, there is the possibility (depending upon the outcome of land claims negotiations) for greater latitude for awarding compensation in the event of losses suffered by Aboriginal groups. To some extent, then, these boards may address issues that would otherwise have to be dealt with on an *ad hoc* basis by instruments such as the IBAs.

Third, the *MVRMA* would create an impact review board specific to the Mackenzie Valley (equivalent institutions already exist in the Inuvialuit Settlement Region), which would largely replace the *Canadian Environmental Assessment Act*, except in certain specified cases where there is a national interest or a transregional impact. Presumably the creation of such a board would lead to the development of an EA process that is particularly sensitive to the needs of the North; for example, one could imagine that such a board would develop an expertise in dealing with traditional knowledge, an area where there

has been some criticism of existing processes.

The fourth and most general point is that all of the institutions to be created by the *MVRMA* have in common the important feature of including significant representation by Aboriginal groups. All the boards discussed above contemplate a membership that, excluding the chair, will be nominated in equal numbers by Aboriginal groups and government (both federal and territorial). In the result, there will be assured and substantial representation for Aboriginal groups on all the key resource management boards in the Western Arctic. Some of the concerns of Aboriginal groups with respect to having an effective voice at various stages of the BHP process may therefore be obviated under the new regime as proposed. As a result, some of the *ad hoc* solutions devised in the course of the BHP process to ensure such a voice may well be unnecessary in the future with the passage of the *MVRMA*.

Devolution of responsibilities from the federal government to the GNWT is the final feature of the evolving institutional context that warrants brief mention here. While an evaluation of the potential implications of devolution is beyond the scope of this report, impacts on project review and regulatory processes may be felt in terms of both who exercises jurisdiction and what resources) financial and human) are available.

In conclusion, application of the BHP model in the future will inevitably reflect changes in the institutional context in the Northwest Territories. While some of these changes may fundamentally affect key aspects of the model, it is likely that other issues raised by the BHP process will continue to require attention regardless of the institutional arrangements that are put in place.

Recommendation #13:

Emerging institutional arrangements in the North should be thoroughly examined with a view to determining their implications for the application of the BHP model to future projects.

6 Conclusion

The fundamental question addressed by this report is whether the BHP process, or some variant of it, should serve as a model for the future. It is evident that the BHP process and the regulatory and benefits package that it produced raise a large number of complex issues. These issues range from broad questions of public policy to specific matters relating to the design of decision-making processes and institutional arrangements. This report has endeavoured to explore a number of these issues, providing detailed analysis where possible and signalling areas where final conclusions will only be possible in the fullness of time. It is clearly too early to determine whether the BHP regulatory and benefits package will be successful in meeting its stated objectives and satisfying the needs and expectations of the various parties. Nonetheless, a number of conclusions regarding the strengths and weaknesses of that approach can be reached at this time.

There is no doubt that the BHP process constitutes an important precedent for mineral development in the North. Given the fluid legal and institutional context and the highly-charged political atmosphere surrounding this project, the success of participants in the BHP process in securing a final package that appears to be broadly satisfactory to most parties is a significant accomplishment. The regulatory and benefits package that emerged from the 60-day process initiated by Minister Irwin on August 8 is a credit to the creativity, flexibility and determination of all of the participants. It also represents, in important respects, a new way of conducting regulatory processes and ensuring that the benefits of resource development in the North are distributed in a more equitable fashion than has been the case in the past. As such, it provides a valuable base on which to build.

There is also no doubt that the BHP process was in large measure a response to a particular set of circumstances. The project was the first diamond mine in Canada and it was located in an area of overlapping and unsettled land claims. A degree of uncertainty in relation to project review and regulation was therefore unavoidable and innovative responses to problems were called for. As noted at several points in this report, the land claims situation in particular coloured all aspects of the BHP process and was the source of many of the challenges that arose throughout the project review and regulatory stages. The eventual outcome of land claims negotiations will certainly have important implications for the applicability of the BHP model in the future. There is also a possibility that the BHP experience may itself have an impact on the land claims negotiations that are currently in progress.

