

**Factual Record**  
**BC Mining Submission**  
**(SEM-98-004)**

**Prepared in Accordance with**  
**Article 15 of the North American Agreement**  
**on Environmental Cooperation**



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## 1. Executive Summary

Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (“NAAEC”) establish a process allowing residents of Canada, Mexico and the US to file submissions alleging that a Party to the NAAEC (Canada, Mexico or the United States) is failing to effectively enforce its environmental law. Under the NAAEC, this process can lead to the publication of a factual record. The Secretariat (“Secretariat”) of the North American Commission for Environmental Cooperation (“CEC”) administers the NAAEC citizen submissions process.

In June 1998, Sierra Legal Defence Fund, on behalf of Sierra Club of British Columbia, Environmental Mining Council of British Columbia, and Taku Wilderness Association (the “Submitters”), filed a submission with the Secretariat alleging the systemic failure of the Government of Canada to enforce s. 36(3) of the *Fisheries Act* (“s. 36(3)”) against mining operations in British Columbia, in particular as regards violations of s. 36(3) caused by acid rock drainage (“ARD”). S. 36(3) prohibits the deposit of deleterious substances into waters frequented by fish, unless authorized by regulation. In May 2001, the Secretariat notified the Council that the submission warranted preparation of a factual record and recommended preparing a factual record regarding Canada’s actions to enforce and promote compliance with s. 36(3) at forty-two known or potentially acid-generating mines referenced in the submission. In November 2001, the CEC Council instructed the Secretariat “to prepare a factual record for the assertion that Canada is failing to effectively enforce s. 36(3) with respect to the Britannia Mine,” one of the mines referenced in the submission.

The Britannia Mine is located on the eastern shore of Howe Sound in British Columbia, Canada, on the road from Vancouver to Whistler. The mine was in operation from 1904-1974, producing millions of tons of copper and zinc that was concentrated on-site and shipped to the US for further processing. The mine is located inside Mount Sheer, which rises to a height of 4,600 feet over several kilometers from the shore. Inside Mount Sheer, 210 kilometers of abandoned mine workings act as conduits for rain water and snowmelt that enter open pits at the summit and flush out of a portal located at the base of the mountain. The acidic,

metal-laden effluent, which is acutely lethal to fish, is channeled to a submerged outfall and discharged, untreated, into the fish-bearing waters of Howe Sound. An Environment Canada employee has called the Britannia Mine the single-worst point source of metals pollution in North America.

Regulations adopted in 1977, and updated in 2002, under s. 36(4) of the *Fisheries Act* to authorize the discharge of mine effluent to water frequented by fish do not apply at mines such as Britannia that closed down before June 2002. At these mines, the s. 36(3) general prohibition on depositing deleterious substances into waters frequented by fish continues to apply. The courts have held that ARD (see above) is a deleterious substance for the purpose of s. 36(3). Under s. 36(3), no proof is required that a deleterious substance actually caused harm to fish. All that is required to establish a violation of s. 36(3) is proof that the ARD is acutely lethal to fish and is being deposited into water frequented by fish. Experts present courts with facts that establish a violation of s. 36(3), and courts decide whether, in regard to those facts and other considerations, a person has committed a contravention punishable as an offence under the *Fisheries Act*.

Under the *Fisheries Act* Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy (the “Compliance and Enforcement Policy”) adopted by Fisheries and Oceans Canada and Environment Canada in 2001, “[e]nforcement is achieved through the exercise or application of powers granted under legislation.” The *Fisheries Act* provides a range of potential enforcement responses to alleged violations of s. 36(3), including information requests or orders by the Minister of Fisheries and Oceans; prosecutions; injunctions; court orders upon conviction; and civil suits for the recovery of federal government remediation costs. Despite the existence of facts consistent with ongoing violations of s. 36(3) at the Britannia Mine, Canada has taken no enforcement action under the *Fisheries Act*. Environment Canada has no enforcement file regarding the Britannia Mine, but has kept numerous compliance promotion-related files in respect of the site.

The Compliance and Enforcement Policy states that enforcement measures are directed towards ensuring that violators comply with the *Fisheries Act* within the shortest possible time and that violations are not repeated. Under the Compliance and Enforcement Policy, to identify an appropriate action—which may or may not include enforcement action—to be taken in response to an alleged violation, Environment Canada and Fisheries and Oceans Canada consider (i) the nature of the alleged violation; (ii) “the effectiveness of a proposed action in achieving

the desired result, with the alleged violator, of compliance in the shortest possible time with no further occurrence of violations;” and (iii) “how similar situations in Canada are being or have been handled.”

At Britannia, consistent with Department of Justice policy and the Compliance and Enforcement Policy, Environment Canada and the province coordinated their compliance promotion and enforcement efforts.

Regarding compliance promotion, federal Department of Justice policy allows prosecutors to consider whether a compliance program exists that might better achieve the purpose of a statute than would prosecution. A federal/provincial program for the remediation of orphaned/abandoned contaminated sites in Canada ended in 1995. Since then, Environment Canada, Fisheries and Oceans Canada and provincial officials have cooperated on an *ad hoc* basis to obtain funding to assess and find solutions for the effluent problem at the Britannia Mine. During this time, industry and governments (federal/provincial/territorial) in Canada have repeatedly identified the need for a systematic approach to addressing non-compliance with environmental laws such as s. 36(3) at abandoned mines such as Britannia.

Regarding enforcement, Environment Canada has actively supported the province’s enforcement of the BC *Waste Management Act* contaminated sites provisions at Britannia since 1997, when that Act was amended to allow the province to hold past owners and operators retroactively liable for pollution at the mine. Environment Canada’s actions have been consistent with the Compliance and Enforcement Policy, which allows Environment Canada to consider enforcement actions of other levels of government in determining the appropriate response to an alleged violation of the *Fisheries Act*. Environment Canada’s actions have also been consistent with, and illustrate the practical application of, ongoing federal/provincial environmental harmonization initiatives that seek to streamline the content and administration of environmental laws in Canada, including laws that regulate environmental impacts from mining, with a view to eliminating duplication and overlap.

Environment Canada asserts that at Britannia, prosecution under s. 36(3) is not and has not been a viable option. Environment Canada asserts that in the past, the mine’s long history of operation and changes in owners and operators made it difficult for Environment Canada investigators to obtain the evidence required to attribute responsibility for environmental impacts from the mine to a particular past owner or operator. Further, the agency adds that the limitation period for prose-

cutting such persons has now expired and that the present owner of the mine is insolvent and therefore lacks the means to implement any court-ordered remediation. In light of these considerations, Environment Canada explains that it and Fisheries and Oceans Canada have decided to engage in compliance promotion at Britannia and to lend technical assistance to the province in support of enforcement actions by the province under provincial contaminated sites legislation.

Copper Beach Estates Ltd. (“CBE”) purchased the Britannia Mine from Anaconda Canada Exploration Ltd. (“Anaconda”) in 1979. BC Environment issued effluent remediation orders against CBE under the *BC Pollution Control Act* and its successor, the *Waste Management Act* in 1981, 1993 and 1999. CBE has not complied with these remediation orders. Over the years, CBE sold off millions of dollars in development property at Britannia without using the profits to pay for site remediation, despite an undertaking in its sale contract with Anaconda that it would comply with all future requirements of environmental authorities at the site. CBE has been insolvent since 1994 and there is a court order for sale of the Britannia lands. Since 1997, CBE has advanced—and received considerable federal and provincial government technical review of—several “reclamation/remediation” proposals aimed at financing site remediation through redevelopment of the Britannia site, none of which have materialized. In 2001, CBE repudiated a memorandum of agreement signed with the province under which CBE had agreed to fund construction and operation of an effluent treatment plant at the mine using revenue from proposed real estate development projects at the site.

To promote compliance with s. 36(3) at the Britannia Mine, in 1994-95, Environment Canada and BC Environment attempted to obtain financing for research into environmental impacts from, and treatment methods for, Britannia effluent through the National Contaminated Sites Remediation Program. The federal government and the province agreed to commit up to \$2M each for studies and site remediation, but delays in obtaining provincial funds caused federal funding to lapse. Beginning in 1995, Environment Canada and BC Environment jointly funded \$130K for effluent monitoring at the site. In 1998, consultants working for Environment Canada and BC Environment identified the high-density sludge (“HDS”) process as being the best technology to treat Britannia effluent. Between 1997 and 2000, Fisheries and Oceans Canada carried out a major study of impacts of Britannia effluent on the receiving environment, to generate momentum for site remediation. The results showed negative impacts on fish and fish habitat over a distance of several kilometers in Howe Sound.

To enforce provincial environmental standards and enable remediation of the Britannia mine site, in 1998, under the *Waste Management Act*, BC Environment named certain past owners and operators of the Britannia Mine as “Potentially Responsible Persons” (“PRPs”) in connection with pollution from the mine. Submissions filed with BC Environment by these “private PRPs” led to BC Environment naming other PRPs. The Provincial Crown and the Federal Crown were named as PRPs on the basis of past involvement with the site. The submissions process did not result in any PRPs being named as “responsible persons,” a designation that would have made them subject to the 1999 remediation order issued by BC Environment against CBE. Rather, the Provincial Crown signed a settlement agreement (the “Settlement Agreement”) with the private PRPs in 2001. Under the Settlement Agreement, the private PRPs contributed \$30M toward a comprehensive, provincial site investigation and remediation program at Britannia in exchange for a release and indemnity in connection with all Britannia environmental liabilities. The Federal Crown participated in negotiating the Settlement Agreement but did not sign it. During these negotiations, Environment Canada agreed to conduct offshore sediment investigations at Britannia and provide technical reviews of remediation works including a waste water treatment plant. As a result of amendments to the *Waste Management Act* in 2002, the provincial regulator is now likely barred from holding the private PRPs responsible for any shortfall in remediation or effluent treatment costs at Britannia because the indemnity under the Settlement Agreement removes them from the category of “potentially responsible persons” under the Act.

At the time this factual record was written, in October 2002, a submerged outfall at Britannia continued to discharge untreated mine effluent that is acutely lethal to fish into the fish-bearing waters of Howe Sound. In addition to the \$30M obtained from the private PRPs, the BC Government expects to incur additional costs of \$45M or more to complete the remediation program, which includes construction of an effluent treatment plant using HDS technology by June 2004. The federal government has not made direct financial assistance available. A provincial remediation action plan states that federal and provincial effluent standards for the treatment plant will be “risk based,” but Environment Canada has stated that effluent requirements will be consistent with limits set in federal regulations that apply to operating mines, including a requirement for non-acutely lethal effluent.

The Secretariat retained an expert on ARD treatment to provide preliminary comments on the effectiveness of the current provincial

remediation program in stopping the deposit of deleterious substances at the Britannia Mine in the shortest possible time and in the long term, as provided by the *Fisheries Act* Compliance and Enforcement Policy. In his report, the expert concluded that a treatment plant using HDS technology could likely be in operation sooner than the projected start-up date in June 2004, as HDS technology is “practically off the shelf.” He cautioned that because of the variable nature of Britannia effluent, strict treatment plant operating controls will be required to avoid deposits of deleterious substances in the future. Finally, he stated that the amount budgeted for Britannia remediation and treatment plant operation (\$75M) is only marginally sufficient to fund treatment plant operation in perpetuity, requiring strict control of treatment plant operating costs and a minimum 5% return on investment.

## 2. Summary of the Submission

The Submitters filed the submission on 29 June 1998, alleging “the systemic failure of the Government of Canada to enforce s. 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia.”<sup>1</sup> S. 36(3), together with s. 40(2), make it an offense “to deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter such water.”<sup>2</sup>

The Submitters identify four types of mining impacts on water quality and they claim that acid mine drainage and heavy metal contamination cause the worst impacts.<sup>3</sup> They explain that during mining, acid mine drainage results when sulfide-bearing rock is exposed to air and water, creating sulfuric acid. The sulfuric acid dissolves the metals in the surrounding rock. This combination of toxic substances then flows into water systems, harming fish, other aquatic species, fish habitat, water quality and human health.<sup>4</sup> Acid mine drainage continues as long as sulfide-bearing rock is exposed to air and water, until all the sulfides are leached out. This process can take hundreds or thousands of years.<sup>5</sup>

The Submitters assert that there are at least 25 mines in British Columbia that are known to be acid-generating and at least 17 other

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1. Submission at 5.

2. S. 36(3) of the *Fisheries Act*.

3. Submission at 7-8, 5.

4. *Ibid.* at 5.

5. *Ibid.* at 8.

mines that are potentially acid-generating.<sup>6</sup> The submission focuses on three abandoned mines known to be acid-generating and states that these mines have been leaching toxic, deleterious substances into salmon-bearing waters in violation of s. 36(3) for over 25 years.<sup>7</sup>

According to the Submitters, the Tulsequah Chief Mine, an abandoned copper mine located on the Tulsequah River in northwest British Columbia, has been discharging high levels of zinc, lead and copper into the Tulsequah River since the mine began operating in the 1950s. These toxic substances are having a significant impact on downstream water quality and are acutely toxic to fish.<sup>8</sup> The Submitters allege that the Britannia Mine, located 50 km north of Vancouver on the Sea-to-Sky Highway, discharges high levels of minerals, especially copper and zinc, into Britannia Creek and Howe Sound and has been described as “the single worst point source of metal pollution on the North American continent.”<sup>9</sup> The Mt. Washington Mine on Vancouver Island, which operated for two years, from 1964 to 1966, leaches copper-laced acid mine drainage into nearby streams which flow into the Tsolum River. The Tsolum River’s salmon population has been virtually destroyed.<sup>10</sup> The Submitters claim that no charges have ever been laid against the owners or operators of these mines.<sup>11</sup>

The Submitters state that they were able to find only three prosecutions of mining companies in British Columbia for violations of s. 36(3) of the *Fisheries Act*, and that these date back to the 1980s.<sup>12</sup> They claim that neither Environment Canada nor the Department of Fisheries and Oceans has enforced the *Fisheries Act* against mining companies in the province for at least a decade, despite their knowledge of ongoing violations of the *Fisheries Act* caused by acid mine drainage.<sup>13</sup> The Submitters contend that “the fact that [the three mines highlighted in the submission] have been allowed to continue polluting fish habitat for decades is *prima facie* evidence that enforcement mechanisms other than prosecution have been complete and utter failures.”<sup>14</sup>

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6. *Ibid.* The Submitters attach a list of these 42 mines as Appendix 1 to the Submission.

7. *Ibid.* at 5.

8. *Ibid.* at 10. The Submitters attach a copy of a letter from Environment Canada to the British Columbia Ministry of Environment, Lands and Parks describing copper, zinc and lead present in the effluent as being acutely toxic to fish.

9. *Ibid.* at 10, citing a mining specialist working with Environment Canada, quoted in the Vancouver Sun, June 13, 1996.

10. *Ibid.*

11. *Ibid.* at 10-12.

12. *Ibid.* at 14.

13. *Ibid.*

14. *Ibid.* at 17.

The Submitters attribute Canada's failure to effectively enforce the *Fisheries Act* in part to a severe shortage of staff and resources.<sup>15</sup> They also cite reduced accountability and transparency resulting from Canada's efforts to devolve responsibility for enforcing environmental laws to the provinces as another factor contributing to Canada's alleged failure to enforce the *Fisheries Act*.<sup>16</sup> They claim that problems faced by Environment Canada associated with staff and resource shortages and reduced accountability and transparency "[...] lead inexorably to the conclusion that the examples highlighted in this submission demonstrate a persistent, systemic pattern of non-enforcement of Canada's environmental laws."<sup>17</sup>

### 3. Summary of Canada's Response

In its response, filed with the Secretariat on 8 September 1999, Canada submits that further consideration of the submission and preparation of a factual record are not warranted for several reasons: the assertions underlying the submission are subject to pending judicial or administrative proceedings; Canada is taking all necessary actions to ensure compliance with the pollution prevention provisions of the *Fisheries Act*; the Submitters did not provide Canada with a reasonable opportunity to respond to their concerns; the NAAEC cannot be applied retroactively (pre-1 January 1994); private remedies appear not to have been pursued; and development of a factual record would not further the objectives of the NAAEC.<sup>18</sup>

Canada asserts that it is enforcing s. 36(3) against mines in British Columbia and other industrial facilities.<sup>19</sup> Canada denies that there is a pattern of non-enforcement because of staff and resource shortages. It points to a comprehensive review of its enforcement program launched in May 1998, the object of which is to further strengthen the enforcement program and increase its reach and impact through development of an action plan.<sup>20</sup> No other information is provided regarding the enforcement program review.<sup>21</sup>

Canada asserts that in practice, and as a natural result of the constitutional division of responsibilities in environmental matters, the fed-

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15. *Ibid.* at 12.

16. *Ibid.* at 13.

17. *Ibid.*

18. Response at 8-9.

19. *Ibid.* at 11.

20. *Ibid.* at 16.

21. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada stated: "[...] the plan in question added over \$40 million to the enforcement program, increasing our number of enforcement officers and operating funds base."

eral and provincial governments cooperate in setting goals, enacting complementary legislation, and achieving compliance in a manner that most effectively avoids gaps, overlaps or conflicts in government enforcement action.<sup>22</sup> It states that Canada and British Columbia “have legislation, regulations, policies and procedures including a range of compliance promotion and other enforcement tools in place to prevent mining operations from harming fish and fish habitat.”<sup>23</sup>

Canada refers to its ongoing work on developing a compliance and enforcement policy for the habitat protection and pollution prevention provisions of the *Fisheries Act*,<sup>24</sup> and attaches to the response the July, 1999 draft of the *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* (the “Draft Compliance and Enforcement Policy”).<sup>25</sup> Canada states that although this policy is still being developed, Environment Canada follows the working draft at the regional level in its enforcement of s. 36(3).<sup>26</sup> Canada describes the range of enforcement and compliance mechanisms at its disposal pursuant to the Draft Compliance and Enforcement Policy and states “in dealing with pollution problems, such as those from the three abandoned mines, the mechanism determined to be the most effective in bringing about compliance is always the preferred one.”<sup>27</sup>

With respect to criminal prosecutions, Canada explains that the requirement to prove all elements of the offense beyond a reasonable doubt means that prosecution may not always be a feasible enforcement response for violations of s. 36(3), particularly in relation to abandoned mines.<sup>28</sup> The Crown will not approve the laying of charges unless there is sufficient evidence to meet the criminal standard of proof and prosecution is in the public interest. The Crown will also consider the defendant’s chances of successfully invoking a defense, such as due diligence or officially induced error. At an abandoned mine, there may be no person available to answer the charges. Alternately, the environmental problem may not be resolved if the current owners do not have the financial resources to clean up the pollution.

Canada claims that the Submitters appear to equate enforcement with legal and judicial prosecution and sanctions, and that this reflects only a partial view of a much wider system of compliance-seeking

22. Response at 10.

23. *Ibid.* at 15.

24. *Ibid.* at 13.

25. *Ibid.*, Exhibit 4.

26. *Ibid.* at 13.

27. *Ibid.* at 11.

28. *Ibid.* at 14-15.

actions which collectively constitute the proper enforcement of environmental laws in a modern and complex society.<sup>29</sup> Canada states that “[i]n the case of mining operations, extensive monitoring, research and data gathering activities over the past 15 years have led to a better understanding of the acid rock generation problems associated with mining including the drainages emanating from abandoned mines in BC.”<sup>30</sup>

Canada’s response does not contain information about any of the known or potentially acid-generating mines listed in Appendix 1 of the submission, other than the three mines cited as examples by the Submitters, because in Canada’s view, the Submitters did not include specific assertions about those mines.<sup>31</sup> Canada adds, however, that it regularly reviews and evaluates monitoring data from over 80 operating and abandoned mines in British Columbia, including those listed in Appendix 1, to ensure compliance with the *Fisheries Act*. As an example of the use of the full range of available enforcement responses, Canada states that *Fisheries Act* charges have been laid against owners of the Kemess Mine.<sup>32</sup>

Canada acknowledges that there are ongoing discharges of acutely lethal effluent at the Britannia, Tulsequah Chief and Mt. Washington mines<sup>33</sup> and describes actions it has taken to address these potential violations of s. 36(3), such as participating in technical and multi-stakeholder committees, and conducting multi-year studies, monitoring, and field research.<sup>34</sup> Canada contends that there are pending judicial or administrative proceedings within the meaning of Articles 14(3)(a) and 45(3)(a) of the NAAEC at each of the three mines.<sup>35</sup> At Britannia, Canada provided detailed comments on provincial permit applications for the construction and operation of an effluent treatment plant and other works.<sup>36</sup> At Tulsequah Chief, Canada issued a warning letter and conducted follow-up inspections.<sup>37</sup> At Mt. Washington, Canada collected effluent samples and wrote a letter to four persons with ownership or other interests in the property, advising them that the effluent violated s. 36(3) of the *Fisheries Act*.<sup>38</sup> Canada states that these actions

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29. *Ibid.* at 12.

