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## FISHERIES AND OCEANS CANADA

### Interventions

Arctic Canadian Diamond Company Inc. – Point Lake Project – Water Licence

Submitted to: **Wek'èezhii Land and Water Board**

October 28, 2021

WLWB File No.: W2020L2-0004

Canada 

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## Executive Summary

Arctic Canadian Diamond Company Inc. (ACDC) submitted a Type A Water Licence Amendment Application to the Wek'èezhìi Land and Water Board (the Board). The mandate of Fisheries and Oceans Canada's Fish and Fish Habitat Protection Program (DFO-FFHPP) is to protect all fish and fish habitat; DFO-FFHPP conducted the review of the Water Licence Amendment Application to ensure that works, activities and undertakings are conducted in such a way that the proponents are in compliance with the applicable provisions of the *Fisheries Act*, and whether the information provided was sufficient to make such a determination. DFO-FFHPP is providing the following interventions in response to the Board's draft work plan which states that Interventions are due to the board on October 28, 2021.

### 1 Introduction

This submission summarizes Fisheries and Oceans Canada (DFO) – Fish and Fish Protection Program's (FFHPP) assessment and recommendations concerning proposed works of the Point Lake Project. The purpose of these interventions is to provide expert advice to the Board regarding the completeness of the water licence amendment application and identify potential impacts to fish and fish habitat associated with the project changes.

### 2 Mandate, Relevant Legislation and Policy

The *Constitution Act* (1982) provides the Federal Government with exclusive authority for coastal and inland fisheries within Canada's territorial boundaries. DFO exercises this power through the administration of the *Fisheries Act* and some aspects of the *Species at Risk Act*. Under the *Fisheries Act*, DFO is responsible for the management, protection and conservation of fish (which include marine mammals as defined by the *Fisheries Act*) and fish habitat. The Minister of Fisheries, Oceans and the Canadian Coast Guard is one of the competent ministers under the *Species at Risk Act* (SARA).

In general, DFO's Fish and Fish Habitat Protection Program (FFHPP) undertakes the review of proposed project in and around fisheries waters to ensure that works, activities and undertakings are conducted in such a way that the proponents are in compliance with the applicable provisions of the *Fisheries Act*.

The mandate of DFO-FFHPP is to protect all fish and fish habitat. New Fish and Fish Habitat Protection Provisions of the *Fisheries Act* came into force on **August 28<sup>th</sup>, 2019**. From the provisions, there are two key prohibitions:

- **Subsection 34.4(1)** of the *Fisheries Act* (2019) prohibits the carrying on of any work, undertaking or activity, other than fishing, that results in the death of fish, and
- **Subsection 35(1)** of the *Fisheries Act* (2019) prohibits the carrying on of any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.

The new *Fisheries Act* (2019) includes the following definitions:

- *“fish” includes (a) parts of fish, (b) shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, and (c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.*
- *“fish habitat” means water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas.*
- *“Death of Fish” means any action that results in the end of life of fish. Furthermore, No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish.*
  - *“Work” means a physical thing that has been created through labour or the exercise of creative process that has some degree of permanency or lasting quality;*
  - *“Undertaking” means to take upon oneself a task;*
  - *“Activity” means physical task incidental to a work or undertaking as well as physical tasks that may not qualify as works or undertakings.*
- *“Harmful Alteration, Disruption and Destruction of fish habitat” is defined as follows:*
  - *Harmful alteration of fish habitat is any permanent change to fish habitat that reduces its capacity to support one or more life processes of fish but does not permanently eliminate the fish habitat.*
  - *Disruption of fish habitat is any change to fish habitat occurring for a limited period that reduces its capacity to support one or more life processes of fish for a limited period.*
  - *Destruction of fish habitat is any permanent change to fish habitat that completely eliminates its capacity to support one or more life processes of fish.*

Under paragraphs 34.4(2)(b) and 35(2)(b) of the *Fisheries Act*, the Minister of Fisheries, Oceans and the Canadian Coast Guard (the Minister) may issue an authorization with terms and conditions in relation to a proposed work, undertaking or activity that may result in death of fish or harmful alteration, disruption or destruction of fish habitat. Factors that the Minister must consider prior to recommending to the Governor-in-Council regulations or the Minister exercising powers related to authorizations, permits, orders or Ministerial regulations include:

- (a) the contribution to the productivity of relevant fisheries;
- (b) fisheries management objectives;
- (c) whether there are measures and standards;
- (d) the cumulative effects;
- (e) any fish habitat banks;
- (f) whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;
- (g) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister; and

(h) any other factor that the Minister considers relevant.

DFO-FFHPP is guided by the “Fish and Fish Habitat Protection Program Policy Statement (2019)”. This Policy provides guidance on undertaking effective measures to offset death of fish and the harmful alteration, disruption or destruction of fish habitat, consistent with the fish and fish habitat protection provisions of Canada’s *Fisheries Act*.