As BHP's project was the first diamond mine in Canada and the first major resource development in the Northwest Territories in a number of years, the BHP process was a learning experience for all participants. In the aftermath of that process, the principal challenges from the public policy and regulatory perspective are to identify and act on the key lessons. These lessons should be translated into specific policy measures so that the strengths of the BHP process can be reinforced, its weaknesses corrected, the role of government more clearly defined, and the need to reinvent the wheel with each new project eliminated. A few comments highlight how each of these issues has been addressed in this report.

First, the BHP model includes significant innovations in a number of areas that should be firmly entrenched and further refined. In particular, important lessons were identified in terms of the effectiveness of regulatory processes, both quasi-judicial and negotiated. The BHP experience also shows the value of inclusive and participatory processes and provides important clues regarding the necessary preconditions if these processes are to operate in an effective, efficient and fair manner. Discrete elements of the BHP model, notably the Independent Environmental Monitoring Agency, may also prove to be valuable innovations. A number of recommendations in this report focus on the need to reinforce positive aspects of the BHP process and ensure that the conditions necessary for success in these areas are reproduced in the future.

Second, there is no doubt that significant adjustments are required if the BHP model is to be a satisfactory template for future projects. These adjustments relate primarily to the need to provide greater certainty regarding the various components of the model and the relationships among them. For example, the role of the environmental assessment (EA) process and its relationship to regulatory processes is

obviously an area where certainty is lacking. A number of important issues relating to impact and benefits agreements (IBAs) were also discussed in this report, as was the unresolved matter of compensation to land users in the event of certain types of losses caused by individual projects or the cumulative effects of development. The need for greater coordination between various elements of the process was also noted. Finally, significant concerns were identified at a number of points regarding the absence of a solid legal and policy foundation for certain key elements of the BHP model.

The third important issue is the role of government in the BHP model. As noted in the thematic discussion of the BHP experience, a number of aspects of the model involve a significant redefinition of the role of government. Government's new role may in some respects be characterized as a more limited one, ceding functions in some areas and working in partnership with interested parties in others. While government's role may be redefined in important ways, it is clearly not eliminated. In fact, this report underlines in a number of places the critically important role of government in ensuring the success of the BHP model. One key point to keep in mind is that government establishes the framework, incentive structure and balance of bargaining power that underpin the negotiated components of the BHP model and structure their relationships to other regulatory processes. The BHP model cannot work without careful attention to government's role in this area. A second important point is that government has an overall responsibility to protect the public interest and a fiduciary duty owed to Aboriginal people. There are few, if any, elements of the BHP regulatory and benefits package that have no impact on the broader public interest or on the particular interests of Aboriginal people. Government oversight in these respects is therefore essential.

Finally, the BHP process illustrates the need to establish greater certainty regarding project review and regulatory processes in the North. Paradoxically, the scope for flexibility and innovation that made possible some of the notable successes of the BHP process also threatens the usefulness of the model in the future. A process like that applied to BHP's diamond mine cannot be invented, or reinvented, for every project. Uncertainty cannot, of course, be completely eliminated, especially given the fluid political, jurisdictional and institutional context of the North. In particular, any proponent whose project is located in an area where land claims are not settled will have to tread carefully. Nonetheless, project proponents and other participants should be provided with clear and reliable guidance on the procedural and substantive requirements for project review and regulation.

Once the lessons of the BHP experience are identified and analyzed, government should develop a basic checklist for the required regulatory and benefits package and a road map to show how to get from initial project planning to a final decision on regulatory approvals. In this way, the many positive features of the BHP model could serve as a template for mineral development in the North, and much of the frustration experienced by participants in that process could be avoided in the future.