30. *Ibid.* at 12.

31. *Ibid.* at 16.

32. *Ibid.* at 15.

33. *Ibid.* at 17, 20, 23.

34. *Ibid.* at 16-24.

35. *Ibid.* at 4-5, 16-24.

36. *Ibid.* at 18-19.

37. *Ibid.* at 23-24. As the response was filed by Canada with the Secretariat in September 1999, it does not present up to date information regarding actions of Canada in regard to enforcement of s. 36(3) at the Tulsequah Chief and Mt. Washington mines.

38. *Ibid.* at 21-22.

“clearly demonstrate a comprehensive and productive strategy aimed at eliminating the discharge of deleterious substances and thereby achieving compliance with the *Act*.”<sup>39</sup> Further, Canada maintains that these actions were pursued in a timely manner, are consistent with the Draft Compliance and Enforcement Policy, and are expected to resolve the many issues raised in the submission.<sup>40</sup>

#### 4. Scope of the Factual Record

On 11 May 2001, the Secretariat notified the Council under Article 15(1) of the NAAEC that the Secretariat considered that the submission, in light of Canada’s response, warranted development of a factual record. The Secretariat found that using three mines as examples, the submission raised central questions regarding the Party’s efforts to control and prevent acid mine drainage so as to enforce compliance with s. 36(3) of the *Fisheries Act* in relation to mining operations in British Columbia.

Council Resolution 01-11, which is set out in its entirety in Appendix 1, instructs the Secretariat:

[...] to prepare a factual record in accordance with Article 15 of the NAAEC and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation for the assertion that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* with respect to the Britannia Mine.

In addition, in Council Resolution 01-11, the Council unanimously decided “[...] to terminate this submission process with respect to the assertions concerning the Tulsequah Chief and Mt. Washington Mines” on the basis that both mines remained subject to pending judicial or administrative proceedings.<sup>41</sup> The Submitters objected to Council Resolution 01-11, claiming that at both Mt. Washington and Tulsequah Chief, Environment Canada had taken no action since it issued warning letters in June 1998, and that the two-year limitation period for bringing summary conviction proceedings expired in June 2000.<sup>42</sup> The Submitters claimed “[...] looking only at the Britannia site will paint an unrepresentative and inaccurate picture.”<sup>43</sup>

39. *Ibid.* at 12.

40. *Ibid.* at 5.

41. The Council Resolution (Appendix 1 to this Factual Record) provides information regarding the Council’s reasons for limiting the scope of the factual record.

42. Letter from Randy L. Christensen, Sierra Legal Defence Fund, to the Council (6 March 2002).

43. *Ibid.*

In light of the Council's instructions in Council Resolution 01-11, the scope of this factual record is significantly different from the scope of both the factual record requested in the submission and the factual record that the Secretariat considered to warrant development.<sup>44</sup> This section clarifies the scope of the factual record and briefly summarizes the matters raised in the submission and the Secretariat's Article 15(1) notification to Council that fall outside the scope of Council Resolution 01-11. As stated in the overall work plan for the factual record, this factual record presents information regarding:

- (i) alleged violations of s. 36(3) of the *Fisheries Act* in connection with the Britannia Mine;
- (ii) Canada's enforcement of s. 36(3) of the *Fisheries Act* in connection with the Britannia Mine; and
- (iii) whether Canada is failing to effectively enforce s. 36(3) of the *Fisheries Act* in the context of the Britannia Mine.

Legal background regarding the scope and meaning of s. 36(3) of the *Fisheries Act* as it applies to the Britannia Mine is within the scope of the factual record. Information regarding general policies and practices of the Government of Canada for enforcing and promoting compliance with s. 36(3) of the *Fisheries Act* at abandoned mines such as Britannia is included in the factual record to the extent relevant to the experience with the Britannia Mine. However, consistent with Council Resolution 01-11, the Secretariat has included no information in this factual record regarding enforcement and compliance promotion actions taken by Canada at the Tulsequah Chief and Mt. Washington mines cited as examples in the submission, or at any other known or potentially acid-generating mines listed in Appendix 1 to the submission.

Specifically, and pursuant to Council Resolution 01-11, this factual record generally excludes information relevant to

- compliance with MMLER (now MMER) and/or s. 36(3) at operating and abandoned mines in British Columbia, except at the Britannia Mine;
- MMER and/or s. 36(3) enforcement and compliance promotion efforts at operating and abandoned mines in British Columbia, except at the Britannia Mine;

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44. Council Resolution 01-11 is binding on the Secretariat. It should not be assumed that the Secretariat's Article 15(1) Notification to Council recommending a factual record for SEM-98-004 (B.C. Mining) was intended to include a recommendation to prepare a factual record of the scope set out in Council Resolution 01-11, or that the Secretariat would have recommended a factual record of this scope.

- detailed information on s. 36(3) enforcement/compliance promotion resources in British Columbia;
- role of the harmonized environmental assessment process in promoting compliance with the MMER and/or s. 36(3) at operating and abandoned mines in British Columbia; and
- effectiveness of MMER and/or s. 36(3) enforcement and compliance promotion efforts at operating and abandoned mines in British Columbia, except at the Britannia Mine.

## 5. Summary of Other Relevant Factual Information and Facts Presented by the Secretariat with Respect to Matters Raised in Council Resolution 01-11

### 5.1 Information Gathering Process

On 16 November 2001, the CEC Council instructed the Secretariat to develop a factual record in regard to submission SEM-98-004 (B.C. Mining), pursuant to Council Resolution 01-11 (Appendix 1). Under Article 15(4) of the NAAEC, in developing a factual record, “the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”

On 14 December 2001, the Secretariat published an Overall Plan to Develop a Factual Record (Appendix 2) pursuant to Council Resolution 01-11. The plan stated the Secretariat’s intention to gather and develop information relevant to facts regarding:

- (i) alleged violations of s. 36(3) of the *Fisheries Act* in connection with the Britannia Mine;
- (ii) Canada’s enforcement of s. 36(3) of the *Fisheries Act* in connection with the Britannia Mine; and
- (iii) whether Canada is failing to effectively enforce s. 36(3) of the *Fisheries Act* in the context of the Britannia Mine.

To comply with Council’s instruction to the Secretariat in Council Resolution 01-11 “to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan,” the Secretariat stated that execution of the plan

would begin no sooner than 14 January 2002. Canada provided the Secretariat with comments on the plan on 14 January 2002 and the United States provided comments on the plan on 23 January 2002 (Appendix 3).

As noted above in Section 4 regarding the scope of the factual record, and as reflected in the overall plan to develop the factual record, the Council, in Resolution 01-11, determined the scope of the information gathered for the factual record. Accordingly, the Secretariat prepared a Request for Information (Appendix 4) limited, as described above, to the matters set out in Council Resolution 01-11. The Request for Information provided the following examples of relevant information falling within the scope of the factual record:

1. Information regarding the characteristics of acid mine drainage at the Britannia Mine, including annual and seasonal volumes and chemical composition.
2. Information on whether and to what extent acid mine drainage from the Britannia Mine renders water to which it is added deleterious to fish or fish habitat or to the use by man of fish that frequent that water, including:
  - monitoring or inspection results;
  - studies carried out by or on behalf of owners or operators of the Britannia Mine, universities, government, nongovernmental organizations or others;
  - public complaints or petitions.
3. Information about remedial measures for controlling acid mine drainage, including:
  - whether such measures have been adopted at the Britannia Mine;
  - who is responsible for implementing such measures;
  - cost of such measures and who bears the risk of cost over-run;
  - effectiveness of such measures in ensuring compliance with section 36(3) of the *Fisheries Act* at the Britannia Mine.
4. Information on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, section 36(3) of the *Fisheries Act*, specifically ones that might apply to acid mine drainage from the Britannia Mine.

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5. Information on federal, provincial or local enforcement or compliance-related staff or resources available for enforcing or ensuring compliance with section 36(3) of the *Fisheries Act* in connection with the Britannia Mine.
  6. Information on Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* section 36(3) in connection with the Britannia Mine, including for example:
    - efforts to prevent violations, such as by providing technical assistance;
    - monitoring or inspection activity;
    - public consultations;
    - warnings, orders, charges or other enforcement action issued to owners of the Britannia Mine;
    - agreements entered into with owners or former owners or operators of the Britannia Mine;
    - actions to remedy impacts to fish habitat caused by acid mine drainage from the Britannia Mine; or
    - coordination between different levels of government on enforcement and compliance assurance.
  7. Information on the effectiveness of Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* section 36(3) in connection with the Britannia Mine, for example their effectiveness in:
    - remedying any violations of *Fisheries Act* section 36(3) that occurred;or
    - preventing future violations of that provision.
  8. Information on barriers or obstacles to enforcing or ensuring compliance with section 36(3) of the *Fisheries Act* in connection with the Britannia Mine.
  9. Any other technical, scientific or other information that could be relevant.

In early February 2002, the Secretariat posted the Request for Information on the CEC web site and issued a press release notifying the public of its availability. In addition, on 7 February 2002, the Secretariat sent the Request for Information to the Government of Canada, inviting a response by 15 April 2002 in order to allow time to request follow-up information and also requesting meetings with officials from relevant federal, provincial and/or local agencies to discuss the matters to be addressed in the factual record. As requested by Canada, requests for information from the Canadian federal government were made in writing through designated points of contact. The Secretariat also sent the Request to the Submitters, the Governments of Mexico and the United States, the Joint Public Advisory Committee (JPAC), representatives of current and past owners of the Britannia Mine, and nongovernmental organizations identified as potentially having relevant information, inviting them to respond with any relevant information by 30 June 2002. The Secretariat sent the Government of Canada an additional information request on 8 May 2002 with follow-up questions based on the Secretariat's review of information received from Canada on 15 March 2002 (Appendix 5).

The Submitters provided documents that the Secretariat requested from them. The Secretariat also met with a representative of the Submitters on 24 May 2002. The Secretariat met with representatives of the province on 12-13 June 2002. The Secretariat received additional information from members of the public. In addition to information received in response to the Secretariat's requests for information, the Secretariat developed information through publicly available sources and hired independent experts to assist in the development of information regarding the meaning and scope of s. 36(3) of the *Fisheries Act*, the effectiveness of the Britannia Mine Remediation Project in achieving compliance with s. 36(3) at the Britannia Mine in the shortest possible time and with no further occurrence of violations, and federal government structure as regards decision-making on enforcement matters.

Article 15(5) of the NAAEC provides that "[t]he Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter." Pursuant to Article 15(6), "[t]he Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council." The Secretariat submitted the draft factual record to the Council on 28 March 2003 and received comments from Canada and the United States on 15 May 2003. Mexico did not comment on the draft factual record.

## 5.2 *Meaning and Scope of Fisheries Act s. 36(3)*

### 5.2.1 *Introduction*

Under the Canadian Constitution, the federal government has exclusive legislative jurisdiction over “Sea Coast and Inland Fisheries.”<sup>45</sup> The federal *Fisheries Act* was adopted in 1868, a year after confederation.<sup>46</sup> British Columbia became a province of Canada in 1871. British Columbia’s Terms of Union included a requirement for the federal government to “assume and defray the charges for protection and encouragement of fisheries.”<sup>47</sup> Except as provided in the Terms of Union, all generally-applicable provisions of the Constitution applied to British Columbia as though it had become a province in 1867.<sup>48</sup>

S. 36(3) is in the part of the *Fisheries Act* entitled “Fish Habitat Protection and Pollution Prevention.” It provides that

[s]ubject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

The kind of prohibition contained in s. 36(3) has been part of the *Fisheries Act* since it was adopted in 1868.<sup>49</sup> It applies everywhere in Canada, on public and private property, to any and all activities, whether carried on by private persons or companies, provinces, municipalities or the federal government.<sup>50</sup> Only regulations adopted under s. 36(4) can make a deposit that would otherwise violate s. 36(3) legal.

Regulations have been adopted under s. 36(4) to control effluent discharges to the environment from certain industrial activities.<sup>51</sup> These

45. S. 91(12) of the *Constitution Act, 1867* (U.K.), 30 and 31 Vict. c. 3.

46. 31 Vict. 1868, c. 60.

47. S. 5(e) of the Schedule to the British Columbia Terms of Union.

48. *Ibid.* at s. 10.

49. 31 Vict. 1868, c. 60, s. 14; replaced S.C. 1969-70, c. 63, s. 3.

50. S. 3(2) of the *Fisheries Act*: “This Act is binding on Her Majesty in right of Canada or a province.”

51. See MMLER (*infra*, note 54); *Pulp and Paper Effluent Regulations*, SOR/92-269; *Chlor-Alkali Mercury Liquid Effluent Regulations*, C.R.C., c. 811; *Meat and Poultry Products Plant Liquid Effluent Regulations*; C.R.C., c. 818; *Petroleum Refinery Liquid Effluent Regulations*, C.R.C., c. 828; *Potato Processing Plant Liquid Effluent Regulations*, C.R.C., c. 829. Regulations have also been adopted for specific facilities: *Alice Arm Tailings Deposit Regulations*, SOR/79-345 (repealed); *Port Alberni Pulp and Paper Effluent Regulations*, SOR/92-638. See Environment Canada <<http://www3.ec.gc.ca/EnviroRegs/Eng/SearchDetail.cfm?intAct=101>> (last updated: 6 November 2001).

regulations recognize that substances present in industrial effluent can be deleterious to fish, and that in some cases, the effluent itself can be a “deleterious substance” for the purposes of the *Fisheries Act*.<sup>52</sup>

### 5.2.2 S. 36(3) and Mining

Operating and closed mines often generate effluent that can violate s. 36(3) of the *Fisheries Act*.<sup>53</sup> Mine effluent results from water entering into contact with minerals, metals, and other substances. This can happen as part of the mining or milling process, or as a natural phenomenon, when precipitation, surface water or groundwater comes into contact with such substances. Substances become suspended in or dissolve in the water, sometimes producing chemical reactions. Mine effluent can reach fish habitat from a number of sources, including as discharge from abandoned mine workings, as contaminated groundwater or surface run-off, or even as outflow from an effluent treatment plant.

*Metal Mining Liquid Effluent Regulations* (“MMLER”) were adopted under the *Fisheries Act* in 1977.<sup>54</sup> At the time, “existing metal mines”<sup>55</sup> were excluded from the application of the MMLER but were encouraged to comply with a non-binding guideline that was intended to control effluent from existing mines in a manner similar to the MMLER. An environmental code of practice was also issued, specifying actions to be taken to protect the environment throughout the life of a mine (MMLER mines and “existing mines”), including post-closure.<sup>56</sup> Because Britannia closed down in 1974, it was not an “existing metal mine” for the purposes of the MMLER and was considered by Environment Canada not to be covered by the guidelines or the code.<sup>57</sup>

52. See, for e.g., s. 3 of the MMLER (*infra*, note 58): “For the purpose of these Regulations, the substances set out in column 1 of Schedule 4 and any acutely lethal effluent are prescribed as deleterious substances.”

53. At exploration sites and operating mine sites, other activities can also violate s. 36(3). However, for present purposes, the focus is on effluent.

54. C.R.C., c. 819. Under the MMLER, “effluent” was defined to include mine water effluent, mill process effluent, tailings impoundment area effluent, treatment pond or treatment facility effluent, seepage and surface drainage.

55. Under the MMLER, “existing mine” meant a mine that came into commercial production before February 25, 1977 and that operated on a commercial basis for at least two months in the 12 months immediately prior to that date (Britannia closed in 1974).

56. See Canada, *Metal Mining Liquid Effluent Regulations and Guidelines* (Regulations, Codes and Protocols Report EPS 1-WP-77-1) (Ottawa: Environment Canada, 1977).

57. Telephone conversation with Ken Wile, Head, Inspections, Environment Canada, Pacific and Yukon Region, 29 July 2002. It is not clear whether the guidelines actually applied to Britannia, because s. 3 of the guidelines states that “[t]hese Guidelines apply to every metal mine, except gold mines, to which the MMLER do not apply.”

The *Metal Mining Effluent Regulations* (“MMER”)<sup>58</sup> replaced the MMLER in June 2002.<sup>59</sup> Like the MMLER, the MMER set limits on concentrations of certain substances in mine effluent.<sup>60</sup> They also contain a standard for “total suspended solids” (which make water murky, affecting the health of fish and fish habitat), prescribe an acceptable range for pH levels (the balance between acidity and alkalinity), and include a new requirement that mine effluent be non-acutely lethal to fish. Under the MMER, mine owners must also monitor effluent for “chronic toxicity,” and must conduct “environmental effects monitoring” to identify effects, if any, of the effluent on the receiving environment. As long as effluent from a mine meets the qualitative and quantitative standards found in the MMER and the mine owner complies with MMER monitoring requirements, that mine is not violating s. 36(3), even though it may be depositing a deleterious substance into water frequented by fish.

The “Regulatory Impact Analysis Statement” published with the MMER states that the MMLER applied to approximately 30 mines in Canada, while the MMER apply to approximately 90 mines.<sup>61</sup> The increase is explained by the fact that “existing mines” (mines that began operating before 1977) are now covered by the MMER. However, mines that closed before 6 June 2002, including thousands of so-called “abandoned mines” such as Britannia, are not covered by the MMER.<sup>62</sup>

Because the MMER do not contain standards for effluent from mines such as Britannia, that effluent remains subject to the “general

58. SOR/2002-222, C. Gaz. 2002.II.1412. Effective date 6 December 2002. Under the MMER, “effluent” means mine water effluent, milling facility effluent, tailings impoundment area effluent, treatment pond effluent, treatment facility effluent (other than effluent from a sewage treatment facility), seepage and surface drainage that contains a deleterious substance.

59. For background information, see the Regulatory Impact Analysis Statement (“RIAS”) published with the MMER; *ibid.* at 1444-62.

60. Such as 0.3 – 0.6 mg/L for copper, the principal contaminant of concern at Britannia. The RIAS for the MMER explains that “[t]he new MMER limits are based on a comprehensive review and assessment of national and international mining effluent standards, pollution prevention practices and control technologies of relevance to the mining sector, and the current performance of the Canadian mining sector in terms of effluent quality. The new limits reflect the effluent quality that is achieved by the best performing (upper 50th percentile) of Canadian metal mines and thus are based on the availability of demonstrated technology. The proposed MMER requirements take into account current provincial and territorial regulatory requirements and essentially mirror those in place under the Province of Ontario’s *Municipal Industrial Strategy for Abatement* (MISA) program;” *ibid.* at 1447.

61. *Ibid.* at 1454.

62. See W.O. Mackasey, “Abandoned Mines in Canada” (prepared for MiningWatch Canada) (Sudbury: WOM Geological Associates, 2000) at Section 6.0. This report estimates that there are 10,139 abandoned mines in Canada, but cautions that this figure is based on provincial government inventories, some of which include small trenches and test pits in the definition of “mine.”

prohibition” against depositing deleterious substances into water frequented by fish found in s. 36(3). At these mines, an acute lethality test is routinely used as one measure of compliance with s. 36(3).<sup>63</sup> This test involves exposing rainbow trout to undiluted effluent for ninety-six hours. A mortality rate of fifty percent or more means the effluent is acutely lethal to fish. Courts have repeatedly held that acutely lethal effluent is a deleterious substance for the purposes of the *Fisheries Act*. Under the *Fisheries Act*, discharging or permitting the discharge of a deleterious substance into water frequented by fish is a violation of s. 36(3) and an offense pursuant to s. 40. Courts determine whether facts presented by the prosecution establish the existence of a violation of s. 36(3) and if so, whether a person is guilty of an offence in respect of that violation.

### 5.2.3 Responses to Alleged Violations of s. 36(3) Provided for under the *Fisheries Act*

The *Fisheries Act* provides a range of potential responses to alleged or apprehended violations of s. 36(3), including information requests and orders from the Minister of Fisheries and Oceans of Canada (the “Minister”), prosecutions, court orders upon conviction, injunctions, and civil suits for recovery of remediation costs. Information regarding these types of responses is provided below, along with explanations provided by Canada, where available, regarding why none of these responses have been pursued at the Britannia Mine despite ongoing violations of s. 36(3) resulting from the discharge to Howe Sound of mine effluent that is acutely lethal to fish.