The “Policy for Applying Measures and Standards to Offset Impacts to Fish and Fish Habitat Under the Fisheries Act (2019)” was prepared by DFO to provide an overview of how to apply measures and standards to offset for impacts to fish and fish habitat. Furthermore this policy is intended to support the conservation and protection of fish and fish habitat, including objectives, guiding principles and types of measures; and describes step-by-step procedures for developing an offsetting plan.

The *Species at Risk Act* (SARA) is intended to prevent Canadian indigenous species, subspecies and distinct populations of wildlife from being extirpated or becoming extinct. SARA facilitates the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and manage species of special concern (to prevent them from becoming endangered or threatened). The Minister is the competent minister for listed aquatic species that are fish as defined in the *Fisheries Act* Section (2) and for marine plants as defined in the *Fisheries Act*, Section 47.

Environmental and Climate Change Canada (ECCC) is responsible for the administration and enforcement of the pollution prevention provisions of the *Fisheries Act*, Sections 34 and 36-42 on behalf of DFO.

For more information, see: <http://www.dfo-mpo.gc.ca/pnw-ppe/pol/index-eng.html>

### 3 Interventions

This intervention will focus on information provided by ACDC that was submitted as part of the Project Application and as responses to comments made by DFO. The purpose of the intervention is to provide DFOs expert advice to the Board regarding the completeness of the provided information and to identify potential impacts to fish and fish habitat associated with the project changes.

#### 3.1 Water Frequented by Fish

<b>Review Comment Number</b>	3.1 Point Lake Watershed Water Frequented by Fish
<b>Subject/Topic</b>	<ul style="list-style-type: none"> <li>• Downstream Effects of the Loss of Point Lake and its Hydrologic Contribution on the Arctic Grayling Population in Connor Lake</li> </ul>
<b>References</b>	<ul style="list-style-type: none"> <li>○ Ekati - Point Lake Project Type A Licence Amendment and Type A Permit Applications (W2012L2-0001, W2021X0004, and W2021D0005)</li> <li>○ Ekati – Point Lake Project Technical Sessions</li> <li>○ Ekati – Point Lake Project Request for Review</li> </ul>
<b>Summary</b>	<p>The Fish and Fish Habitat Protection Program (the Program) of Fisheries and Oceans Canada (DFO) would like to note that the Point Lake watershed, including Point, Connor and Alexia Lakes and their connecting channels, is considered water frequented by fish as defined by the Fisheries Act. The development of the Point Lake project will see the removal of the entirety of Point Lake and its hydrologic contribution to the rest of the watershed. DFO would like to ensure that the impact of the removal of Point Lake on waterbodies occurring downstream and how those impacts may negatively affect fish populations in those lakes is thoroughly understood.</p>
<b>Importance of issue to the impact assessment process</b>	<p>Understanding the contribution that Point Lake has to its watershed and how the loss of this contribution will affect downstream waterbodies is vital to understanding how fish and fish habitat will be impacted by the project. Any change in the water balance could have significant impacts to how fish populations are able to access and use littoral zones and the streams which connect the watershed to carry out life processes. Understanding the changes to the water balance is necessary for DFO to be able to identify potential fisheries impacts. If the downstream effects are not fully understood, DFO will be unable to properly assess the threats posed by the project to the fish and fish habitat within the Point Lake Watershed.</p>
<b>Detailed Review Comment</b> <ol style="list-style-type: none"> <li>1. <b>Gap/Issue</b></li> <li>2. <b>Disagreement with conclusion</b></li> </ol>	<p>ACDC, in their Request for Review to DFO, has provided information indicating that the Connor Lake North Outflow, flowing to Lac du Sauvage, will be significantly impacted by the loss of Point Lake. The Connor Lake North Outflow has been shown to support several life stages of Arctic Grayling including spawning and the rearing of young. Thus far, to DFO’s knowledge, spawning by Connor Lake Arctic Grayling has only been shown</p>

<p><b>3. Reasons for disagreement with conclusion</b></p>	<p>to occur within the Connor Lake North Outflow. However, Arctic suggests that the grayling population in Connor Lake may be able to be prompted to utilize lake habitat to complete spawning activities.</p> <p>It is DFO's opinion that inducing lake spawning and monitoring of the Arctic Grayling population in Connor Lake does not have a high likelihood of success and may not be sufficient to ensure a sustainable population throughout all phases of the project.</p> <p>Due to the lack of complete information regarding the size of the Arctic Grayling population in Connor Lake, DFO believes that the loss of the only known spawning locations of these fish may pose a significant threat to the future of the entire population. Measures can be put in place to encourage lake spawning, but years of recruitment may be lost if these measures are unsuccessful. Even with monitoring of the Arctic Grayling in Connor Lake, it is possible to negatively impact the population if lake spawning attempts prove unsuccessful. The development and approval of an alternate strategy would likely lead to delays that would further harm the grayling population.</p>
<p><b>Recommendation/ Request</b></p>	<p>Flow augmentation into Connor Lake during critical times of the year may be required to ensure the maintenance of water levels in the Connor Lake North Outflow in support of the spawning and rearing activities of the grayling population. It is DFO's position that this be taken into consideration in the issuance of the water licence for the Point Lake Project.</p>