Appendix 1) List of People Interviewed

Karen Azinger
Manager, External Affairs
BHP Diamonds Inc.
Vancouver

Paul Bachand
Legal Counsel
Legal Division
Department of Justice
Government of the Northwest Territories
Yellowknife

Nigel Bankes
Member of the Canadian Arctic Resources Committee and
Professor
Faculty of Law
The University of Calgary
Calgary

P. Hiram Beaubier
Director General
Natural Resources and Environment Branch
Northern Affairs Program
DIAND
Ottawa

Ellen Bielawski
Assistant Negotiator/Researcher
ºutsel K'e Dene First Nation
ºutsel K'e

William B. Blakeman
Section Head
Mining, Mineral and Metallurgical Process Division
Industrial Sectors Branch
Department of the Environment
Ottawa

Ted Blondin
Land Claims Manager
Dogrib Treaty 11 Council
Yellowknife

Steve Burgess
Chief, Policy and Program Development
Habitat Management Branch
Department of Fisheries and Oceans
Ottawa

Christopher J. Cuddy
Chief, Water Resources Division
Environment and Renewable Resources Directorate
Natural Resources and Environment Branch
Northern Affairs Program
DIAND
Ottawa

Jim Cunningham
Lands Manager
Kitikmeot Inuit Association (KIA)
Kuguktuk

John Donihee
Lawyer
Bayly Williams
Yellowknife

Katherine Emmett
Director, Resource Policy
Department of Resources, Wildlife and Economic Development
Government of the Northwest Territories
Yellowknife

Ben Hubert
Consultant
Hubert and Associates Ltd.
Calgary

Christina Ishoj
Land and Environment Manager
Yellowknives Dene First Nation
Ndilo

Bob Keyes
Senior Vice-President
Canadian Chamber of Commerce
Ottawa

Don Law-West
Senior Mineral Economist
Mineral Resources Directorate
Natural Resources and Environment Branch
Northern Affairs Program
DIAND
Ottawa

Dr. Joseph Lazarovich
Director, Mineral Resources Directorate
Natural Resources and Environment Branch
Northern Affairs Program
DIAND
Ottawa

David Livingstone
Director, Renewable Resources &
Environment Directorate
DIAND
Yellowknife

Letha MacLachlan
Lawyer
Bennett Jones Verchere
Calgary

Catherine MacQuarrie
Director, Aboriginal &
Territorial Relations Directorate
DIAND
Yellowknife

Fred McFarland
Chief, Biological Resources Division
Environment and Renewable Resources Directorate
Natural Resources and Environment Branch
Northern Affairs Program
DIAND
Ottawa

David Milburn
Manager, Water Resources Division
Renewable Resources &
Environment Directorate
DIAND
Yellowknife

James R. Moore
Assistant Deputy Minister
Northern Affairs Program
DIAND
Ottawa

Chris O'Brien
Campaign Co-ordinator
Northwest Territories Endangered Spaces Campaign
World Wildlife Fund
Yellowknife

Kevin O'Reilly
Research Director
Canadian Arctic Resources Committee
Yellowknife

Doug Paget
Chief, Special Projects Division
Mineral Resources Directorate
Natural Resources and Environment Branch
Northern Affairs Program
DIAND
Ottawa

Arthur Pape
Lawyer
Pape and Salter
Vancouver

Clem Paul
President
North Slave Metis Alliance
Yellowknife

John Rayner
Executive Advisor to the
Deputy Minister on Northern Affairs
DIAND
Ottawa

David Robinson
Chief, Western and Chemical Hazards
Department of Fisheries and Oceans
Ottawa

Stephen Traynor
Senior Lands Specialist
Special Projects Division
Operations Directorate
DIAND
Yellowknife

Lorne Tricoteux
Associate - Regional Director General
DIAND
Yellowknife

James Wahshee
Dogrib Treaty 11 Council
Yellowknife

Leslie Whitby
Director, Environment and Renewable
Resources Directorate
Natural Resources and Environment Branch
Northern Affairs Program
DIAND
Ottawa