#### 5.2.3.1 Information Requests and Orders from the Minister

The *Fisheries Act* gives the Minister the power to request information in connection with any work or undertaking that results or is likely to result in the deposit of a deleterious substance contrary to the *Fisheries Act* (s. 37(1)). Specifically, the Minister can request the production of information relating to the work or undertaking, whether there is or is likely to be a deposit of a deleterious substance by reason of the work or undertaking, and what measures, if any, would mitigate the effects thereof. On the basis of such information and any representations made by the person who provided it, the Minister can, with the approval of the Governor in Council, order modifications to the work or undertaking, restrict its operation, or direct its closing for a specified period.

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63. Telephone conversation with Robert McCandless, Senior Program Officer, Industrial Programs, Pacific and Yukon Region, Environment Canada, 11 October 2002.

### 5.2.3.2 Prosecutions

Another potential response to an alleged violation of s. 36(3) is to initiate a prosecution against a named person responsible for the alleged violation. To succeed in a prosecution, the Crown must be able to prove beyond a reasonable doubt that the named person “deposited” or “permitted the deposit of” a “deleterious substance” into or near “water frequented by fish.”

The *Fisheries Act* specifies that a “deposit” takes place whether or not the act resulting in the deposit is intentional.<sup>64</sup> “Water frequented by fish” is defined as “Canadian fisheries waters,” but it is not “water frequented by fish” for the purposes of the *Fisheries Act* if the defendant can prove that at all times material to the proceedings the water is not, has not been and is not likely to be frequented by fish.<sup>65</sup> The deposit of a deleterious substance may also be a potential violation if deposited into waters which may enter waters frequented by fish.

The courts have held that if a substance is “deleterious” in and of itself (such as acutely lethal effluent), the Crown does not have to prove that depositing such a substance into water frequented by fish actually caused harm to fish or fish habitat in order to secure a conviction under s. 36(3).<sup>66</sup> It only needs to prove that the substance was deposited or permitted to be deposited.

Under s. 40(2) of the *Fisheries Act*, violations of s. 36(3) are offenses punishable either on summary conviction (carrying fines of up to \$300,000 for a first offense, with the possibility of a \$300,000 fine and/or imprisonment for up to six months for repeat offenders) or on indict-

64. S. 40(5)(a) of the *Fisheries Act*.

65. Ss. 34(1) and 40(5)(b) of the *Fisheries Act*. It has been held that even if there are no fish in the vicinity of the deposit, where the surrounding water is tidal in nature and fish bearing, the deposit is considered to have been made to water frequented by fish; *R. v. Stora Forest Industries Ltd.*, [1993] N.S.J. No. 330 (Prov. Ct.).

66. In determining whether a substance is deleterious, it is sufficient to prove that the substance deposited is capable of making water harmful to fish. For instance, in *R. v. MacMillan Bloedel (Alberni) Limited* (1978), 42 C.C.C. (2d) 70 (B.C. Co. Ct.) at 73-74; affirmed 47 C.C.C. (2d) 118 (B.C.S.C.); leave to appeal to S.C.C. refused (1979), 47 C.C.C. (2d) 118n (S.C.C.), the Court held that “[t]he effect of the Act is to provide that if such a substance has had a harmful effect on fish elsewhere when added to water, then it qualifies as a deleterious substance under the *Fisheries Act*.” See also *R. v. Abitibi Consolidated* (2000), 190 Nfld. and P.E.I.R. 326; 2000 Nfld. and P.E.I.R. LEXIS 238; 576 A.P.R. 326 (Nfld. Prov. Ct.) at para. 51: “In determining whether the Crown has established that there was a deposit of a deleterious substance beyond a reasonable doubt, I agree with the Crown’s assertion that it is not necessary to establish actual harm or damage to fish or fish habitat.”

ment (with fines of up to a \$1M for a first offense and fines of up to \$1M and/or prison terms of up to three years for repeat offenders). Every day on which a *Fisheries Act* violation continues is a separate offense (s. 78.1). Officers, directors or agents of a corporation who direct, authorize, assent to, acquiesce in or participate in the commission of an offense are a party to and guilty of the offense, and liable to the punishment provided for the offense, whether or not the corporation is prosecuted (s. 78.2).

Canada has stated that prosecution under s. 36(3) is not, and has not been, a viable option for addressing the pollution problem at the Britannia Mine.<sup>67</sup> Canada has stated that because the site was owned and operated by a number of different companies over the years, it was

[...] very difficult for Environment Canada investigators in the 1970s and 1980s to determine whether the pollution they were targeting had occurred within the two year limitation period for prosecuting an offence under s. 36(3), and to identify which company was responsible for causing the pollution. The requirement for the Crown to prove, beyond a reasonable doubt, all elements of a charge under the *Fisheries Act* made it very unlikely that a prosecution would have been successful.<sup>68</sup>

Canada has explained that even though the two-year limitation period for bringing prosecutions was dropped as a result of amend-

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67. Facts on the Britannia Mine at 4-5. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada stated: "Environment Canada asserts that until 1991, a contravention of subsection 36(3) was a summary conviction offence (misdemeanour) under the *Fisheries Act* that was required to be prosecuted within two years of the occurrence of the offence (i.e. the deposit of substances deleterious to fish). The pollution problem at the Britannia Mine began in 1906 and continued throughout operation of the mine, which ended in 1974, to the present day. Over those years, the mine site has been owned and operated by a number of different mining companies. These factors made it very difficult for Environment Canada investigators to determine whether the pollution they were targeting had occurred within the two year limitation period for prosecuting an offence under s. 36(3), and to identify which company was responsible for causing the pollution. The requirement for the Crown to prove, beyond a reasonable doubt, all elements of a charge under the *Fisheries Act* made it very unlikely that a prosecution would have been successful.

As a result of a substantive amendment to the *Fisheries Act* in 1991, a violation of section 36(3) became a hybrid offence which could be prosecuted by summary conviction (misdemeanour) or by way of indictment (felony), and the two year limitation period for prosecuting offences was dropped. This amendment, however, did not have retrospective application. This means that no person could be prosecuted after 1991 for a violation of s. 36(3) which occurred before 1991. Because the substances causing the pollution were deposited by the mining companies before 1991, these companies could not be prosecuted under the *Fisheries Act* after it was amended in 1991."

68. *Ibid.*

ments to the *Fisheries Act* in 1991, the amendments were not retroactive, meaning that no one could be prosecuted after 1991 for a violation of s. 36(3) which occurred before 1991.<sup>69</sup> Canada stated that “[b]ecause the substances causing the pollution were deposited by the mining companies before 1991, these companies could not be prosecuted under the *Fisheries Act* after it was amended in 1991.”<sup>70</sup> This statement appears to refer to the fact that in addition to discharging mine effluent to Howe Sound, past operators of the mine deposited mine tailings (which are considered to be deleterious substances) into the Sound. Environment Canada provided no information regarding why no prosecutions were launched against previous owners or operators of the mine for s. 36(3) violations resulting from the continuous effluent discharge, although for the purposes of this factual record, the relevant time period is post-1 January 1994. As regards the current owner, Copper Beach Estates Ltd., see 5.2.3.4 and 5.2.3.6, below.

#### 5.2.3.3 Defenses to Charges under s. 36(3)

Violation of s. 36(3) is a strict liability offense. Under the *Fisheries Act*, this means that even if the Crown succeeds in proving all the elements of the offense beyond a reasonable doubt, a defendant will not be convicted for violating s. 36(3) if the defendant enters a defense and can prove on a balance of probabilities that the facts support that defense.<sup>71</sup> For example, even if the Crown proves beyond a reasonable doubt that a company discharged a deleterious substance into water frequented by fish, the company will be acquitted if it can prove on a balance of probabilities that it was duly diligent in trying to prevent the discharge from occurring. “Due diligence” requirements vary depending on the facts in each case (see below, s. 5.2.3.3.1).

In its response to the submission, Canada stated “the accused has several defences to which the Crown must be able to respond. The two most common defences are officially induced error and due diligence. Although the evidentiary onus is on the accused to prove such a defence, the investigating law enforcement agency or department investigates both these components of the case before the Crown prosecutor approves the laying of charges.”<sup>72</sup> The facts at the Britannia Mine (see ss. 5.4, 5.5 and 5.6, below), together with the information provided below, are relevant to a consideration of whether the defenses of due diligence

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69. *Ibid.* at 5.

70. *Ibid.*

71. S. 78(6) of the *Fisheries Act*.

72. Response at 14.

or officially induced error might be available to counter any charges laid in connection with facts consistent with ongoing violations of s. 36(3) at the Britannia Mine.

#### 5.2.3.3.1 *The Defense of Due Diligence*

Under the *Fisheries Act*, a defendant will avoid conviction if it can prove that it was duly diligent in trying to prevent the occurrence of the offense or reasonably and honestly believed in mistaken facts that, had they been true, would render the defendant's conduct innocent (s. 78.6). Where the alleged offense is based on "inaction" on the part of the defendant and the defendant is accused of "permitting" a violation, the courts have suggested that "[...] the real issue is whether the accused had exercised due diligence."<sup>73</sup>

Due diligence requirements at an abandoned mine site were recently reviewed in an Ontario case involving the Ontario Ministry of the Environment ("MOE") as "remediator of last resort" of the Deloro mine.<sup>74</sup> Information on the case is provided in some detail because of its relevance in showing how a court applied s. 36(3) to facts that are in many respects similar to those at Britannia (see ss. 5.4, 5.5, and 5.6, below). Particularly relevant is the distinction drawn between the evidentiary requirements of s. 35(1) (habitat protection) and s. 36(3) (pollution prevention) of the *Fisheries Act*, as well as the discussion regarding due diligence obligations of the provincial environment ministry, although it should be noted that at Britannia, BC Environment has taken over site remediation under a private agreement with past owners and operators (see s. 5.5.3, below), rather than pursuant to a statutory obligation. This factor would likely be considered by a court in determining whether BC Environment has sufficient control of the site to be potentially liable for any s. 36(3) violations at Britannia. It would also, as discussed below, be relevant to a determination of the ministry's due diligence obligations regarding ending any s. 36(3) violations at Britannia. Relevant information regarding the Deloro case is set out below.

After a century of mining and smelting activities, different types of arsenic and other wastes had accumulated on-site at the Deloro mine. In the late 1950s, high concentrations of arsenic were detected in a nearby river. Subsequently, it was discovered that sediment, groundwater and surface water contamination were all contributing to pollution of the

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73. *R. v. Rivtow Straits Ltd.* (1993), 12 C.E.L.R. (N.S.) 153 (B.C.C.A.) at para. 45.

74. *R. v. Ontario (Ministry of the Environment)*, [2001] O.J. No. 2581 (Ont. Ct. of Justice) [hereinafter "Deloro"].

river. The mine was sold to a shell company, and that company abandoned the site after being issued an MOE remediation order, followed by a stop order. The MOE became the “remediator of last resort” under the Ontario *Environmental Protection Act* in 1979. Thereafter, like at Britannia, remediation efforts were hampered by lack of knowledge concerning contaminants at the site, remediation technology issues, and remediation funding issues. Charges were laid against the MOE for violations of the Ontario *Water Resources Act* and ss. 35(1)<sup>75</sup> and 36(3) of the *Fisheries Act* during the 1995-97 period (the “charge period”). At trial, the court found that upon taking over the site, the MOE was immediately subject to liability under the habitat protection and pollution prevention provisions of the *Fisheries Act*.<sup>76</sup>

Under s. 35(1) of the *Fisheries Act*, the Crown had to prove that inaction by the MOE resulted in harmful alteration, disruption or destruction of fish habitat. The Crown was successful in proving that metal-contaminated sediments in the river were having a deleterious effect on fish. However, it was not successful in proving that MOE inaction during the charge period (1995-97) had resulted in the sediment contamination identified by the prosecution. The judge ruled “[...] there is little evidence before me to establish that the metal contaminants in that sediment were deposited since the defendant has taken control of the site, let alone the charge period.”<sup>77</sup>

Unlike s. 35(1), s. 36(3) does not require proof of harm to fish habitat. It only requires proof of the deposit of a deleterious substance into water frequented by fish (see s. 5.2.2, above), although proof of harm to fish and fish habitat is a factor that is taken into account during sentencing. Consequently, in determining whether there had been a violation of s. 36(3) at Deloro, the court accepted evidence that in the scientific literature, levels of metals such as those registered in the river were stated to be harmful to fish, and pointed out that the law (s. 36(3)) does not require

75. S. 35(1) “No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.” Here, the court accepted the prosecution’s definition of “work” as being “[...] the management and control of the site” (*ibid.* at para. 155).

76. *Ibid.* at paras. 139-40: “When the defendant assumes management and control over an abandoned property (or over a property still operated by an owner unwilling to act) it does so to protect the environment from further deterioration by the refusal to remediate. It must act accordingly. [...] The intervening entity must proceed with the remediation of the property with due diligence. The entity is indeed immediately subject to prosecution for permitting discharges which were not caused by it.” The court also held that the status of the party was a factor to be considered in assessing due diligence.

77. *Ibid.* at para. 161.

proof that the metals are actually causing an effect in the river.<sup>78</sup> The judge specifically rejected the defense's argument that the prosecution had failed to make its case because it had not conducted field studies to determine whether arsenic in the river was in a form that is absorbed by fish. He stated that the law does not require such specificity, and concluded that the prosecution had established all elements beyond a reasonable doubt.<sup>79</sup>

The court then considered whether the MOE had been duly diligent in its management of the site between 1995 and 1997. The court specified that even though the MOE had been in charge of the site for much longer, it only needed to prove due diligence for the charge period. It also clarified that

[e]vidence of the defendant's actions prior to that period is relevant to the proper understanding of the efforts made during the charge period. It is obvious that if the remediation plans are suspended during the charge period as a result of unforeseen circumstances, the due diligence must be addressed in the context of the action which preceded the "event" [i.e. the 1995-97 period]. Similarly, if the solutions to the polluting act are provided and planned for prior to the "event" and not acted upon, the previous efforts at remediation will not satisfy the due diligence criteria. In other words, due diligence must be placed in context but the context cannot be determinative of the issue.<sup>80</sup>

The court also cited case law defining due diligence requirements under Canadian law. Due diligence does not require superhuman efforts, but rather a high standard of awareness and decisive, prompt, and continuing action. It requires the taking of all reasonable steps, not all conceivable steps.<sup>81</sup>

The court considered the prosecution's argument that the MOE had failed to establish due diligence because the provincial government

78. *Ibid.* at para. 165.

79. *Ibid.* at paras. 166-67, 171.

80. *Ibid.* at para. 174.

81. *Ibid.* at paras. 175-76. He also cited a case that lists factors that must be weighed and balanced in assessing due diligence: 1. the nature and gravity of the adverse effect; 2. the foreseeability of the effect, including abnormal sensitivities; 3. the alternative solutions available; 4. legislative or regulatory compliance; 5. industry standards; 6. the character of the neighbourhood; 7. what efforts have been made to address the problem; 8. over what period of time, and promptness of the response; 9. matters beyond the control of the accused, including technological limitations; 10. skill level expected of the accused; 11. the complexities involved; 12. preventative systems; 13. economic considerations; and 14. actions of officials; *R. v. Commander Business Furniture*, [1992] O.J. No. 2904, 1992 Carswell Ont. 222 (Ont. Ct. J. (Prov. Div.)) cited in Deloro, *ibid.* at para. 177.

had failed to provide funding for the remediation effort on a timely basis. The court cited judicial precedent for the view that “the government’s decision for the disbursement of public funds is not subject to judicial review.”<sup>82</sup> It clarified that the court’s “[...] function at trial, however, is not to ‘review’ the decision but to assess its impact.” The court went on to hold that

Courts should not be placed in a position where they are required to assess the respective priorities of the government of the day. It must, however, consider the economic requirements of remediation in the context of the overall income of the defendant. When a corporation seeks to claim an inability to fully remediate a site, the Courts are not required to examine the financial records to assess the appropriateness of the corporation’s expenditures. It can, however, require financial context to determine the issue.

I do not find it necessary to make determinations of fact with respect to funding. Whether the requests for approval were being delayed, denied or simply going through the process is not determinative. The Court must look at the end result.

Although too much time had elapsed in fragmented studies of parts of the property previously, as of 1993 the defendant had a detailed and planned approach to the remediation of a complex site. The defendant proceeded with minor but essential components of its plan pending the approval of funding.<sup>83</sup>

The court concluded that on the basis of all the factors that needed to be considered, the MOE had established on a balance of probabilities that it was duly diligent in the charge period and the defendant was acquitted.

Courts have denied the defense of due diligence in cases where the defendant took a calculated risk regarding the possibility of a s. 36(3) violation. For example, in one case, a municipality commissioned a sewage treatment plant and to save money, the plant was designed to discharge directly to a watercourse in an emergency. When an emergency occurred and sewage was discharged to a stream, the municipality was found guilty despite showing due diligence in emergency response procedures and plant maintenance.<sup>84</sup>

82. *Hamilton Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (1991), 2 O.R. (3d) 716 (Div. Ct.), leave to appeal to Ont. C.A. denied, [1991] O.J. No. 3201 (12 August 1991) Doc. A-48/91 cited in Deloro, *ibid.* at para. 182.

83. *Ibid.* at paras. 182-184.

84. *R. v. North Vancouver (District)* (1982), 3 F.P.R. 233 (B.C. Prov. Ct.), affirmed (1983), 3 F.P.R. 249 (B.C. Co. Ct.), which was affirmed (1984), 3 F.P.R. 491 (B.C.C.A.).

#### 5.2.3.3.2 *Defenses Based on Actions of the Regulator*

Other defenses and excuses are available under the Common Law. These include but are not limited to “officially induced error” and “abuse of process,” both of which exist to prevent someone from being convicted for action or inaction that, at the time it occurred, appeared (from the perspective of a reasonable person) to meet with government approval. As stated above (s. 5.2.3.3), in its response to the submission, Canada stated that officially induced error is one of the most common defenses to charges under s. 36(3). Information on this defense is provided below, along with information on the defense of “abuse of process,” which is also based on actions of the regulator. The facts at the Britannia Mine (see ss. 5.4, 5.5 and 5.6, below), together with the information provided below, are relevant to a consideration of whether the defense of officially induced error or abuse of process might be available were charges to be laid in connection with ongoing violations of s. 36(3) at the Britannia Mine.

A defendant must satisfy four conditions to invoke the defense of officially induced error of law successfully.<sup>85</sup> It must have considered its legal position and sought advice about it; consulted an appropriate official; obtained erroneous advice that was reasonable in the circumstances; and relied on that advice. The Supreme Court of Canada has held that because it functions as an “excuse” and not as a “justification” for wrongful behavior—and therefore results in a stay of proceedings rather than an acquittal—an officially induced error of law argument “will only be successful in the clearest of cases.”<sup>86</sup>

Depending on the circumstances, advice from provincial officials regarding the requirements of a federal statute can provide a basis for a defense of officially induced error, “[...] provided that a reasonable person would consider that particular government organ to be responsible for the law in question. The determination relies on common sense rather than constitutional permutations.”<sup>87</sup>

The existence of a permit or approval is sometimes invoked as providing the basis for a defense of officially induced error. In such cases the defendant claims that it honestly, reasonably and mistakenly believed that by complying with the permit, it was satisfying all requirements under the law. In a 1998 report on the enforcement of s. 36(3) by Environ-

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85. See *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 129 D.L.R. (4th) 510, at paras. 25-38.

86. *Ibid.* at para. 38.

87. *Ibid.* at para. 31.

ment Canada, the House of Commons Standing Committee on Environment and Sustainable Development identified “government-induced error” as a barrier to effective enforcement of federal legislation. The Committee explained:

A further barrier to the effective enforcement of the federal legislation occurs when authorizations or permits granted by another level of government conflict with the federal environmental legislation. These permits or authorizations might allow the release of pollutants into the environment in amounts that would constitute an offence under a federal law or regulation. Offenders, however, are not always prosecuted in such cases because, by reason of the permit or authorization, they can raise the defence of “government-induced error.” Since the chances of obtaining a conviction in such cases are questionable, charges may not be laid in the first place, or if they are laid, they may not be proceeded with, or again, they may result in acquittal.<sup>88</sup>

The Committee then quoted the Head of the Inspections Section of the Pacific and Yukon Region of Environment Canada, who provided the Committee with several examples of failed prosecutions:

The first example was a private individual who basically created a landfill on his property that ended up leaching into the most productive part of a salmon-bearing stream. He dealt with civic officials, who eventually brought in the provincial officials, and eventually I was called by the mayor and we initiated an investigation. We dealt with almost three months of trial and proved the offence technically, but the interference and the conflicting information given by the other officials in the junior levels of government created a situation called government-induced error, and the judge made a decision that [the accused] had been duly diligent and that it was the confusion of the officials that related to that.<sup>89</sup>

The House of Commons Standing Committee recommended that Environment Canada take steps to make the regulated community aware of its obligations under federal laws. Regarding the defense of officially-induced error, the courts have held that whether this defense will be successful depends on a consideration of all the factors that must be proved, including that the defendant was duly diligent by making appropriate inquiries.<sup>90</sup>

88. Canada, “Enforcing Canada’s Pollution Laws: The Public Interest Must Come First!” (Report of the Standing Committee of the House of Commons on Environment and Sustainable Development, Charles Caccia, Chair) (Ottawa: Queen’s Printer, 1998) at paras. 72 and 73.

89. *Ibid.*

90. See *R. v. Northwest Territories (Commissioner)* (1994), 15 C.E.L.R. (N.S.) 85 (N.W.T.S.C.), where the Town of Iqaluit was unsuccessful in arguing that its license

“Abuse of process” can be invoked by a defendant in cases where entering a conviction would be unconscionable, risking bringing the administration of justice into disrepute. This would be the case, for example, if a person were charged with an offense after having been assured that no enforcement action would be taken, or after having agreed on a plan of remedial action and a timetable with the regulator and having implemented the plan in accordance with the timetable.<sup>91</sup> This remedy is also only available in the clearest of cases, and past non-enforcement alone may not be enough, absent an express or implied promise not to prosecute, to make this defense available. The Supreme Court of Canada has stated that to amount to one of the clearest of cases, there must be “overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice.”<sup>92</sup>

#### 5.2.3.4 Court Orders Upon Conviction

The *Fisheries Act* gives the courts broad powers to issue orders upon conviction, in addition to any punishment imposed (s. 79.2). A court can order the convicted person to do or refrain from doing anything in order to prevent the continuation or repetition of the offense or to remedy harm to fish or fish habitat resulting from the commission of the offense, and it can secure compliance with this order by requiring posting of a bond or payment of an amount of money into court. It can order the convicted person to compensate the Minister of Fisheries and Oceans for any remedial or preventive action taken by or on behalf of the Minister as a result of the commission of the offense. Finally, it can require the convicted person to report to the court on its activities following conviction and can set any other conditions it considers appropriate to secure the person’s good conduct and to prevent repetitions of the offense or commission of other violations of the *Fisheries Act* by that person. Violation of such an order makes the convicted person liable to the punishment provided for the underlying offense (s. 79.6). Under the *Fisheries Act*, money owed under court orders becomes a debt due to the Crown (s. 79.4(1)).

Canada has stated that even if a conviction had been obtained against CBE, “it would have been very unlikely that a court would have

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under the *Northern Inland Waters Act*, which authorized it to “use waters,” covered sewer discharges, since it was discharging sewage to waters not covered by the license and in any event, nothing in the license exempted the town from complying with the *Fisheries Act*.

91. *Re Abitibi Paper Co. and the Queen* (1979), 47 C.C.C. (2d) 487 (Ont. C.A.).

92. *R. v. Power*, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, at para. 12.

ordered the company to take measures to bring the site into compliance because of its lack of resources.”<sup>93</sup> Canada states that “[s]ince 1979, CBE has derived its only income by renting houses situated on the site.”<sup>94</sup> In its response to the submission, Canada states “[i]n such an instance, the environmental problem will not be resolved.”<sup>95</sup>

#### 5.2.3.5 Injunctions

The Attorney General can apply for an injunction to enjoin anything punishable as an offense under s. 40 of the *Fisheries Act*, whether or not a prosecution has been instituted (s. 41(4)).

#### 5.2.3.6 Civil Suits for the Recovery of Remediation Costs

Once the elements of an offense can be established, the *Fisheries Act* gives the Crown the right to institute a civil action for recovery of all costs and expenses reasonably incurred by federal or provincial officials to prevent, counteract, mitigate or remedy any adverse effects that result or may reasonably be expected to result from the unauthorized deposit of a deleterious substance or a serious and imminent danger thereof by reason of any condition (s. 42(1)).

Canada has stated that, as an alternative to prosecution, Environment Canada might have carried out remediation at Britannia itself and brought an action against CBE to recover its costs, but Environment Canada did not have funds available to undertake such remediation. In any event, Canada has explained, the poor prospect of cost recovery would have made it unlikely for Environment Canada to incur such costs.<sup>96</sup>

### 5.3 *Policies Regarding Compliance Promotion and Enforcement of s. 36(3) of the Fisheries Act at Abandoned Mines*

In its February 2002 Request for Information,<sup>97</sup> the Secretariat stated that in preparing a factual record regarding the assertion that Canada is failing to effectively enforce s. 36(3) of the *Fisheries Act* at the Britannia Mine, the Secretariat would be gathering information “on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, section 36(3) of

93. Facts on the Britannia Mine at 4.

94. *Ibid.*

95. Response at 15.

96. Facts on the Britannia Mine at 5.

97. Appendix 4 to the Factual Record at IV.4.

the *Fisheries Act*, specifically ones that might apply to acid mine drainage from the Britannia Mine.” This section presents relevant information gathered by the Secretariat.

As noted above (Section 5.2.3), the *Fisheries Act* provides for a range of possible responses to alleged violations of s. 36(3), including information requests or orders by the Minister, prosecutions, court orders upon conviction, injunctions, and civil suits for the recovery of remediation costs. Also as noted above (s. 5.2.3), Canada has explained that prosecution and other remedies available under the *Fisheries Act* have not been and are not a viable option at the Britannia Mine, because the limitation period for prosecuting former owners and operators under the *Fisheries Act* has expired, and because the current owner does not have the financial means to carry out court-ordered remediation.<sup>98</sup>

Canada has stated that despite the constraints with proceeding with prosecutions under the *Fisheries Act*, Environment Canada and the Department of Fisheries and Oceans have taken various other actions since the 1970s to promote compliance with and enforce the *Fisheries Act* at the Britannia Mine site.<sup>99</sup> According to Canada, these actions have included assessment and monitoring, public education, field and laboratory research, and maintaining effective partnerships with provincial ministries to address the pollution problems.<sup>100</sup> Canada has stated that “[a]s contemplated by the *Statement on Interjurisdictional Cooperation on Environmental Matters*, Environment Canada has, throughout this period, provided technical advice and expertise to the Province of British Columbia to support the province’s enforcement efforts under the [BC] *Pollution Control Act* and its replacement, the [BC] *Waste Management Act*.”<sup>101</sup> This section of the factual record presents relevant information gathered by the Secretariat regarding the basis for the approach taken by Environment Canada to promoting compliance with s. 36(3) at the Britannia Mine. This information, together with information presented in s. 5.2, 5.4, 5.5 and 5.6, is relevant to a consideration of whether Canada is failing to effectively enforce s. 36(3) at the Britannia Mine.

Subsections 5.3.1 and 5.3.2 describe how Environment Canada, Fisheries and Oceans Canada, and the Department of Justice determine the appropriate response to an alleged violation of the *Fisheries Act*, on the basis of department policies. Under these policies, enforcement action by federal authorities is seen as one of several types of actions con-

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98. Response at 14-15; Facts on the Britannia Mine at 4-5.

99. Facts on the Britannia Mine at 5.

100. *Ibid.*

101. *Ibid.*

sidered appropriate to address a situation of non-compliance. Under these policies, the action most likely to achieve the goal of compliance in the shortest possible time and with no further occurrence of violations is considered to be the appropriate action to take.

Subsection 5.3.3 provides relevant information regarding the basis for Environment Canada's decision to support provincial enforcement efforts under provincial pollution legislation at Britannia as an alternative to direct enforcement of s. 36(3) by federal authorities against the mine owner. Beginning with the 1990 *Statement on Interjurisdictional Cooperation on Environmental Matters*, information is provided on the evolution of federal/provincial/territorial efforts to streamline environmental protection, with particular reference to s. 36(3) and the mining sector.

In its response to the submission (see s. 3, above), Canada stated "Canada approaches potential violations of the *Fisheries Act* in a systematic and predictable way,"<sup>102</sup> and that "Canada's actions with each of these three abandoned mines [Mt. Washington, Britannia, and Tulsequah Chief] and other mines clearly demonstrate a comprehensive and productive strategy aimed at eliminating the discharge of deleterious substances and thereby achieving compliance with the Act."<sup>103</sup> Subsection 5.3.4 contains information relevant to the existence of such a strategy as regards abandoned mines such as Britannia.

#### 5.3.1 *The Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy*

By law, the federal Minister of Fisheries and Oceans is responsible for the administration and enforcement of the *Fisheries Act*.<sup>104</sup> However, in 1978, the Prime Minister assigned to the Minister of the Environment responsibility for administration and enforcement of s. 36(3) (formerly subsection 33(2)). A 1985 Memorandum of Understanding ("MOU") between the Department of Fisheries and Oceans and Environment Canada outlines the responsibilities of both departments for the administration and enforcement of the pollution prevention provisions of the *Fisheries Act*.<sup>105</sup>

102. Response at 13.

103. *Ibid.* at 12.

104. Section 4(1)(a) of the *Department of Fisheries and Oceans Act*, R.S.C. 1985, c. F-15.

105. Memorandum of Understanding between the Department of Fisheries and Oceans and the Department of the Environment on the Subject of the Administration of Section 33 of the *Fisheries Act* signed at Ottawa, Ontario, 6 May 1985.

Under the MOU, Fisheries and Oceans Canada and Environment Canada agree to cooperate and communicate openly and regularly on all matters related to the administration of s. 36(3) (s. 1). At the regional level, senior managers are responsible for consulting with one another regarding, for example, major development projects; actions proposed by agents of provincial governments; identification of fishery resource or habitat information required to support protection actions; proposed regulations and amendments to existing regulations; and annual program reviews (s. 2). They also make joint decisions on enforcement actions (s. 4), but Fisheries and Oceans Canada reserves the right to take action directly in circumstances where the fisheries resource is being affected by the deposit of a deleterious substance and Environment Canada is unable or unwilling to take action (s. 8). Regional directors are responsible for arbitrating any disagreements (s. 3), and any matters on which there is no resolution at the regional level are submitted to the assistant deputy ministers (Pacific and Freshwater Fisheries [1985 title], Fisheries and Oceans Canada, and Environmental Protection Service, Environment Canada (s. 5(a)). Assistant deputy ministers also discuss proposed regulations and amendments thereto, and discuss national policy issues of concern to both parties (s. 5(b), (c)).

Canada has explained that at Britannia, Environment Canada has assumed the lead federal role pursuant to its responsibilities for the administration of the pollution prevention provisions of the *Fisheries Act*, and that Fisheries and Oceans Canada provided technical and scientific support to Environment Canada and conducted key research on the environmental effects of the mine's drainage.<sup>106</sup>

Fisheries and Oceans Canada and Environment Canada officially issued a *Fisheries Act* Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy (the "Compliance and Enforcement Policy") in July 2001,<sup>107</sup> although according to Canada, Environment Canada has been working with a draft of the Compliance and Enforcement Policy, including at Britannia, since at least 1998.<sup>108</sup> Notable differences between the draft and final versions are identified below. The Compliance and Enforcement Policy states that regulatory

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106. Facts on the Britannia Mine at 5.

107. Policy at 3. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada attached a copy of the Compliance and Enforcement Policy dated November 2001. On 4 June 2003, Environment Canada confirmed that there are no substantive differences between the July 2001 and November 2001 versions of the Compliance and Enforcement Policy.

108. Response at 13.

officials will secure compliance with the habitat protection and pollution prevention provisions of the *Fisheries Act* through compliance promotion and enforcement.<sup>109</sup> Under the Compliance and Enforcement Policy, enforcement is achieved through the exercise or application of the following powers granted under legislation: inspections; investigations; issuance of warnings, directions by fishery inspectors, authorizations, and Ministerial orders; and court actions, such as injunctions, prosecution, court orders upon conviction, and civil suits for recovery of costs. Compliance is promoted through communication and public information; public education; consultation with stakeholders; and technical assistance.

The Compliance and Enforcement Policy sets out guiding principles for the application of the habitat protection and pollution prevention provisions of the *Fisheries Act*.<sup>110</sup> The guiding principles provide that compliance with the Act and accompanying regulations is mandatory. Enforcement action will be fair, predictable and consistent, using rules, sanctions and processes securely founded in law. Enforcement personnel will administer the statutory provisions and accompanying regulations with an emphasis on preventing harm to fish, fish habitat or human use of fish caused by physical alteration of fish habitat or pollution of waters frequented by fish. Priority for action to deal with suspected violations will be guided by degree of harm or risk of harm to fish, fish habitat or human health, and whether or not the alleged offense is a repeat occurrence. Enforcement personnel will take action consistent with the Compliance and Enforcement Policy, and the public will be encouraged to report suspected violations. Compliance will be promoted through communication with stakeholders.

Under “Responses to Alleged Violations,” the Compliance and Enforcement Policy states that “[e]nforcement measures are directed towards ensuring that violators comply with the *Fisheries Act* within the shortest possible time and that violations are not repeated.”<sup>111</sup> The Compliance and Enforcement Policy provides that

[e]nforcement personnel will respond to suspected violations. They will take into account the harm or risk of harm to fish, fish habitat and/or human use of fish. If they determine that there is sufficient evidence a violation has occurred, they may take enforcement action.<sup>112</sup>

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109. Policy at 5.

110. *Ibid.* at 6.

111. Policy at 20.

112. *Ibid.*

The draft of the Compliance and Enforcement Policy that was in circulation at Environment Canada in 1998, at the time of the filing of the BC Mining submission, states “[i]f they determine that there is sufficient evidence a violation has occurred, they *will* take enforcement action” [emphasis added].<sup>113</sup>

If enforcement personnel are able to substantiate that an alleged violation has occurred and there is sufficient evidence to proceed, the Compliance and Enforcement Policy states that they will decide on an appropriate action, taking into account certain criteria.<sup>114</sup> The Compliance and Enforcement Policy lists these criteria under three headings: nature of the alleged violation; effectiveness in achieving the desired result with the alleged violator; and consistency in enforcement.

In considering the nature of the violation, enforcement personnel will consider the seriousness of the environmental damage; the intent of the alleged violator; whether it is a repeat occurrence; and whether there were attempts by the alleged violator to conceal information or otherwise circumvent the objectives and requirements of the habitat protection and pollution prevention provisions.<sup>115</sup>

For the purpose of determining the effectiveness of a response in achieving the desired result with the alleged violator, the Compliance and Enforcement Policy states that

[t]he desired result is compliance with the Act in the shortest possible time and with no further occurrence of violations, in order to protect fish and fish habitat and human use of fish.<sup>116</sup>

Factors to be considered are the alleged violator’s history of compliance; willingness to cooperate with enforcement personnel; and the existence of enforcement actions by other federal or provincial/territorial authorities.<sup>117</sup> At a June 2002 meeting with the Secretariat, Environment Canada and Fisheries and Oceans Canada officials from the Pacific and Yukon Region explained that after considering these factors, they decided that supporting provincial enforcement efforts under the BC *Waste Management Act* was deemed to be the appropriate action to take in order to achieve the desired result of compliance with s. 36(3) at Britannia in the shortest possible time and with no further occurrence of violations.

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113. Response, Appendix 4.

114. Policy at 20.

115. *Ibid.*

116. *Ibid.*

117. *Ibid.*

Specifically, federal officials noted that provincial legislation allowed the province to recover remediation costs from past owners and operators (the current owner is insolvent), while the *Fisheries Act* contains no such provisions.

Under the Compliance and Enforcement Policy, enforcement personnel also aim to achieve consistency in their responses to alleged violations. Consequently, the Compliance and Enforcement Policy states that they will consider how similar situations in Canada are being or have been handled when deciding what enforcement action to take.<sup>118</sup> At a June 2002 meeting with the Secretariat, federal officials explained that an objective at Britannia was to avoid getting involved in litigation, because this would result in valuable resources being shifted away from solving the environmental problem at Britannia. They mentioned that at another contaminated site in BC, the federal government had spent millions in litigation. It appears that federal officials were referring to the *Beazer* site, where the Canadian National Railway has been named as a party responsible for clean-up under the *BC Waste Management Act*.<sup>119</sup>

The Compliance and Enforcement Policy lists a range of responses available to deal with alleged violations: warnings; directions by fishery inspectors; orders by the Minister; injunctions; and prosecutions.<sup>120</sup>

### 5.3.2 *The Decision to Prosecute*

Under the Compliance and Enforcement Policy (see above, s. 5.3.1), prosecution is the preferred course of action where evidence establishes that

the alleged violation resulted in risk of harm to fish or fish habitat; the alleged violation resulted in harmful alteration, disruption or destruction of fish habitat (not authorized by DFO); the alleged violator previously received a warning for the activities and did not take all reasonable measures to stop or avoid the violation; the alleged violator had previously been convicted of a similar offence.

As stated earlier (see above, s. 5.2.2), s. 36(3) of the *Fisheries Act* does not require proof of harm to fish or fish habitat in establishing the elements

118. *Ibid.* at 21.

119. See *Canadian National Railway Company v. Regional Waste Manager (Beazer East Inc. and Atlantic Industries Ltd., Third Parties)* (24 May 2002), Environmental Appeal of British Columbia 2001-WAS-025; online: Environmental Appeal Board of British Columbia <<http://www.eab.gov.bc.ca/waste/Wastsm02.htm>> (date accessed: 10 October 2002).

120. Policy at 21.

of the offense. All that is required is proof that the substance that was deposited is inherently deleterious to fish. Consequently, it appears that under the Compliance and Enforcement Policy, prosecution is precluded, or at least unlikely, for violations in which a deleterious substance was deposited but without resulting in harm or risk of harm to fish or fish habitat. Information obtained by the Secretariat regarding the Britannia Mine shows that mine effluent is harming fish habitat.<sup>121</sup> The Secretariat obtained no information indicating that Environment Canada has ever sent a warning letter to, or recommended laying charges against, owners or operators of the Britannia Mine in regard to facts consistent with ongoing violations of s. 36(3).

The Compliance and Enforcement Policy states that prosecution will always be pursued where evidence establishes that the

alleged violation was deliberate; the alleged violator knowingly provided false or misleading information to enforcement personnel; the alleged violator obstructed enforcement personnel in the carrying out of their duties or interfered with anything seized under the Act; the alleged violator concealed or attempted to conceal or destroy information or evidence after the alleged offence occurred; or the alleged violator failed to take all reasonable measures to comply with a direction or an order issued pursuant to the Act.

In the case of Britannia, actions taken by the present owner since 1979 have been consistent with the above criteria for pursuing prosecution under the Compliance and Enforcement Policy. These actions are described in detail in s. 5.5, below. They include reneging on a contractual obligation toward the previous owner (undertaken at the time of purchasing the property) to comply with all future environmental requirements of government authorities at the site; selling company assets without using profits to comply with an effluent remediation order; distributing false or misleading information;<sup>122</sup> obstructing pro-

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121. "Effect of an Abandoned Mine on the Nearshore Ecosystem, Britannia Beach," online: Fisheries and Oceans Canada <<http://www.pac.dfo-mpo.gc.ca/oceans/meq/MEHSD/mines.htm>> (date accessed: 10 October 2002).