Gordon Wray
Chairman
Northwest Territories Water Board
Yellowknife

Glenn Zelinski
President
Frontier Mining and Industrial Supplies
Yellowknife

Appendix 2) Chronology of Events

1983	Chuck Fipke forms Dia Met Minerals Ltd.
1989	Fipke finds indicator minerals in the Lac de Gras area of the Northwest Territories and starts staking mineral claims.
August 1990	BHP and Dia Met sign a joint venture agreement for the Northwest Territories Diamonds Project.
Fall 1991	BHP and Dia Met discover diamonds at Point Lake.
Winter 1992	BHP begins its winter drilling program.
Winter 1993	BHP's winter drilling program for Leslie, Fox, and Koala sites begins.
1993	BHP undertakes bulk sampling at the Fox site.
August 1993	BHP initiates environmental baseline studies in the project area.
October 1993	BHP opens Koala Camp.
December 1993	BHP opens its office in Yellowknife.
January 1994	The processing plant at Koala Camp becomes operational.
Winter 1994	BHP undertakes winter drilling program for Panda, Koala, Fox, Leslie and Misery sites.
1994	BHP undertakes bulk sampling at the Panda site.
February 1994	BHP submits a proposal for a full-scale mining project for review by the Northwest Territories Regional Environmental Review Committee (RERC).
2 May 1994	BHP initiates discussions of an impact and benefits agreement (IBA) with the Treaty 11 Dogrib.
26 July 1994	The Minister of DIAND recommends that the Northwest Territories Diamonds Project undergo a public environmental assessment under the Environmental Assessment Review Process Guideline Order (EARPGO).
9 December 1994	The EARP panel is appointed by Minister of the Environment.

9 December 1994	The project description for the Northwest Territories Diamonds Project is issued by BHP.
9 December 1994	The Government of Canada announces a major study of environmental and other issues related to mineral development in the Slave Geologic Province of the Northwest Territories. This study is independent of the EARP panel review of the Northwest Territories Diamonds Project. The study is known as the West Kitikmeot/Slave Study (WKSS).
Winter 1995	BHP's winter drilling program continues at the Panda, Koala, Fox, Leslie and Misery sites.
23 January 1995	Operational Procedures are issued by the EARP panel.
31 January 1995	Draft Guidelines for the Preparation of an Environmental Impact Statement (EIS) are issued by the EARP panel.
14 March- 8 April 1995	The EARP panel holds scoping meetings in eight Northwest Territories communities.
April 1995	BHP initiates the Northwest Territories Job Development Strategy by meeting with local businesses to communicate the concept and to invite businesses and communities to join in the partnership strategy.
23 May 1995	The EARP panel issues the Final Guidelines for the Preparation of an EIS and a Government Information Request.
7 July 1995	The Canadian Environmental Assessment Agency issues its decision on intervenor funding for the EARP panel review.
24 July 1995	The EIS is submitted by BHP and the 90-day review period begins.
1 August 1995	Responses to the EARP panel's government Information Request are received from the federal government and the Government of the Northwest Territories (GNWT).
23 October 1995	The public review period for the EIS ends.
27 October 1995	The EARP panel issues draft Procedures for Public Hearings for public comment.

22 November 1995	The EARP panel announces that the EIS is sufficient to commence planning for public hearings but also requests additional information from BHP on specific issues.
24 November 1995	BHP is a founding partner in establishing a society to help promote the Northwest Territories Community Mobilization Partnership Strategy.
13 December 1995	The EARP panel announces the schedule for public hearings and issues final hearing procedures.
19 December 1995	Additional information from BHP is received by the EARP panel.
22 January- 23 February 1996	The EARP panel holds eighteen days of public hearings in nine communities in the Northwest Territories.
22 March 1996	BHP submits its application for a water licence to the Northwest Territories Water Board.
May 1996	BHP signs a Protocol Agreement for an IBA with the Metis Nation of the Northwest Territories.
22 May 1996	The West Kitikmeot/Slave Study (WKSS) announces the first 13 research projects to be approved by its management board.
21 June 1996	The EARP panel's report is submitted to the federal government and released to the public.
3 July 1996	The World Wildlife Fund (WWF) issues a press release announcing its intention to initiate proceedings for judicial review of the EARP panel report and procedures if the issue of protected areas is not addressed to its satisfaction.
19 July 1996	WWF's application for judicial review of the EARP panel report and procedures is filed in the Federal Court of Canada.
31 July 1996	BHP and the GNWT sign a letter of intent to negotiate a socio-economic agreement.
8 August 1996	The Minister of DIAND announces the federal government's acceptance of most of the recommendations of the EARP panel and its conditional approval of the BHP Diamond Mine, subject to progress on IBAs and an environmental