122. See letter from Eric Partridge, Director of Waste Management, MWLAP to CBE *et al.* (12 February 2002) Re: Britannia Mine Remediation—Copper Beach Estates Ltd. Alternative Remediation Plan: "[...] I also wish to provide clarification on a matter related CBE's plan. The use of the Provincial logo and the Ministry of Water, Land and Air Protection title on CBE's plan was without prior consent by the regulator. My staff and I were not involved or consulted in the development of the plan. I also understand that the Provincial proponent, under the direction of Jim McCracken, was not involved in the preparation of the plan. Therefore, I have requested CBE, and CBE has agreed, to distribute a revised report cover with reference to the Ministry of Water, Land and Air Protection and the Province of British Columbia

vincial remediation efforts by denying access to the site;<sup>123</sup> and appealing decisions of the provincial environmental regulator allowing provincial government remediation activities to go forward at the site.<sup>124</sup>

In any prosecution, the Attorney General must approve the laying of charges. It does so based on consideration of two factors: whether the evidence is sufficient to justify the institution or continuation of proceedings, and if so, whether the public interest requires a prosecution to be pursued.<sup>125</sup> Under Department of Justice policy, it is not the rule that all offenses for which there is sufficient evidence to prosecute must be prosecuted. Prosecution should be pursued only when it is required, in the public interest, in light of the provable facts and “the whole of the surrounding circumstances.”<sup>126</sup>

Under Department of Justice policy, where the alleged offense is not so serious as plainly to require criminal proceedings, the Crown should consider public interest factors, which may include, among others:

- the seriousness of the offense;
- significant mitigating or aggravating circumstances;
- the degree of staleness of the offense;
- the availability and appropriateness of alternatives to prosecution, particularly in the case of regulatory offenses;
- the prevalence of the offense and the need for general and specific deterrence;

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removed.” See also below, s. 5.5.3 and Appendix 7, reference to fraudulent letter (Errington: 10/17/97).

123. Letter from Eric Partridge, Director of Waste Management, MWLAP to CBE *et al.* (13 March 2002) Re: Approval for the Discharge of Effluent to Howe Sound from Remediation Activities at the Britannia Mine Site, Britannia Beach, B.C.

124. See, for example, *Britannia Mines and Reclamation Corp. v. Director of Waste Management (Province of British Columbia, Third Party)*, (17 September 2002) British Columbia Environmental Appeal Board 2002-WAS-008(a), online: British Columbia Environmental Appeal Board <<http://www.eab.gov.bc.ca/waste/Wastsm02.htm>> (date accessed: 10 October 2002).

125. Canada, *Federal Prosecution Service Deskbook*, Part V “Proceedings at Trial and on Appeal,” Chapter 15 “The Decision to Prosecute” (Ottawa: Justice Canada, 2000) [hereinafter “The Decision to Prosecute”] at s. 15.2.

126. *Ibid.* at 15.3.2.

- the likely length and expense of a trial and the resources available to conduct the proceedings;
- the likely sentence in the event of a conviction;
- in the case of regulatory offenses, consideration of how the regulatory purpose of the statute might best be achieved.

In respect of regulatory offenses, such as violations of s. 36(3), Department of Justice policy states that

[...] it is appropriate for Crown counsel to consider the views of the investigating agency in considering whether prosecution is warranted. [...] Consideration of what the public interest requires will of necessity require consideration of how the regulatory purpose of the statute might best be achieved.<sup>127</sup> If, for example, the relevant regulatory authority has a mechanism for dealing with the alleged offender such as a compliance program, Crown counsel should consider whether an alternative such as this might better serve the public interest than prosecution.<sup>128</sup>

Information regarding such programs is provided below, in s. 5.3.4.

Canada has stated that at one time, Environment Canada considered bringing an action in public nuisance against the current owners of the Britannia Mine, but that the Department of Justice “did not recommend this course of action.”<sup>129</sup> Canada provided no additional information on this matter.<sup>130</sup>

### 5.3.3 *Streamlining Environmental Protection*

Federal officials from the Pacific and Yukon Region of Environment Canada and Fisheries and Oceans Canada have explained to the Secretariat that in British Columbia, there is an informal, “one-window” approach to administering s. 36(3). Under this approach, the regulated

127. The *Fisheries Act* briefly contained a section setting out its purposes, including “[...] to provide for the conservation and protection of fish and waters frequented by fish,” but the relevant section was repealed as soon as it was enacted; S.C. 1985, c. 31, ss. 2.1(a), 6.

128. The Decision to Prosecute at 15.3.2.1, “The “Public Interest” in the Regulatory Context.”

129. Facts on the Britannia Mine at 5.

130. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada stated: “As a matter of course, legal advice provided by the Department of Justice to other federal government departments is not released outside the federal government. However, in this case as noted earlier, Canada was of the view that the federal Crown had no standing to bring such an action.”

community deals primarily with provincial officials, who in turn consult federal officials on matters related to enforcement of s. 36(3).<sup>131</sup> This has been the case at Britannia (see s. 5.5, below).<sup>132</sup>

Since the early 1990s, federal and provincial environment ministers have worked to harmonize the development and implementation of environmental legislation in Canada, including s. 36(3) of the *Fisheries Act* and regulations adopted pursuant to s. 36(4) of the *Fisheries Act*. The process has been informed by input from standing committees of the House of Commons, the Auditor General, the Commissioner for the Environment and Sustainable Development, industry, and other stakeholders.

This subsection provides relevant information regarding this harmonization process, which provides context for Environment Canada's decision to support provincial enforcement efforts under provincial pollution legislation at Britannia as an alternative to direct enforcement of s. 36(3) by federal authorities against the mine owner.

#### 5.3.3.1 Federal-Provincial Harmonization

In 1990, the Canadian Council of Ministers of the Environment ("CCME") issued a *Statement of Interjurisdictional Cooperation on Environmental Matters* ["Statement"]. Under the Statement, the federal and provincial Environment Ministers agreed, among other things, to harmonize environmental legislation, policies and programs and their implementation, and to develop bilateral accords and issue-specific agreements to promote environmental cooperation between and among governments, with the objective of clarifying responsibilities, improving efficiency and effectiveness of decision making and regulatory processes, and taking advantage of the respective strengths and capabilities of each jurisdiction. With respect to the Britannia Mine, Canada has stated "[a]s contemplated by the *Statement on Interjurisdictional Cooperation on Environmental Matters*, Environment Canada has, throughout this period [1970s-2002], provided technical advice and expertise to the Province of British Columbia to support the province's enforcement efforts under the [BC] *Pollution Control Act* and its successor, the [BC] *Waste Management Act*."<sup>133</sup> The information provided below, in conjunction with information provided in ss. 5.2, 5.4, 5.5 and 5.6, is relevant to a

131. Meeting at Pacific and Yukon Regional Headquarters, Environment Canada, North Vancouver, 11 June 2002.

132. *Ibid.*

133. Facts on the Britannia Mine at 5.

consideration of whether federal-provincial cooperation has resulted in effective enforcement of s. 36(3) at the Britannia Mine.

In 1994, pursuant to the Statement and under the authority of s. 5 of the *Department of Fisheries and Oceans Act*<sup>134</sup> and s. 7 of the *Department of Environment Act*,<sup>135</sup> Fisheries and Oceans Canada and Environment Canada concluded framework agreements with Alberta and Saskatchewan regarding the administration of the pollution prevention provisions of the *Fisheries Act* (including s. 36(3)). Each agreement set out principles of cooperation and listed activities, such as monitoring, inspection, and investigation and enforcement, in respect of which the parties could enter into detailed collaborative arrangements. Both agreements contain sub-agreements on inspections, investigations and enforcement providing for, among other things, information-sharing, coordinated inspections, the designation of a lead agency in joint investigations, the role of the supporting agency, and consultation on enforcement response. No such agreement exists for British Columbia.<sup>136</sup>

In December 1997, the House of Commons Standing Committee on Environment and Sustainable Development issued a report entitled “Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment (CCME).”<sup>137</sup> The report noted that in 1993, Canada’s Environment Ministers, acting through the CCME, had identified harmonization of environmental management in Canada as a top priority. Under the direction of the CCME, a *Canada-Wide Accord on Environmental Harmonization* (the “Harmonization Accord”) was developed and given approval in principle by the Environment Ministers in November 1996, with final approval expected in early 1998. The Harmonization Accord provided an umbrella for the negotiation of sub-agreements on various

134. R.S.C. 1985, c. F-15. “The Minister may, with the approval of the Governor in Council, enter into agreements with the government of any province or any agency thereof respecting the carrying out of programs for which the Minister is responsible.”

135. R.S.C. 1985, c. E-10. “The Minister may, with the approval of the Governor in Council, enter into agreements with the government of any province or any agency thereof respecting the carrying out of programs for which the Minister is responsible.”

136. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada stated: “No such agreement is presently in force for British Columbia, although the Canada-BC Pulp and Paper Effluent Agreement was followed between 1994-1996.”

137. Canada, “Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment” (Report of the Standing Committee on Environment and Sustainable Development, Charles Caccia, Chair) (Ottawa: Queen’s Printer, 1997) [hereinafter “Harmonization and Environmental Protection”].

matters such as environmental standards, environmental assessment, and enforcement. The Committee reviewed the history of federal and provincial involvement in the regulation of environmental matters in Canada and invited submissions from the public regarding the draft Harmonization Accord and three proposed sub-agreements.

Based on information gathered, the Committee concluded that there did not exist sufficient evidence of federal/provincial overlap and duplication in environmental regulation to allow for an assessment of whether the Harmonization Accord would actually result in greater efficiency or cost savings. The Committee expressed concern that implementation of the Harmonization Accord could result in a net decrease in environmental regulation and enforcement, and weaker environmental protection. It stated that transfers of environmental protection duties and powers to the provinces required full consideration of accountability issues and funding implications, and that transfer mechanisms needed to include detailed decision-making and dispute resolution procedures. The Committee cautioned that budget cuts by either order of government could put the quality of the environment and human health in jeopardy. The Committee also concluded that Aboriginal rights, and Canada's internal and international trade commitments, should be given careful consideration in the context of the harmonization initiative.

The Secretariat considered whether there is evidence of overlap and duplication in the content and/or enforcement of federal and provincial effluent criteria at Britannia. Information obtained by the Secretariat regarding the Britannia Mine does not show any overlap or duplication between federal and provincial effluent criteria and enforcement thereof (see s. 5.5, below). Under a long-standing working arrangement between Environment Canada and BC Environment, provincial instruments such as effluent remediation orders and effluent discharge permits have been the vehicle for enforcing s. 36(3) against current and past owners at Britannia. Under the WMA, the province has discretion in determining appropriate effluent standards for Britannia based on impacts of Britannia effluent to the receiving environment. In 1999, the province consulted with Environment Canada and Fisheries and Oceans Canada regarding standards required to prevent s. 36(3) violations at Britannia. The province subsequently incorporated these standards into an effluent discharge permit for the mine.<sup>138</sup> Before 1999, the

138. See e.g. recommendations of Environment Canada for requirements of 1999 effluent discharge permit for Britannia (see below, Appendix 7 (McCandless: 05/19/99)) and Remediation Order OE-16097 as Amended January 7, 2000, under the Provisions of Section 27.1 of the *Waste Management Act*—Britannia Mine Site; online

mine had no provincial effluent discharge permit, although it was ordered to apply for one in 1974 and again in 1993. Provincial effluent remediation orders issued against the owners of the Britannia Mine between 1974 and 1993 did not require compliance with either provincial or federal effluent standards.

Because the current owner of the Britannia Mine has been insolvent since 1994, government officials at Britannia have sought to hold past owners of the mine liable for achieving compliance with applicable effluent standards at the site. This has never been possible under the *Fisheries Act*. In 1997, amendments to the WMA contaminated sites provisions allowed the province to name past owners as persons potentially responsible (“PRPs”) for cleaning up the site. In 1998, the province began naming parent companies of past owners of the mine as PRPs in connection with Britannia. Although this process did not lead to any of these PRPs being added to the provincial Britannia effluent remediation order, the province was successful in obtaining \$30M in remediation funding from these PRPs. Amendments to the WMA in 2002 have likely made it impossible, once again, to enforce provincial effluent standards against past owners of the Britannia Mine under the WMA (see s. 5.6, below).

On the issue of funding mentioned in the December 1997 “Harmonization and Environmental Protection” report of the House of Commons Standing Committee on Environment and Sustainable Development, the Secretariat asked federal officials in June 2002 whether there existed funding arrangements between Canada and British Columbia for the implementation of the “one-window approach” (mentioned above) to administration of s. 36(3) at Britannia. The Secretariat was told that there are no such arrangements.<sup>139</sup> Earlier in 2002, federal Environ-

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MWLAP <[http://wlapwww.gov.bc.ca/epd/epdpa/contam\\_sites/legal\\_decisions/orders/Britannia/oe16097\\_amended\\_order.html](http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/legal_decisions/orders/Britannia/oe16097_amended_order.html)> (date accessed: 10 October 2002). Federal input on effluent standards is incorporated into the effluent permit by BC Environment, but the permit contains a disclaimer warning the permit holder that the permit does not provide a guarantee of compliance with the *Fisheries Act*. This disclaimer is consistent with the 1998 recommendations of the House of Commons Standing Committee on Environment and Sustainable Development, in its report entitled “Enforcing Canada’s Pollution Laws: The Public Interest Must Come First!” (see *infra*, note 142). Recommendation No. 8(b) of the report: “the Minister of the Environment [should] negotiate agreements with the territorial, Aboriginal, and municipal governments, requiring that they incorporate, in the permits that they issue, an express notification that all federal environmental laws and regulations continue to apply and that compliance with such laws remains mandatory, notwithstanding any of the terms of the permit.”

139. Meeting at Pacific and Yukon Regional Headquarters, Environment Canada, North Vancouver, 11 June 2002.

ment Minister David Anderson is reported to have announced that “[i]n response to deep budget cuts announced by the British Columbia government January 17 [...] the federal government was ready to assume some of the responsibilities for environmental protection should the British Columbia provincial government find it necessary to pass on those tasks to their federal counterpart.”<sup>140</sup>

In its December 1997 report, the House of Commons Standing Committee on Environment and Sustainable Development recommended delaying ratification of the Harmonization Accord until the Committee’s concerns and recommendations were addressed, and until all proposed sub-agreements had been made available for public consultation. Specifically, the Committee recommended that the Auditor General of Canada conduct an audit of the effectiveness of bilateral environmental agreements such as those concluded with Alberta and Saskatchewan for the administration of the pollution prevention provisions of the *Fisheries Act*. Notwithstanding these recommendations, in January 1998 Environment Ministers from across Canada, except Quebec, signed the Harmonization Accord along with three sub-agreements on inspections, environmental assessment, and standards.

In May 1998, the House of Commons Standing Committee on Environment and Sustainable Development issued a report entitled “Enforcing Canada’s Pollution Laws: The Public Interest Must Come First!”<sup>141</sup> The report made many recommendations related to enforcement of the *Canadian Environmental Protection Act* (“CEPA”) and the pollution prevention provisions of the *Fisheries Act*. The report recommended, among other things, disclosure to the Committee of financial information related to enforcement budgets; review of the effectiveness of the enforcement program; review of statutes and regulations to ensure their enforceability; notifying the regulated community of regulatory requirements; separation of enforcement functions from managerial functions, with regional enforcement operations to report to an

140. *Environmental Dimensions*, 25 January 2002, ISSN 1187-5828, “Federal Environment Minister Says Sharp Budget Cuts by BC Government Could See Increased Federal Government Role for Environmental Protection” at 4-5. The article reports that the operating expenditures of the BC Ministry of Water, Land and Air Protection “will be cut by 24% over the next three years to \$127.007 million in fiscal 2004/05, down from \$214.266 million in fiscal 2001/02. Staff will be cut by 31% from 1,298 to 897 over the same period.”

141. Canada, “Enforcing Canada’s Pollution Laws: The Public Interest Must Come First!” (Report of the Standing Committee on Environment and Sustainable Development, Charles Caccia, Chair) (Ottawa: Queen’s Printer, 1998) [hereinafter “Enforcing Canada’s Pollution Laws”].

independent, centralized enforcement agency; development of an enforcement and compliance policy for the pollution prevention provisions of the *Fisheries Act*; and ensuring that the federal government retains full authority and accountability under enforcement agreements with other governments. The report also recommended that the Minister of the Environment seek, and that the Government of Canada grant, more resources to ensure proper enforcement of legislation by Environment Canada.

In her response to the report, the federal Minister of the Environment addressed each recommendation made by the Committee.<sup>142</sup> The Minister stated that Environment Canada began an internal review to strengthen its enforcement program in March 1998, resulting in an “Enforcement Action Plan” which apparently addressed most of the Committee’s recommendations, and the Minister stated that Environment Canada would keep the Committee informed on the progress of the enforcement review through regular reports. The Minister stated that an enforcement and compliance policy for the fish habitat protection and pollution prevention provisions of the *Fisheries Act* would be in place by the end of 1998.<sup>143</sup> In response to the recommendation that more resources be allocated to enforcement, the Minister stated

[t]he issue of enforcement capacity and the resources devoted to the Department’s enforcement program have been the subject of intensive internal and external review.

Environment Canada as part of the enforcement review process has initiated a comprehensive assessment to determine the level and allocation of funding required to ensure the appropriate ongoing enforcement of pollution laws. The first step in this assessment is a detailed analysis of the potential benefits associated with various levels of effort. Consideration of any additional resources for enforcement would only take place after completion of the assessment. The Government will ensure an appropriate level of resources is allocated to the enforcement program.<sup>144</sup>

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142. Canada, “Enforcing Canada’s Pollution Laws: The Public Interest Must Come First! – The Government Response to the Third Report of the Standing Committee on Environment and Sustainable Development” (tabled in the House of Commons by The Honourable Christine Stewart, Minister of the Environment) (Ottawa: Queen’s Printer, 1998) [hereinafter “1998 Government Response”].

143. A draft policy was already in circulation in 1998 (see s. 3, above). The policy was officially released by Environment Canada and Fisheries and Oceans Canada in July 2001 (see s. 5.3.1, above).

144. 1998 Government Response at 15. See also Canada, *Integrated Risk Management Framework* (Ottawa: Treasury Board Secretariat, 2000), and Canada, *A Canadian Perspective on the Precautionary Principle – Proposed Guiding Principles* (Ottawa: Government of Canada, 2001).

This approach to enforcement is consistent with Canada's *Integrated Risk Management Framework*, which encourages government departments to take a strategic approach to resource allocation.<sup>145</sup>

The Government's response included requested financial information regarding Environment Canada's enforcement program (excluding expenditures for compliance promotion) for 1993/4-1998/9, broken down by region. In the Pacific and Yukon Region, human resources remained constant over that period, but the operations budget decreased, as did capital expenditures: there were eight inspectors, three investigators, and three chiefs, with approximately \$900,000 per year expended in salaries, \$350,000 per year expended on operations and maintenance (in 1998-1999, the last year for which information was provided, this figure dropped to \$195,000), and capital expenditures ranging from \$31,000 to \$170,000 per year.<sup>146</sup> Except as specifically mentioned below, the Secretariat obtained no additional information on the results of Environment Canada's review of its enforcement programme.<sup>147</sup>

In February 1998, pursuant to the recommendations of the December 1997 report of the House of Commons Standing Committee on Environment and Sustainable Development, the Commissioner of the Environment and Sustainable Development of Canada ("CESD") agreed to assess the operation of equivalency and administrative agreements entered into by the federal government and the provinces under CEPA and the *Fisheries Act*. The CESD proposed to evaluate such agreements on the assumption that they would: seek to protect the environment while decreasing costs to taxpayers; hold parties accountable, for example through audit requirements; provide for regular reporting between governments; include a risk analysis prior to execution; contain a plan to resume federal responsibilities if necessary; reflect a clear understanding of who is responsible for what; and provide for performance evaluation. The audit covered seven bilateral agreements, including the administrative agreements concluded by Fisheries and Oceans Canada and Environment Canada with Saskatchewan and Alberta in 1994 for the control of deleterious substances under the *Fisheries Act*.

145. *Ibid.* See online: Treasury Board of Canada Secretariat <[http://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/RiskManagement/rmf-cgr01-1\\_e.html#Integrating](http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/RiskManagement/rmf-cgr01-1_e.html#Integrating)> (date accessed: 10 October 2002).

146. 1998 Government Response at 1 and Appendix A.

147. See *supra*, note 21.

The CESD audit report, issued in 1999, made several recommendations for improving the design and implementation of the agreements, in particular to enable the federal government to account for how provinces spend federal transfer funds and results achieved. Environment Canada responded by pointing out that the agreements reviewed by the CESD pre-dated the 1998 Harmonization Accord, and that the Accord addressed management concerns identified by the CESD, including accountability mechanisms and reporting requirements. Fisheries and Oceans Canada responded by committing to include Environment Canada reports on enforcement of s. 36(3) and implementation of the administrative agreements in its annual report to Parliament on administration of the *Fisheries Act*.<sup>148</sup>

At the time of writing this factual record, in October 2002, the latest available annual report on the administration and enforcement of the habitat protection and pollution prevention provisions of the *Fisheries Act* is for the period ending 31 March 2000. In that report, aquatic effects investigations carried out by DFO at Britannia, as well as DFO participation in public consultations at Britannia and DFO review of provincial permits for Britannia, are described in Section 2.5 entitled “Scientific Support.” “Scientific Support” is listed in the report as a key activity for habitat management in Canada.<sup>149</sup> It combines “Scientific Research” and “Habitat Monitoring” strategies adopted by DFO under its 1986 *Policy for the Management of Fish Habitat*.<sup>150</sup>

A sub-agreement on inspections and enforcement (that would revoke the 1998 inspections sub-agreement referred to above) was endorsed by the CCME Council of Ministers at a meeting in Winnipeg on 30 April–1 May 2001. The Inspections and Enforcement Sub-Agreement (the “Sub-Agreement”) sets out a framework for negotiating federal/provincial agreements on inspections and enforcement of envi-

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148. The latest available annual report on the administration and enforcement of the habitat protection and pollution prevention provisions of the *Fisheries Act* is for the period ending 31 March 2000 (see *infra*, note 149). In that report, aquatic effects investigations carried out by DFO at Britannia, as well as DFO participation in public consultations at Britannia and DFO review of provincial permits for Britannia are described in Section 2.5 entitled “Scientific Support.” The report makes no mention of EC activities at Britannia.

149. Canada, *Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (For the period of April 1, 1999 to March 31, 2000) (Ottawa: DFO, 2001) at Figure A.2.2.

150. The list of strategies is as follows: Protection and Compliance (Strategy 1); Integrated Resource Planning (Strategy 2); Scientific Research (Strategy 3); Public Consultation (Strategy 4); Public Information and Education (Strategy 5); Cooperative Action (Strategy 6); Habitat Improvement (Strategy 7); and Habitat Monitoring (Strategy 8).

ronmental protection laws, and it provides guidance on the respective roles of the federal government and the provinces under such agreements.

Under the Sub-Agreement, federal inspection and enforcement functions include international borders and obligations; transboundary domestic issues; federal lands and facilities; products/substances in Canada-wide trade and commerce; and other matters specific to the federal government. Provincial inspection and enforcement functions include industrial and municipal facilities and discharges, application of laws on provincial and territorial land, waste disposal and destruction, and other matters specific to provincial and territorial governments. The Sub-Agreement provides that in certain instances, these functions may be varied based on a “best-situated assessment,” as per listed criteria, including past practice; available resources; scientific and technical expertise and capacity; and scale, scope and nature of the environmental issue. Each government commits to maintaining an inspection and enforcement capacity, despite any agreements, and to ensuring that such agreements make adequate provision for, among other things, coordination of training and other procedures; and resource implications. At Britannia, federal and provincial officials have implemented this agreement on an *ad hoc* basis.

A document entitled “The Changing Face of Enforcement,” posted on the Environment Canada web site in 1999, suggests that the shift in federal enforcement focus toward “federal facility enforcement” pursuant to the federal/provincial harmonization process and as contemplated by the Sub-Agreement “meant that pressure was exerted to temper classical enforcement responses to violations with compliance promotion and other compliance assurance tools.”<sup>151</sup> This is particularly

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151. The document states “[m]ore recently, political pressure for constitutional reform in Canada, has resulted in a shift of emphasis for the Environmental Protection Service away from direct intervention in domestic industry towards more activity on federal facilities, aboriginal lands and transboundary issues especially international commerce. This “harmonization,” while in most cases not supported by formal federal/provincial agreements, saw a general shift of domestic environmental enforcement responsibilities toward the provinces. The forces driving change in the Environmental Protection Service were pushing the department to simultaneously 1. examine ways to improve efficiencies for delivery on heightened expectations with static resources; 2. to shift emphasis from a reactive, domestic enforcement program to an anticipatory, international program. In addition, the emphasis on federal facility enforcement meant that pressure was exerted to temper classical enforcement responses to violations with compliance promotion and other compliance assurance tools. The regional structure of the Environmental Protection Service made planning for change difficult. The differing priorities of the regions, organizational structures and resource levels and absence of centralized management mitigated against common solutions. [...] The changes implemented by the

relevant in the context of mine sites, because when these sites are abandoned, title usually reverts to either the Federal Crown or the Provincial Crown. Consequently, for example, Indian and Northern Affairs Canada is potentially liable for violations of s. 36(3) occurring at abandoned mines in the north of Canada. Environment Canada indicated in October 2002 that it does not intend to adopt regulations under CEPA to force federal government departments to clean up federal contaminated sites.<sup>152</sup>

In response to the 1998 recommendation by the House of Commons Standing Committee on Environment and Sustainable Development, that Environment Canada ensure the “enforceability” of its regulations, Environment Canada created a “Regulations and Strategies” division within its Enforcement Office in Ottawa.<sup>153</sup> This division is developing an enforcement strategy for the new MMER (see above, s. 5.2.2).<sup>154</sup> It appears that the possibility of including a strategy for enforcing s. 36(3) at thousands of mines not covered by the MMER, such as Britannia, has been ruled out.<sup>155</sup> The Secretariat was not able to obtain

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Environment Canada Enforcement Program can be categorized in two approaches. The “Project Management Approach,” manifested as Action Plans, identified particular problem sectors, developed enforcement strategies, dedicated resources, established and strengthened external relationships with relevant agencies, and coordinated national activities. “Organization Efficiency” involved integrating the Environmental Protection and Wildlife Enforcement programs. [...] Implementation of selected changes is still ongoing. Due to contrasts between regions [...] each region adopted its own “home-grown” combination of the options.”

152. Canada, *2002 Report of the Commissioner for the Environment and Sustainable Development*, Chapter 2 “The Legacy of Federal Contaminated Sites” at 2.71: “Recommendation. ‘Environment Canada should develop a clear, mandatory requirement for federal organizations to clean up or manage their contaminated sites.’ [...] Environment Canada’s response. ‘The Department does not accept this recommendation at this time. It does not propose to develop a mandatory instrument under the *Canadian Environmental Protection Act* (CEPA) at this time. Environment Canada views Treasury Board Policies [see below, s. 5.3.4.1] as mandatory. Departments are making progress and significant investments are being made. The Department will continue to monitor progress on the implementation of the Treasury Board policy and will explore the development of CEPA instruments.’”
153. Telephone conversation with Patrick Hollier, Chief, Regulations and Strategies, Environment Canada, 28 August 2002. The enforcement office of Environment Canada located in Ottawa has no authority over enforcement operations in the regions.
154. Telephone conversation with Yves Corriveau, Senior Advisor, Regulations and Strategies, Environment Canada, 4 September 2002.
155. *Ibid.* At the 2001 annual meeting of the federal/provincial “Canadian Environmental Law Enforcement Association” chaired by Environment Canada, recommendations were apparently made regarding enforcement of s. 36(3) at abandoned mines for consideration by those responsible for approving the MMER enforcement strategy; telephone conversation with Ken Wile, Head, Inspections, Pacific and Yukon Region, Environment Canada, 29 July 2002.

additional information on this topic. It appears that in the absence of such a strategy, abandoned mines are inspected as part of Environment Canada's overall inspection plan, which appears to shift emphasis, from year to year, between sites that are subject to regulations, such as the MMER, and sites that are subject to the general prohibition contained in s. 36(3).<sup>156</sup>

### 5.3.3.2 Environmental Harmonization and Mining

The mining industry has been an active proponent of environmental harmonization. It has recommended amending s. 36(3) to bring it into line with provincial legislation that requires enforcement authorities to prove that a discharge caused negative environmental effects before they can take enforcement action. The industry has also urged the federal government to enter into agreements with the provinces that would give the provinces the lead in the administration of s. 36(3). At Britannia (see s. 5.6.2 and s. 5.5.3, below), a provincial remediation action plan states that "risk based" standards will be developed for inclusion in a provincial effluent permit for an upcoming effluent treatment plant, but Environment Canada has stated that the plant will have to comply with s. 36(3) as well. This subsection provides information regarding the basis for federal/provincial cooperative action which, taken together with information contained in ss. 5.2, 5.4, 5.5 and 5.6 of this factual record, allows for a consideration of whether Canada is failing to effectively enforce s. 36(3) in the context of the Britannia Mine.

In September 1992, the Mining Association of Canada presented a brief to the 49th Annual Mines Ministers' conference in Whitehorse, Yukon, outlining serious challenges facing the minerals and metals industry in Canada, including lack of public trust and environmental issues. It proposed the creation of a multi-stakeholder process to "develop a common vision and strategic plan that would take the metals and minerals industry into the next century."<sup>157</sup> The proposal was endorsed by the federal, provincial and territorial Mines Ministers and the "Whitehorse Mining Initiative" ("WMI") was launched in March 1993. The objective of the WMI was to "move toward a socially, econom-

156. The 1999-2000 report on enforcement of the habitat protection and pollution prevention provisions of the *Fisheries Act* (this is the last year for which the report is available; see *supra*, note 149) states that 29.5% of field inspections (430 field inspections) were in relation to the general prohibition contained in s. 36(3) (these figures are not broken down by industrial sector) while the rest verified compliance with specific regulations such as the MMER.

157. Whitehorse Mining Initiative, Final Report of the Environment Issue Group, October 1994 [hereinafter "EIG Final Report"] at iii.

ically and environmentally sustainable and prosperous mining industry, underpinned by political and community consensus.”<sup>158</sup>

The WMI was headed by a Leadership Council composed of all the Mines Ministers in Canada (federal/provincial/territorial); top officials of mining and processing companies; leaders of national Aboriginal organizations; labour unions; environmental organizations; and independent individuals drawn mainly from academia. The Leadership Council was supported by a Working Group consisting of assistant deputy ministers and other senior bureaucrats from a range of ministries and departments, upper management officials in mining and processing companies, heads of industry associations, and key representatives from the Aboriginal, labour, and environmental communities. Four Issue Groups were created to address the central concerns identified by the WMI, and a Secretariat was established to manage the operations of the WMI.

An “Environment Issue Group” (“EIG”), including federal government representatives from Fisheries and Oceans Canada, the Industrial Sectors Branch of Environment Canada, and the Resource Management Division of Natural Resources Canada, first met in August 1993. Its mandate covered “environmental management and regulations.” The EIG was divided into three subgroups charged with addressing issues related to the three phases of a mine’s life cycle: assessment, operations, and closure. The EIG issued its final report in October 1994. Under “Overlap and Duplication,” the report stated that

[l]ack of harmonization at the federal and provincial/territorial levels causes serious problems, including: conflicting regulations; different reporting requirements; and poor communication between regulators.<sup>159</sup>

The report recommended that “[a] designated lead agency should administer and enforce regulations. Equivalency or administrative agreements should be concluded.”<sup>160</sup> A “Leadership Council Accord” was signed in September 1994.<sup>161</sup> It set out a non-binding vision, principles and goals that the signatories agreed to support, implement, and promote. Under “Overlap and Duplication,” goals included continuing to establish cooperation agreements among jurisdictions for the development, administration, and enforcement of environmental standards

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158. *Ibid.*

159. *Ibid.* at 31.

160. *Ibid.* at 33.

161. Alberta, Quebec, Newfoundland and the Assembly of First Nations did not sign the accord at that time.

to improve the efficiency and effectiveness of the regulatory system and to reduce unnecessary industry compliance costs. Another goal was to streamline the permitting and compliance processes to minimize the time and costs to meet the requirements of the various regulatory regimes.

In November 1996, as a follow-up to the recommendations of the WMI, the House of Commons Standing Committee on Natural Resources released a report entitled “Streamlining Environmental Regulation for Mining.” The report identified impediments to mining arising under various federal statutes, including the *Fisheries Act*, and made recommendations for improvements.

Under “Towards a More Realistic Regulation of Water Quality,” the Committee’s report stated that

[t]he mining industry continues to be concerned with the broad scope of Section 36, in particular the fact that consideration is not given to the amount of the substance deposited into the water and its actual effect.<sup>162</sup>

The report stated that representatives of the mining industry urged the government to amend s. 36(3)

[...] to clearly reflect a more appropriate emphasis on the risk from exposure rather than on hazard. More specifically, the use of an acute lethality test and undiluted effluent shows hazard but does not reflect the risk posed to fish as a result of exposure to a particular contaminant concentration over a given period of time.

See s. 5.2.2, above, regarding the use of acute lethality testing to measure compliance with s. 36(3). Industry argued “[...] that it was wrong for government to impose an absolute prohibition on the deposit of deleterious substances in fish habitat waters,” and that “[...] such factors as risk assessment, the length of exposure, the concentration of the contaminant, and the chemical nature of the water body in question are all important factors that need to be considered by department officials before making regulatory decisions.”

The report stated that a joint submission filed with the Committee by the Canadian Environmental Law Association and the Canadian Institute for Environmental Law and Policy

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162. Canada, “Streamlining Environmental Regulation for Mining” (Report of the House of Commons Standing Committee on Natural Resources) (Ottawa: Queen’s Printer, 1996), “Toward a More Realistic Regulation of Water Quality.”

[...] argued that criticism that MMLERs are not “scientifically based” was simply out of place and did not reflect the nature of how the regulations were developed and administered. The regulations remain technically defensible since they are based on what is technologically feasible, and not what is required from an ecological point of view. In actual fact, the problem is not the existence of poor science, but rather that the MMLERs are not tough enough to protect local ecosystems.

The Committee reported that “[...] the federal government holds the view that section 36 is sufficiently broad and flexible to allow for a science-based approach and realistic implementation measures.” The Committee encouraged the government to proceed expeditiously with amendments to update the MMLER (see above, s. 5.2.2) and align them with provincial regulations.<sup>163</sup> Despite concern by nongovernmental organizations regarding provincial enforcement capacity, the government was urged to enter into harmonization agreements with the provinces to “allow for an optimal take up by each province of administration and enforcement responsibilities regarding [...] effluent regulations.”<sup>164</sup> The Committee recommended further that

[...] adequate financial compensation be provided by the federal government in those instances where environmental regulatory functions affecting the mining sector are transferred to provincial governments. In the future, unilateral intervention by the federal government in areas of predominantly provincial jurisdiction such as mining should be avoided.<sup>165</sup>

Also in 1996, the federal government replaced the 1987 Mineral and Metal Policy with the Minerals and Metals Policy of the Government of Canada (the “Minerals and Metals Policy”). The foreword to the Minerals and Metals Policy states that “[i]n the 1996 Speech from the Throne, the Government stated its willingness to withdraw from functions, in such areas as mining, that are more appropriately the responsibility of provincial governments, local authorities and the private sector.” Under “Regulatory Efficiency,” the Minerals and Metals Policy commits to streamlining environmental regulations affecting mining, notably by ensuring stakeholder involvement in developing regulatory approaches; ensuring that a broad range of non-regulatory approaches are considered as alternatives or complements to regulation; and strengthening processes for federal-provincial cooperation and harmonization, including through multilateral, bilateral, industry-specific or project specific agreements.<sup>166</sup>

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163. *Ibid.*, Recommendations No. 6 and 8.

164. *Ibid.*, Recommendation No. 8.

165. *Ibid.*, Recommendation No. 11.

166. Minerals and Metals Policy at 9.

#### 5.3.4 *Compliance Promotion at Contaminated Sites including Abandoned Mines*

In its response to the submission (see s. 3, above), Canada stated “Canada approaches potential violations of the *Fisheries Act* in a systematic and predictable way,”<sup>167</sup> and that “Canada’s actions with each of these three abandoned mines [Mt. Washington, Britannia, and Tulsequah Chief] and other mines clearly demonstrate a comprehensive and productive strategy aimed at eliminating the discharge of deleterious substances and thereby achieving compliance with the Act.”<sup>168</sup> This subsection contains information relevant to whether such a strategy underlies or provides the basis for Canada’s actions in regard to the Britannia Mine. In conjunction with information contained in s. 5.5, below, information provided in this subsection is relevant to a consideration of whether such a strategy has contributed to effective enforcement of s. 36(3) at the Britannia Mine.

##### 5.3.4.1 The National Contaminated Sites Remediation Program

In 1989, the CCME (see above, s. 5.3.3.1) launched a five-year National Contaminated Sites Remediation Program (“NCSRP”), a \$250M federal/provincial/territorial initiative aimed at developing a framework for dealing with contaminated sites in Canada and cleaning up high-risk, contaminated properties for which a responsible party could not be found or where the property owner was unable or unwilling to finance remediation.<sup>169</sup> NCSRP funding was made available for the Britannia Mine in 1994 (see s. 5.5.6, below). The NCSRP ended in 1995, but risk assessment criteria and clean-up standards developed by the CCME under the NCSRP are receiving renewed attention in the context of current efforts by the Government of Canada to account for its contaminated sites liabilities in its financial statements, as part of a move to full accrual accounting.<sup>170</sup>

167. Response at 13.

168. *Ibid.* at 12.

169. See CCME, *The National Contaminated Sites Remediation Program – 1994-95 Annual Report* (Winnipeg: Manitoba Statutory Publications, 1995) at 1-2. For additional information regarding the NCSRP, see CCME, *Guidance Document on the Management of Contaminated Sites in Canada*, PN 1279 (Winnipeg: Manitoba Statutory Publications, 1997); see also *1995 Report of the Auditor General of Canada*, Chapter 2 – Environment Canada: Managing the Legacy of Hazardous Wastes, online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca>> (date accessed: 18 September 2002).

170. Implementation of accrual accounting has been delayed until 2002-2003. See Canada, *Public Accounts of Canada – 2002*, Vol. I “Summary Report and Financial Statements of the Government of Canada for the Year Ended 31 March 2002” at 1.36 (Observations of the Auditor-General – Accrual Accounting Delayed) (Ottawa:

Funding under the NCSRP was allocated to provinces and territories on a population basis. Under the program, federal funds were matched by provincial or territorial funds, on a cost-shared basis. The guiding principle of the NCSRP was “polluter pays,” and under the program, the provinces committed to amending their legislation to allow them to implement this principle (through liability-allocation and cost recovery provisions) and reimburse federal contributions. By 1995, the federal government had signed agreements with all the provinces and territories for participation in the NCSRP. The facts at Britannia (see ss. 5.4, 5.5 and 5.6, below) illustrate the operation of the NCSRP on a site-specific basis, allowing for a consideration of the effectiveness of the NCSRP as a means of achieving compliance with s. 36(3) at Britannia.

Under the NCSRP, the CCME Core Group on Contaminated Site Liability developed a set of “Recommended Principles for a

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Receiver General for Canada, 2002). See also Treasury Board of Canada, “Policy on Accounting for Costs and Liabilities Related to Contaminated Sites” (effective 1 April 2002); online: Treasury Board of Canada <[http://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/tbm\\_142/acacs-ccpsc\\_e.html](http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/tbm_142/acacs-ccpsc_e.html)> (date accessed: 20 October 2002): “It is the policy of the government to account for costs and liabilities related to the management and remediation of environmentally contaminated sites when contamination occurs if the government is obligated, or is likely to be obligated, to incur such costs:

- a) for reasons of public health and safety;
- b) due to contractual arrangements; or
- c) to meet standards set out in an act or regulation of a government (federal, provincial or municipal) in Canada or abroad which are considered to be acceptable to the government.

For purposes of applying paragraph c) of the policy statement, it is not intended that the federal government waive immunity from legislation, regulations or by-laws passed by other levels of government; in cases of voluntary compliance with such legislation, regulations or by-laws, it will constitute a financial obligation for the purposes of this policy.

A department is obligated or likely to be obligated when there is little or no discretion to avoid a future transfer of assets (probably in the form of cash) to remediate a contaminated site. However, a general policy intention to remediate, where no public health and safety concerns, no contractual arrangements or no legislation, regulation or by-law exist, is not sufficient to establish a liability.”

Under “Environmental Liabilities,” the 2002 Financial Statements of the Government of Canada state: “Policy guidance has been issued to government departments and considerable progress has been made in the identification and cataloguing of suspected contaminated sites. The process of assessing the nature and level of contamination on suspected sites, and the consequent preparation and costing of a remediation plan, are technically challenging and time consuming. While complete and final estimates of the assessment and remediation liabilities attributable to the Government are not yet available, current estimates indicate that the total will be at least \$2,500 million. The Government will continue to work toward the determination and recognition of environmental liabilities” (p. 1.26 of the 2002 Financial Statements of the Government of Canada).