	agreement during the subsequent 60 days. The announcement also contains a commitment to put in place a protected areas strategy in the Northwest Territories by the end of 1998.
August 1996	The Minister of DIAND expands the objectives of the 60-day period to include negotiation of a socio-economic agreement between BHP and the GNWT.
August 1996	The WWF puts the lawsuit against the BHP EARP "on hold" pending clarification of the government's commitment to protected areas.
September 1996	Negotiations proceed on the four IBAs (Treaty 11 Dogrib, Treaty 8 Dene, Inuit of Kugluktuk, Metis Nation of the Northwest Territories), the Environmental Agreement and the Socio-Economic Agreement. Aboriginal groups become directly involved in negotiating the Environmental Agreement.
9-10 September 1996	The first phase of the Water Board hearing for the Northwest Territories Diamonds Project is held in Yellowknife.
October 1996	The GNWT circulates a draft protected areas strategy.
8 October 1996	The IBA between BHP and the Treaty 11 Dogrib is initialled.
8 October 1996	Implementation Protocol for the Environmental Agreement is signed by the federal government, the GNWT, BHP and the four Aboriginal groups.
10 October 1996	The Socio-Economic Agreement between BHP and the GNWT is initialled.
18 October 1996	The IBA between BHP and the Treaty 11 Dogrib is signed.
21-22 October 1996	The second phase of the Water Board hearing is held in Yellowknife.
22 October 1996	The Socio-Economic Agreement between BHP and the GNWT is signed.
1 November 1996	The Minister of DIAND and the Premier of the Northwest Territories announce that the Northwest Territories Diamonds Project has received final Cabinet approval and now has full government support. The project remains subject to the ongoing regulatory processes, including the Northwest Territories Water Board process.
12 November 1996	The IBA between BHP and the Treaty 8 Dene is signed by the Yellowknives Dene.

14 November 1996	The IBA between BHP and the Treaty 8 Dene is signed by ᵒutsel K'e.
2 December 1996	The draft water licence is circulated to interested parties for comment.
6-7 January 1997	The final regulatory approval processes for the development of the Northwest Territories Diamonds Project are completed and announced. The key elements are: signature of the Environmental Agreement by the federal government, the GNWT and BHP; the issuance of the Water Licence by the Northwest Territories Water Board and the Minister of DIAND; the issuance of six land leases for the area of development (dated 10 January 1997); and the signing of the Fisheries Authorization by DFO.
13 January 1997	The WWF announces that it is withdrawing its application for judicial review of the EARP panel report and process.
5 February 1997	The Northwest Territories Water Board issues its reasons for decision on the BHP water licence application.
20 February 1997	The Independent Environmental Monitoring Agency is formally Incorporated.
28 May 1997	The first meeting of the Independent Environmental Monitoring Agency is held in Yellowknife.

Appendix 3) List of Recommendations

1. Government and Aboriginal groups should work together to settle land claims in an expeditious manner with a view to reducing the current unacceptable level of uncertainty regarding:

   - the rights of Aboriginal people when resource development is proposed for their traditional territories; and

   - the procedural and substantive obligations of project proponents in connection with project review, regulation, and the provision of benefits.

   Without the settlement of land claims, many of the problems encountered in the BHP process seem likely to recur for subsequent projects regardless of what other improvements are made in that process.

2. Government should determine the appropriate role for environmental assessment (EA) in relation to the broad spectrum of policy and regulatory issues raised by projects such as BHP's diamond mine and that role should be made clear to project proponents and intervenors alike in order to promote a greater congruence between their expectations of the EA process and the results that it is able to deliver.

3. Government should clarify the relationship between the EA and regulatory processes, particularly with a view to:

   - providing guidance to project proponents and intervenors regarding the distinctive roles and requirements of these processes; and

   - ensuring formal or informal coordination of these processes where overlap is either desirable or inevitable.

4. The efficiency and effectiveness of quasi-judicial regulatory processes should be promoted in a variety of ways including:

   - the use of both formal and informal hearing procedures, depending on the type of issue being addressed and whether intervenors are members of the public or technical experts;

   - the use of technical meetings and written interrogatories as adjuncts to the formal hearing process;

- the provision of opportunities for the project proponent and intervenors to comment on draft regulatory instruments;

- the establishment of a formal procedure for allocating intervenor funding to Aboriginal groups, environmental groups and other interested parties;

- the coordination of regulatory processes that address related issues; and

- the assignment to a government official or independent consultant of the responsibility for coordinating the processes leading to the different components of the regulatory and benefits package in order to capitalize on opportunities and minimize risks resulting from strategic linkages and spill-over effects among processes.

5. Government action to ensure the efficiency, effectiveness and fairness of negotiated processes should include:

   - establishing an incentive structure conducive to focused and results-oriented bargaining, with particular attention to the balance of bargaining power among the participants;

   - establishing end points for negotiated processes, notably time frames and deadlock-breaking mechanisms;

   - taking measures to facilitate negotiations and reduce bargaining costs;

   - ensuring linkages between bargained outcomes and other components of the regulatory and benefits package where identical or related issues are addressed in different forums; and

   - exercising its responsibilities both to set the parameters for negotiations and to ensure that the public interest is protected.

6. In order to ensure that participatory and inclusive processes operate in an effective, efficient and fair manner, government should:

   - ensure that the appropriate parties are identified and involved in the processes as early as possible and limit participation to those groups having legitimate interests in the project;

   - recognize the critically important distinction between traditional models of consultation and the direct involvement of interested parties in decision making, and promote the latter approach where possible;

   - balance the need for real deadlines with the requirement that parties have adequate time for effective participation; and

- ensure that the Aboriginal and other participants in quasi-judicial and negotiated processes have the financial assistance that is absolutely essential if their involvement is to be effective and if cynicism and frustration are to be minimized.

7. Government should take the following actions in order to define more clearly the role of impact and benefits agreements (IBAs), address the implications of these agreements for the public interest and increase the likelihood that the expectations generated by IBAs will be met:

   - ensure that a clear legal and policy basis is established for IBAs, either through legislation or the land claims process;

   - prohibit the inclusion in IBAs of provisions that would restrict the ability of Aboriginal groups to participate fully and freely in regulatory processes and establish guidelines or legal safeguards to reduce the risk that IBAs will be used to exert undue pressure on Aboriginal groups;

   - address the implications of the cash component of IBAs for the overall fiscal regime applicable to projects;

   - play a more active role in overseeing the use of IBAs as redistributive mechanisms; and

   - work closely with project proponents, Aboriginal organizations, local communities, private sector partners, educational institutions and other interested parties to maximize the likelihood that the intended beneficiaries of IBAs will be able to take advantage of the opportunities made available to them.

8. Government should consider how best to ensure that fair, transparent and legally binding mechanisms, including dispute-resolution procedures, are in place to address all types of compensation claims that may be made by land and resource users for losses related to specific projects or to the cumulative effects of development within the Slave Geological Province.

9. The fish habitat compensation policy administered by the Department of Fisheries and Oceans should be better coordinated with other regulatory processes and the Independent Environmental Monitoring Agency should be seriously considered as a mechanism for identifying habitat enhancement projects.

10. The effectiveness and efficiency of monitoring arrangements and regulatory follow-up may be enhanced by:

    - recognizing that the Independent Environmental Monitoring Agency may be a useful vehicle for ongoing Aboriginal involvement in the project, contributing to issue identification and conflict resolution in addition to playing a technical oversight role;

    - exploring opportunities for the coordination or integration of monitoring programs and agencies

if several projects are developed in the same region; and

- promoting complementarity between project-specific monitoring agencies and the West Kitikmeot/Slave Study.

11. Formal mechanisms should be established to coordinate regulatory and benefits requirements relating to:

    - security deposits;
    - monitoring and reporting; and
    - socio-economic benefits.

12. A clear statutory basis should be established for the negotiated components of the regulatory and benefits package, notably the Environmental Agreement and the IBAs, and for the processes that are essential to their successful conclusion and implementation.

13. Emerging institutional arrangements in the North should be thoroughly examined with a view to determining their implications for the application of the BHP model to future projects.