Consistent Approach Across Canada.”<sup>171</sup> These principles are reproduced below:

1. The principle of “polluter pays” should be paramount in framing contaminated site remediation policy and legislation.
2. In framing contaminated site remediation policy and legislation, member governments should strive to satisfy the principle of “fairness.”
3. The contaminated site remediation process should enshrine the three concepts of “openness, accessibility, and participation.”
4. The principles of “beneficiary pays” should be supported in contaminated site remediation policy and legislation, based on the view that there should be no unfair “enrichment.”
5. Government action in establishing contaminated site remediation policy and legislation should be based on the principles of “sustainable development,” integrating environmental, human health and economic concerns.
6. There should be a broad net cast for the determination of potential responsible persons. [...]
7. Remediation legislation should provide the necessary authority and means to enable the recovery of public funds on the remediation of contaminated sites from those persons deemed to be responsible for such sites. Furthermore, member governments should strive to achieve environmental priority over all other claims or charges on an estate that has entered receivership or bankruptcy.
8. Member governments should pay particular attention to the design of a process which will facilitate cleanup of sites and the fair allocation of liability. Further, this process should discourage excessive litigation to the maximum extent possible by promoting the use of alternative dispute resolution procedures.
9. A list of factors should be established for use in the liability-allocation process to allocate the liability of responsible persons depending on the specific circumstances of their involvement, and in relation to the involvement of other responsible persons. [...]

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171. CCME, *Contaminated Site Liability Report – Recommended Principles for a Consistent Approach Across Canada* (Prepared by the Core Group on Contaminated Site Liability), PN 1122 (25 March 1993).

10. Alternative Dispute Resolution (ADR) procedures should be made available by member governments as a means to resolve issues of liability for contaminated sites. [...]
11. Discretion should be retained by member governments to designate sites as contaminated sites; however, for the purposes of better predictability, governments should clarify their policies for determining which sites are to be designated, with a view to eventually harmonizing their site-designation processes. [...]
12. A “responsible person” who completes the cleanup of a contaminated site to the satisfaction of the regulatory authority, should be issued an official “certificate of compliance” by that authority, certifying that the site has been remediated to the required standards. [...]
13. Benchmarks should be developed for the remediation of contaminated sites, which will vary depending upon the land usage and site location of a particular site. [...]

Under Recommended Principle 10, the CCME cautioned

[d]iscretion must be retained, whereby the Government authority can on a reasonable basis accept or reject any particular liability allocation scheme resulting from Steps 1, 2 or 3<sup>172</sup> (e.g., where the responsible persons agree, without proper justification, to allocate the greatest percentage of liability to an insolvent company). Clear criteria may be required for the use of this authority where government is one of the responsible parties.

At Britannia, in 2001, the Province-as-PRP entered into a settlement agreement with past owners (relieving them of all liability in exchange for \$30M) and a memorandum of agreement with CBE (CBE to provide \$13M+ for perpetual operation of a treatment plant). CBE was and remains insolvent (in October 2002). Environment Canada agreed to conduct sediment investigations in Howe Sound, continue to contribute technical expertise to the review of remediation works, and support an application for \$3M in federal funding for treatment plant construction. In October 2002, the \$3M in federal funding has not yet been approved. In 2001, and consistent with Recommended Principle 10, these private agreements did not bind the provincial regulator, who continued to have authority under the WMA to name additional persons to a remediation order issued against CBE in 1999. In 2002, the WMA was amended, with the result that it is now likely impossible for the provincial regulator to name the private PRPs to the Britannia remediation order because the Province-as-PRP gave them an indemnity under the Settlement Agreement. See ss. 5.5 and 5.6, below.

172. Voluntary allocation, mediated allocation, directed allocation.

#### 5.3.4.2 Initiatives in Relation to Abandoned Mines

Since the early 1990s, the mining industry and governments have identified abandoned mine sites as a major environmental problem requiring a coordinated response. In particular, they have identified the need for a consistent approach to identifying and assessing such sites, prioritizing them for clean-up, and funding remediation, including through agreed-upon liability allocation methods. The facts at the Britannia Mine, particularly as regards current funding arrangements for proposed remediation activities (see s. 5.5.4, below), are relevant to a consideration of whether such an approach has been applied at the Britannia Mine in a manner that amounts to effective enforcement of s. 36(3).

Under the WMI (see above, s. 5.3.3.2), the EIG final report issued in October 1994 stated that “[g]overnment and industry should be jointly responsible for financing or developing mechanisms for financing the reclamation of orphaned mine sites.”<sup>173</sup> The October 1994 WMI Leadership Council Accord established the following goals relevant to abandoned mines:

[t]o establish, in each jurisdiction, an acceptable means of identifying responsible parties to undertake reclamation of old mine sites that pose a health, safety or environmental problem

and

[t]o establish, in each jurisdiction, funding means for reclaiming old mine sites where responsibility cannot be assigned. Reclamation should begin with those sites posing the greatest risk.

In December 1994, the House of Commons Standing Committee on Natural Resources tabled its fifth report, entitled “Lifting Canadian Mining Off the Rocks.”<sup>174</sup> The report was intended to address short-term measures recommended by the WMI to stimulate investment in the mining sector. Under “Tax Treatment of Reclamation Funding,”<sup>175</sup> the Committee noted that

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173. EIG Final Report at 19.

174. Canada, “Lifting Canadian Mining Off the Rocks” (Fifth Report of the House of Commons Standing Committee on Natural Resources, Robert D. Nault, chairman) (Ottawa: Queen’s Printer for Canada, 1994) [hereinafter “Lifting Canadian Mining Off the Rocks”].

175. *Ibid.* Industry sought—and the Committee recommended but was unsuccessful in securing—deferral of income tax on revenue from reclamation funds.

[t]he main issue raised by old mining sites, unlike current and future mines, is the issue of liability for funding site reclamation. The onus today is on the governments concerned and on the mining industry to assume joint or several liability for activities that were conducted at those sites, in some cases a long time ago. On this point, the major stakeholders did not appear to reach agreement during discussions conducted in the context of the WMI. At best, they agreed that it was appropriate to establish a reclamation fund for orphaned sites through a combination of income from the Consolidated Revenue Fund, taxes on the industry and consumption taxes.

In the case of old mining sites for which a liable party can be identified, it appears that the idea of establishing a fund such as that considered for orphaned sites was unacceptable to environmentalists. The industry would have been prepared to approve such an arrangement since it would have offered an alternative to the principle of joint and several liability. Under that principle, both the industry and governments would have been assigned a share of responsibility, the latter because they issued licences and permits, developed the applicable statutes and regulations and benefited from the ensuing operations. Under other scenarios, governments would be solely responsible for sites whose title had reverted to the Crown. This is thus an issue which has yet to be resolved, particularly since it can discourage exploration of old sites if a prospector or business is required to clean up previously caused environmental damage. Clean-up should nevertheless be encouraged one way or another.<sup>176</sup>

The Committee did not issue a formal recommendation regarding abandoned mines, but it suggested that Natural Resources Canada, together with its partners in the provinces and industry, establish a national database on active and orphaned mining sites and reclamation work that must be undertaken on those sites.<sup>177</sup>

In response to the Committee's report, the federal Natural Resources Minister noted that in the September 1993 Liberal Plan for Canada, "Creating Opportunity," and in the October 1993 Liberal Mining Agenda, commitments were made to define a national strategy for sustainable mineral development; to act on the results of the WMI; to promote competitiveness in the mining industry; and to work with the provinces to eliminate regulatory inefficiencies and barriers to land access.<sup>178</sup> The Minister identified the CCME Harmonization Initiative

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176. *Ibid.* at 35.

177. *Ibid.* at 37.

178. Canada, "The Federal Government's Reponse to the Fifth Report of the Standing Committee on Natural Resources: *Lifting Canadian Mining Off the Rocks*" (tabled in the House of Commons by The Honourable A. Anne McLellan, Minister of Natural Resources, 8 May 1995) [hereinafter "1995 Government Response"] at 2.

(see above, ss. 5.3.3.1 and 5.3.3.2) as addressing the issue of regulatory overlap and duplication. The Minister stated that Natural Resources Canada would maintain its momentum regarding the establishment of a national database on mine sites and reclamation. The Minister stated

Natural Resources Canada has had considerable success to date in working cooperatively with the Department of Indian Affairs and Northern Development, Environment Canada, their provincial and territorial counterparts and the mining industry, under the jointly funded Mine Environment Neutral Drainage Program, in constructing an up-to-date data base on mine-site information and on estimates of the costs of reclamation that will be needed at orphaned, inactive and active mine sites. Substantial progress has already been made, and organizations and infrastructure are in place to continue this work. In fact, Environment Canada has developed a database with systematic classification and quantification of contamination levels at federal sites.<sup>179</sup>

During this period, the federal government implemented measures to secure the remediation of abandoned uranium mines in Canada. These measures are relevant to a consideration of the approach taken at the Britannia Mine.

In 1995, the Auditor General of Canada issued a report on federal radioactive waste management.<sup>180</sup> The report noted that uranium tailings are a class of radioactive waste that falls under both federal and provincial regulations, and that the Atomic Energy Control Board had chosen not to license uranium mines that had ceased operations prior to 1976. It stated

[a]s a result, these pre-1976 sites have not been subjected to the AECB's current regulatory regime and need to be brought under its regulatory control. The federal and provincial governments need to assign residual responsibilities for the rehabilitation and decommissioning of uranium tailings sites in Ontario and Saskatchewan and for the provision of their long-term institutional care.

Like metal mines, uranium mine wastes are regulated under both federal and provincial legislation, although in the case of uranium mines, primary legislative jurisdiction rests with the federal government. Also

179. *Ibid.* at 11. The Federal Contaminated Sites and Solid Waste Landfills Inventory can be consulted online: Treasury Board Secretariat <<http://www.tbs-sct.gc.ca/dfrp-rbif/cs-sc/home-accueil.asp?Language=EN>> (date accessed: 10 October 2002).

180. Canada, *1995 Report of the Auditor General of Canada*, Chapter 3 "Federal Radioactive Waste Management" at 3.7-3.9.

like metal mines that closed before June 2002 (see s. 5.2.2, above), wastes at pre-1976 uranium mines are not covered by federal regulations.

The Auditor General's 1995 report noted that over the next 70 years, the federal share of costs for the implementation of disposal solutions for radioactive waste was estimated at \$850 million of the \$10B that is the overall responsibility of radioactive waste producers, and that the federal share was subject to increase if waste producers defaulted on their obligations. This situation is comparable to potential federal and provincial liability in connection with acid rock drainage from metal mines, which, in 1994, was estimated at \$430 million out of approximately \$5B, representing the liability (for the cost of control measures) of both government and companies in the coming decades.<sup>181</sup> As regards abandoned uranium mines, the Auditor General stated that

[t]o minimize future liabilities and the burden on future generations, Canada must now translate its technical knowledge into implementation of long-term, cost-effective solutions for its radioactive waste. It is also important to ensure that funding arrangements are in place to meet the financial requirements of future solutions.

In response to the Auditor General's recommendations, in January 1996, Canada (represented by the Minister of Natural Resources) and Ontario (represented by the Minister of Northern Development and Mines) entered into a Memorandum of Agreement under which they agreed to share (50/50) the cost of decommissioning activities at uranium mine sites in cases where the uranium producer or property owner becomes bankrupt or insolvent, or otherwise defaults on its obligations for decommissioning activities.<sup>182</sup> Management and implementation of the agreement was entrusted to a management committee reporting to the deputy ministers of the respective signatory agencies. The agreement has a term of fifty years. It can be terminated or renewed by written agreement of both parties. In a December 1997 follow-up to its 1995 report, the Auditor General reported that the federal Atomic Energy Control Board had corresponded with current owners of eleven pre-1976 tailings sites to invite them to complete and submit, on a voluntary basis, applications for prescribed substances licenses, and that it expected that most sites would be licensed by 1998.<sup>183</sup>

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181. Grant Feasby and R.K. Jones, "Report of Results of Workshop on Mine Reclamation" (Toronto, Ontario: Canada Centre for Mineral and Energy Technology, 1994) at 10.

182. Memorandum of Agreement between Canada and Ontario dated 23 January 1996.

183. Canada, *1997 Report of the Auditor General of Canada*, "Follow-up of Recommendations in Previous Reports," at s. 35.121.

The 1996 Minerals and Metals Policy addresses the issue of abandoned and orphaned mines. Under “Mine Reclamation,” the Minerals and Metals Policy states that

[...] the Government must also deal with problems associated with past practices that are no longer permitted. Such practices have led to numerous abandoned and orphaned mine sites, some of which pose a risk to the environment, human health, or public safety.

The Government will work with other governments and industry to evaluate and develop alternative financing mechanisms that are acceptable to all stakeholders. In addition, more information on the number and condition of these sites is required. It is recognized that initiatives are underway in some provinces to conduct a survey of abandoned and orphaned mine sites. The Government is aware of the need for action to clean up those abandoned and orphaned mine sites within federal jurisdiction that represent an unacceptable risk to the environment or human health and safety. It also recognizes the need for the owner of the site, where one can be identified, to pay for the clean-up costs.<sup>184</sup>

In its 1996 report on streamlining environmental regulation for mining (see s. 5.3.3.2, above), the House of Commons Standing Committee on Natural Resources referred to the issue of abandoned mine sites without making any recommendations.<sup>185</sup> It stated, however, “WMI was probably the cornerstone of a new approach to all the problems, issues and challenges facing a unique industrial sector. In this context, the Canadian mining industry has made a clear commitment to assume its full environmental responsibilities and implement the ‘polluter pay’ principle.”<sup>186</sup>

At the 1999 and 2000 Mines Ministers meetings, industry associations and environmental nongovernmental organizations proposed that a multi-stakeholder group be formed to address the topic of orphaned/abandoned mines. The Mines Ministers agreed. A workshop was held in Winnipeg in June 2001. The 63 attendees represented 12 provinces and territories; 7 NGO groups; 5 First Nations; 5 federal government departments, offices and boards; 7 mining companies; 5 mining industry associations; 3 communities; 3 consultants and 1 academic. Environment Canada made a presentation about effluent problems at the Britannia Mine and the solution envisaged under an agreement with

184. *Ibid.* at 14.

185. “Streamlining Environmental Regulation for Mining,” Environmental Challenges and Progress in the Mining Sector, A. Primary Environmental Effects of Mining.

186. *Ibid.*, Environmental Challenges and Progress in the Mining Sector, B. Progress Made in the Mining Sector.

past owners (see s. 5.5.3, below). The group developed consensus, guiding principles and recommendations for Ministers to consider at the 2001 Mines Ministers Conference. They concluded that with adequate resources and resolve, significant progress can be made in the assessment, characterization and remediation/reclamation of orphaned and abandoned mine sites in Canada within 5-10 years.

At the September 2001 Mines Ministers meeting, the proposal for a multi-stakeholder advisory committee was endorsed, and government funding was subsequently made available to allow the Committee to commission preliminary studies into three aspects of the abandoned mines problem: information gathering; community involvement; and barriers to collaboration.<sup>187</sup> Preliminary findings were reported to the Mines Ministers at their September 2002 meeting, and are summarized in an Action Plan 2001 Status Report (the “Status Report”).<sup>188</sup> The introduction to the “Orphaned and abandoned mine site rehabilitation” section of the Status Report states

Ministers agreed on the importance of implementing, over the short term, a large-scale programme for rehabilitating orphaned and abandoned mine sites. [...] While recognizing that each jurisdiction will develop its own implementation strategy, the advisory committee will report on options for funding models and mechanisms including the financial participation of industry and federal, provincial and territorial governments, legislative barriers to collaboration, and appropriate community involvement in decision-making.<sup>189</sup>

On information gathering, the Status Report indicates that metadata on active, closed and orphaned/abandoned mines have been collated from seven provinces, one territory and one federal agency.<sup>190</sup> The Status Report states that rehabilitation costs cannot be accurately estimated at this time. Next steps include collating information, agreeing upon definitions and establishing a framework for data collection and prioritization.

On community involvement, the Status Report states that case studies have been completed for three abandoned mines (the Giant Mine

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187. Natural Resources Canada is currently acting as a “Secretariat” for the committee, while the Manitoba Ministry of Industry, Trade and Mines is currently housing the committee’s web site; online: Orphaned/Abandoned Mines Initiative in Canada. <<http://www.gov.mb.ca/itm/mrd/orphan/members.html>> (last updated: 6 September 2002).

188. Canada, 2002 Mines Ministers Conference, “Action Plan 2001 Status Report” at 9.

189. *Ibid.*

190. *Ibid.*

in the Northwest Territories; the Deloro Mine in Ontario (see s. 5.2.3.3.1, above); and the Mount Washington Mine (see s. 2, above) in British Columbia) and one non-mining contaminated site, the Sydney Tar Ponds, in Nova Scotia.<sup>191</sup> Next, the Committee will publish guiding principles for community engagement and develop a best practices guide for community involvement to be presented to the Mines Ministers in 2003.

On barriers to collaboration, the Status Report indicates that a preliminary review of Canadian federal and provincial legislation, as well as select laws at the U.S. federal and state level, and from the United Kingdom and Australia, has been completed with a view to identifying regulatory and institutional barriers, liability disincentives and collaborative opportunities.<sup>192</sup> The Status Report lists “key findings” as follows:

- The current legislative and regulatory regime in Canada is at best patchwork, at worst indifferent to the problem;
- There is no existing or proposed federal or provincial law regarding “Good Samaritan” legislation, (that protects persons willing to redevelop a site from liability for historic contamination);
- There are a number of liability disincentives to carrying out voluntary work with a few limited exceptions (e.g. variance authority);
- There are examples of collaborative initiatives that have been undertaken without legislative reform;
- Federal and Provincial/Territorial governments must work together to establish regulatory certainty for the management of orphaned/abandoned mine sites.<sup>193</sup>

Next steps include publishing a report on barriers to collaboration and identifying preferred options for consideration by federal/provincial/territorial governments in 2003. The Status Report also indicates that the Committee will establish a task group to review funding approaches and identify preferred options (see s. 5.6.2, below).<sup>194</sup>

In September 2002, an international, multi-stakeholder, mining-industry led initiative (entitled “Mining, Minerals and Sustainable Development” (“MMSD”)) coordinated by the London-based Interna-

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191. *Ibid.*

192. *Ibid.* at 10-11.

193. *Ibid.* at 11.

194. *Ibid.* at 12.

tional Institute for Environment and Development (“IIED”) published a series of reports identifying sustainable development challenges for mining across the globe and making recommendations. In a report entitled “Towards Change: The Work and Results of MMSD-North America,” the North American working group identified “the legacy issue” as an immediate priority.<sup>195</sup> It identified key challenges as including: (1) developing a comprehensive inventory of abandoned and orphaned sites; (2) assessing the nature and significance of concerns in each case; (3) developing an effective way for prioritizing sites so that the worst get addressed first; and (4) developing a formula for coming up with the resources for the required action.<sup>196</sup>

The North American MMSD working group recommended enhancing efforts to address the legacy of past mining and mineral activities. It stated that

[i]n Canada, the Mines Ministers have created the Orphaned/Abandoned Mines Advisory Committee to address the issue under the chair of Dr. Christine Kaszycki, Assistant Deputy Minister of Mines, Manitoba. The Advisory Committee is a national multi-interest mechanism involving all key interests including industry associations, regulatory agencies and communities, First Nations and nongovernment organizations. In addition, the Inter-governmental Working Group on Mining has also been mandated by the Mines Ministers to address this issue. Most of the implicated interests also have their own dedicated task forces or committee. For Canada, the Advisory Committee is the logical mechanism to coordinate continued work on this topic.<sup>197</sup>

At the 2002 Canadian Mines Ministers Conference, the IIED presented a submission applauding the Mines Ministers for supporting the work of the Committee and urging them to maintain this topic as a top priority.<sup>198</sup>

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195. MMSD North America, “Towards Change: The Work and Results of MMSD-North America” (MMSD: 2002) at 57.

196. *Ibid.* at 62.

197. *Ibid.* at 57.

198. David Runnalls, President and CEO, IIED and R. Anthony Hodge, IIED Mining Team Leader, Facilitator, MMSD-North America, President, Anthony Hodge Consultants Inc., “Mining and Sustainability in Canada: The Two Top Priorities” (Presentation to the 2002 Mines Ministers Conference, Winnipeg, 15-18 September 2002) at 3-4. By way of background, the submission explains (at 1) that in 1999 in Davos, nine chief executive officers of the world’s largest metal mining companies decided to launch a “Global Mining Initiative” through the World Business Council on Sustainable Development (“WBCSD”) and the WBCSD retained the IIED to carry out the MMSD project to identify how mining and minerals can best contribute to the global transition to sustainable development.

In Canada's country report to the September 2002 Johannesburg World Summit on Sustainable Development, Canada reported on the mining sector, identifying sustainable development challenges facing industry and government during the last decade. It identified the WMI as having established a sustainable development agenda for Canadian mining. It identified the 1996 Minerals and Metals Policy as an example of the federal government's application of the concept of sustainable development to the mining industry. It identified abandoned mines as an environmental performance issue that has faced the mining industry through the 1990s. It stated that the provinces of British Columbia, Saskatchewan, Manitoba, Quebec and Ontario have each launched programs to remediate selected orphaned and abandoned mine sites, and that the mining industry has been promoting establishment of a stakeholder advisory committee to address the issue on a national basis. It noted that a small number of companies have gone back to reclaim mines they had previously sold. Under "Future Challenges," it stated that "[t]he legacy of abandoned mines—un-reclaimed sites with no known owner—remains a complex challenge in Canada for governments, the mining industry and communities."

In October 2002, the CESD issued its annual report, including findings of an audit of federal government actions and policies for the identification, assessment and remediation of federal contaminated sites.<sup>199</sup> Noting that the federal government had spent over \$66M on studies and remediation efforts at the privately-owned Sydney Tar Ponds site in Nova Scotia,<sup>200</sup> the CESD concluded that

[s]everal gaps remain in federal policy related to contaminated sites. The government still needs to decide what role it wants to play in the cleanup of contaminated sites it does not own or manage, including those where other levels of government are involved, such as the Sydney tar ponds. It also needs to decide on its role in dealing with contaminated sites where the federal government is involved but the contamination was caused by others, including orphan sites such as abandoned mines in the North (s. 2.68).

One chapter of the CESD 2002 annual report is devoted to the issue of abandoned mines in the North.<sup>201</sup> These are mines that are closed but where remediation or ongoing maintenance is still required, and owner-

199. Canada, *2002 Report of the Commissioner of the Environment and Sustainable Development*; Chapter 2 "The Legacy of Federal Contaminated Sites;" online: Auditor General of Canada <[http://www.oag-bvg.gc.ca/domino/cesd\\_cedd.nsf/html/menu3\\_e.html](http://www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/menu3_e.html)> (date accessed: 1 November 2002).

200. *Ibid.* at 2.27.

201. *Ibid.* at 3.

ship has reverted to the federal Crown, usually after the private sector owner has gone bankrupt. The CESD concludes that the federal government lacks an overall plan to coordinate and finance remediation and maintenance activities at these sites, and to prevent such situations from recurring, and it makes a number of recommendations, all of which were agreed to by Indian and Northern Affairs Canada, the federal government department responsible for management of these sites.<sup>202</sup>

In its 2002 report, the CESD identified the work and objectives of the Multi-stakeholder Advisory Committee on Orphaned/Abandoned Mines, noting that

[...] action on the ground is slow. Four federal departments, including Indian and Northern Affairs Canada, are part of this committee. We believe that this initiative is an opportunity for the federal government to play a leadership role.<sup>203</sup>

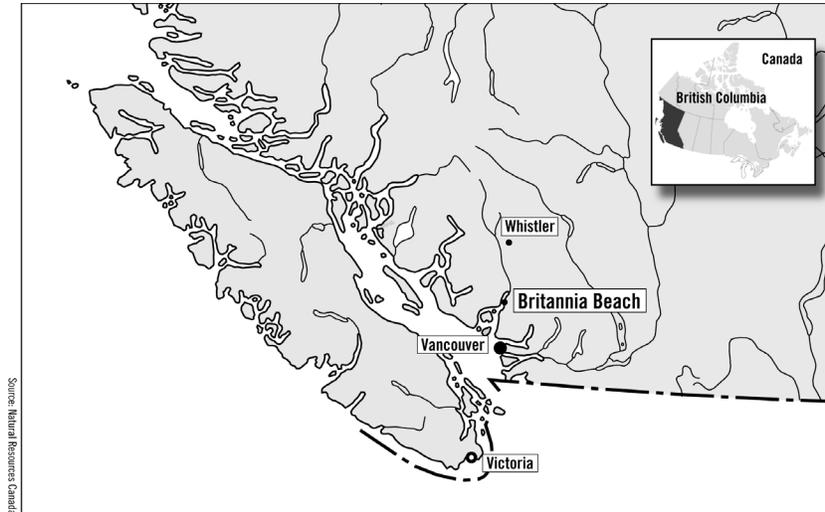
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202. *Ibid.* at 3.83-93.

203. *Ibid.* at 3.77.

#### 5.4 Alleged Violations of s. 36(3) at the Britannia Mine

Figure 1. Map



The Britannia Mine (“Britannia” or the “mine”) is located on the eastern shore of Howe Sound in British Columbia, just off Highway 99, between Vancouver and Whistler. All that can be seen of the mine from the highway is an old mill building that is now home to the B.C. Museum of Mining.<sup>204</sup> The mine workings are located inside Mt. Sheer, which rises to a height of approximately 4600 feet over a distance of about 7 kilometers from the shore.<sup>205</sup> Britannia operated from 1904 to 1974.<sup>206</sup> In the 1920s, it was the largest copper mine in the British Empire.<sup>207</sup> Approximately 47 million tonnes of ore were extracted from the mine during its 72 years of operation.<sup>208</sup>

204. Information gathered by the Secretariat during site visits on 23-24 May 2002 and 12 June 2002. On 23 May 2002, Secretariat staff attended a town hall meeting regarding progress on the Britannia Mine Remediation Project (see below, s. 5.5.4) and toured the B.C. Museum of Mining. Employees of CBE gave Secretariat staff and consultants a tour of the 4100-level and 2200-level portals and former town-site area. Access by land to the Jane Basin was not possible due to poor road conditions and snow cover.

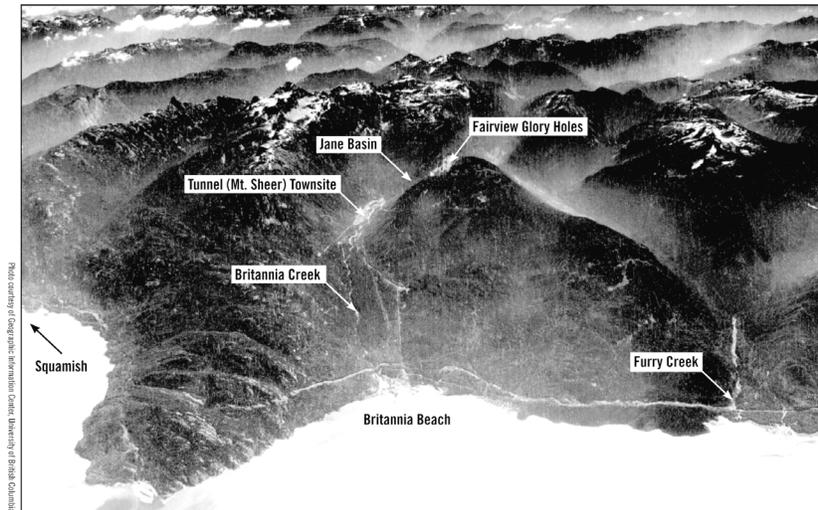
205. For an extensive, if somewhat dated, compilation of information about environmental issues at the Britannia Mine, with hyperlinks to other studies, see Chris Mills, “The Former Britannia Mine, Mount Sheer/Britannia Beach, British Columbia; online: Enviromine <<http://www.enviromine.com/ard/Case%20Studies/Britannia.htm>> (date accessed: 24 October 2002).

206. See B.C. Museum of Mining (Information Brochure), “Facts and Figures”; see also online: <[bcmuseumofmining.org](http://bcmuseumofmining.org)> (date accessed: 20 October 2002).

207. *Ibid.*

208. See Mills, *supra*, note 205 at 1.

**Figure 2. Aerial photograph of the Britannia Mine and Howe Sound showing key locations**



Oblique Aerial View of the Britannia Mine and Mill Area, 1947 (BC 398-111)

The mine was owned and operated by the Britannia Mining and Smelting Company from 1902-58, by the Howe Sound Company from 1958-1963, and by three different subsidiaries of the Anaconda Mining Company from 1963-79.<sup>209</sup> The mine closed in 1974. In 1979, the property was purchased from Anaconda Canada Exploration Ltd. by the current owner, Copper Beach Estates Ltd. (“CBE”).<sup>210</sup> In May 2002, CBE changed its name to Britannia Mines and Reclamation Corp. (“BMARC”). For ease of reference to historic materials, BMARC is referred to as CBE throughout this factual record.

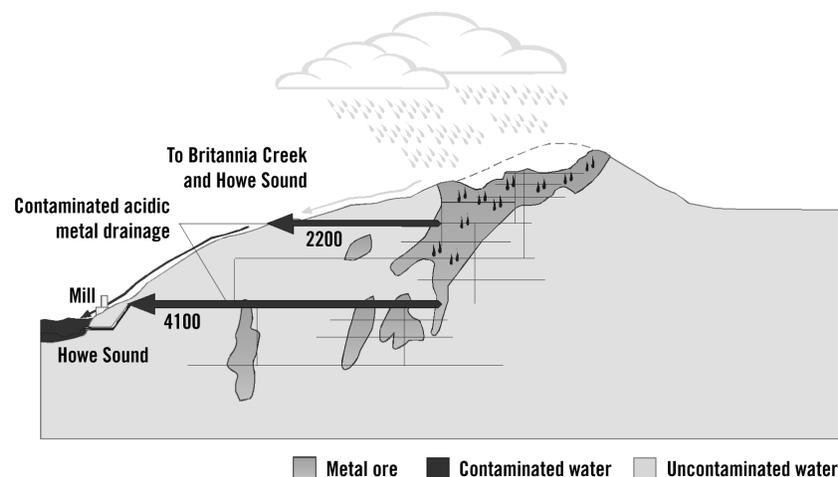
In the early days of mining at Britannia, access to the area was by water only. Company offices were located near the shore at Britannia Beach, and a mining community was situated at the 2200-level, halfway

209. Information in this section is drawn in large part from a submission filed by CanZinco Ltd. (the “CanZinco Submission”) with the British Columbia Ministry of Water, Land and Air Protection (“MWLAP”) in 2000, as part of a process launched by the MWLAP under Part 4 of the BC WMA in 1998 to determine persons responsible for addressing pollution at Britannia. A copy of the CanZinco Submission was provided to the Secretariat by Barry Azevedo of the MWLAP during a meeting on 13 June 2002. See paras. 9, 79 of the CanZinco Submission.

210. In May 2002, CBE changed its name to Britannia Mines and Reclamation Corp. (“BMARC”). For ease of reference to historic materials, BMARC is referred to as CBE throughout this factual record.

up the mountain. Access to the townsite was by mountain railway. Shafts were drilled into the side of the mountain at the 2200- and 4100-levels, as well as at other locations, to allow miners to access underground workings and transport ore out of the mine. From the 4100-level, ore was delivered by rail to a concentrator (or mill) erected on a steep slope at the base of the mountain. From the mill, the ore was shipped to various locations in the United States for further processing. The 2200-level town site was eventually abandoned and the mining community relocated to the flatlands by the water, where it remains.<sup>211</sup> In the late 1960s, a road was built high up Mount Sheer, to the Jane Basin, to allow for open pit mining.<sup>212</sup>

**Figure 3. Graphic Representation of Pollution Problem at the Britannia Mine<sup>213</sup>**



A series of creeks run from the top of Mount Sheer to Howe Sound. Jane Creek passes the 2200-level, eventually joining Britannia Creek, which runs through the flatlands at Britannia Beach before reaching Howe Sound. Some 44 million tonnes of mine tailings—waste produced

211. Some of the original buildings are still present on-site, but trailer homes have been added. The community is still a “mining town.” Residents are tenants of the mine owner, on whom they rely for all utilities, such as water and hydro, and other services usually provided by municipalities.

212. CanZinco Submission at para. 89.

213. Al Colodey, Environment Canada, “Britannia, B.C., Past, Present and Future” (Presentation to Multi-stakeholder Workshop on Orphaned/Abandoned Mines) Winnipeg, June 2001.

during milling—resulted from the operation of the concentrator at Britannia.<sup>214</sup> Tailings were initially piped to Britannia Creek and were later piped directly onto the bed of Howe Sound as well as to shallower waters just offshore.<sup>215</sup> Some tailings were used as fill on the property.

From the beginning of mining at Britannia, effluent from the mine discharged to Britannia Creek and Howe Sound from the 2200- and 4100-level portals. The effluent is acidic and contains dissolved and suspended heavy metals. During the operation of the mine, the level of copper in the effluent was so high that beginning in the 1920s, copper was recovered from the effluent and sold.<sup>216</sup> To recover the copper, in a process called “cementation,” cascading cement trenches were installed at the 2200- and 4100-level portals and filled with scrap iron. As much as 80% of the copper in the effluent would attach to the scrap iron, releasing non-toxic (but unsightly, because of its orange color) iron into the effluent, Britannia Creek and Howe Sound. In the 1930s, copper levels in the mine effluent reached 1300 mg/L (by way of comparison, the allowable limit under the MMER<sup>217</sup> is 0.3 mg/L), with annual copper production from cementation approaching 450,000 kg.<sup>218</sup> Former owners allegedly sought to increase the profitability of this venture by increasing effluent flow through diversion of surface water into glory holes<sup>219</sup> in the Jane Basin.<sup>220</sup> By the time the mine closed in 1974, Mount Sheer contained 210 kilometers of mine tunnels.<sup>221</sup> Rain, surface water, and snow-melt entered the mine through glory holes and open pits, flushing through the old mine tunnels, picking up metals and turning acidic along the way. The effluent then exited the mine through the 2200- and 4100-level portals. In 1974, information was becoming available showing the negative impact of the discharge on the marine environment in Howe Sound (Brodie: 10/22/74).<sup>222</sup> In 1979, the year in which Anaconda sold the mine to CBE, BC Environment adopted pollution control objectives for mine effluent.

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214. Mills at 1.

215. CanZinco Submission at paras. 74, 95-6.

216. *Ibid.* at paras. 75-77.

217. See s. 5.2.2, above.

218. Steffen, Robertson and Kirsten, Consultants, “Evaluation of ARD from Britannia Mine and the Options for Long Term Remediation of Impact on Howe Sound” (1991) at 3-6, quoted in Feasby, *infra* s. 5.6 at 4-5.

219. Mining inside Mount Sheer extended well below sea level as well as all the way to the top of the mountain. At the top, this resulted in “subsidence,” a caving-in phenomenon that left huge “glory holes” at the top of the mountain.

220. CanZinco Submission at paras. 88-90.

221. See B.C. Museum of Mining, *supra*, note 206.

222. See CanZinco Submission, “Pollution Control and Other Environmental Issues: The Provincial Crown and Anaconda/Arco (1971-present)” at paras. 158-196.

MMER standards do not apply to Britannia effluent (see s. 5.2.2, above), but Environment Canada uses them for comparison purposes in evaluating compliance with s. 36(3).<sup>223</sup> The principal MMER criterion relied upon by Environment Canada in assessing whether effluent at Britannia complies with s. 36(3) is the requirement that the effluent be non-acutely lethal to fish.<sup>224</sup> Britannia effluent has been and remains acutely lethal to fish.<sup>225</sup> Environment Canada tests for acute lethality by exposing rainbow trout to undiluted effluent for 96 hours. If more than half the trout die, the effluent is considered to be acutely lethal to fish. Environment Canada uses other MMER standards as a reference in identifying potential violations of s. 36(3).<sup>226</sup>

Information provided to the Secretariat by Environment Canada indicates that between 1995-2001, copper concentrations in mine effluent at Britannia (2100-level portal + 4100-level portal) ranged from a minimum of 3.69 mg/L to a maximum of 134.4 mg/L, compared to an MMLER/MMER limit of 0.3 mg/L.<sup>227</sup> Zinc levels in Britannia effluent ranged from 1.22 mg/L to 75.6 mg/L, compared to an MMLER/MMER limit of 0.5 mg/L. The range of pH levels recorded in Britannia effluent (2200-level portal + 4100-level portal) is 2.4-4.5, while the acceptable range under the MMER is 6.0-9.5.<sup>228</sup>

Information on effluent flow is relevant to a consideration of the magnitude of the potential violations. The average monthly discharge of effluent from the Britannia Mine (2200-level flow + 4100-level flow), per second, ranges from 93 liters per second in September to 334 liters per second in June (the high volume in June is due to snowmelt).<sup>229</sup>

223. Telephone conversation with Robert McCandless, Senior Program Officer, Industrial Programs, Pacific and Yukon Region, Environment Canada, 11 October 2002.

224. *Ibid.*

225. Environment Canada has indicated that an effluent treatment plant being proposed for the site is intended to, among other things, achieve “[...] the removal of acute toxicity to fish (rainbow trout) as evaluated using a 96h test and 100% effluent. [...] In the past 25 years, numerous Court decisions have recognized this type of test as one means of defining ‘deleterious substance’ under s. 36(3) of the *Fisheries Act*,” Facts on the Britannia Mine at 4.

226. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada stated: “The determination of a deposit of a deleterious substance is complex and does not necessarily reference MMER limits or limits of other *Fisheries Act* regulations, but relies on site-specific evidence gathered by an inspector or fishery officer designated under the *Fisheries Act*, and other expert testimony presented to the court at trial.”

227. Facts on the Britannia Mine at 2.

228. These levels were recorded in 1998. See Feasby, *infra*, note 310 at 5.

229. Facts on the Britannia Mine at 2.

The 2200-level portal was plugged on 31 December 2001 (see s. 5.5.4, below), with the result that mine effluent is no longer contaminating Britannia Creek. The plug reroutes effluent from the 2200-level inside the mine to the 4100-level, where the combined effluent discharges to Howe Sound from a submerged outfall. While the effluent is no longer discharging to Britannia Creek, the daily mass or flux of metals released into the fish-bearing waters of Howe Sound from the submerged outfall remains the same or slightly less than before.<sup>230</sup> This results in ongoing potential violations of s. 36(3) at Britannia.

At the provincial level, effluent standards are set on a site-by-site basis, in effluent discharge permits issued under the WMA, by reference to provincial pollution control objectives that were developed in the late 1970s for different industrial sectors, including mining, and on the basis of provincial water quality guidelines. The objectives, together with the guidelines, provide guidance on contamination levels that must not be exceeded at the point of discharge and in the receptor water bodies. The province ordered Anaconda to apply for an effluent discharge permit for Britannia in the early 1970s, but no permit was issued because of protracted negotiations regarding effluent treatment requirements and technical issues caused by mine closure in 1974. The province issued effluent remediation orders against Anaconda in 1974, 1977 and 1979, and against CBE in 1981 and 1993, but those orders did not contain effluent standards. BC Environment issued an effluent discharge permit containing effluent standards to CBE in 1999, but that permit has lapsed because CBE never followed through on a 1999 remediation proposal.<sup>231</sup> In May 2002, the provincial regulator issued a letter stating that he expects that provincial effluent standards will be developed for Britannia based on plans for a future effluent treatment plant and results of ongoing investigations.<sup>232</sup> He has also stated that any future effluent discharge permit will probably be issued to the site remediator [BC Environment] rather than to CBE.<sup>233</sup>

Since the 1970s, the principal focus of federal and provincial environmental regulators at Britannia has been to find a way to stop (or treat) effluent discharge from the 2200-level portal (to Britannia Creek) and from the 4100-level portal (to Howe Sound). Site contamination and offshore sediment contamination issues have received some attention in the past and are being addressed in a comprehensive manner since 2001

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230. *Ibid.*

231. See letter from Eric Partridge, Director of Waste Management, MWLAP to CBE (13 May 2002) Re: Britannia Mine: Permit PR-15938; Permit PE-12840.

232. *Ibid.*

233. *Ibid.*

(see s. 5.6, below). Since 2001, on-site soil and groundwater investigations at Britannia Beach have indicated that the use of tailings as fill material and the presence of waste rock piles is causing groundwater and surface water contamination, much of which reaches Howe Sound in potential violation of s. 36(3).<sup>234</sup> Studies conducted in the past regarding impacts of mine tailings on sediment quality on the bed of Howe Sound concluded that natural build up of new sediment was covering those tailings and helping to prevent them from impacting the marine environment.<sup>235</sup> Federal studies are now underway regarding the potential effects of tailings deposited in the nearshore intertidal zone on fish and fish habitat.<sup>236</sup>

#### 5.5 *Canada's Actions in Regard to Alleged Violations of s. 36(3) of the Fisheries Act at the Britannia Mine*

In April 2000, in reply to Canada's response to the submission (see s. 3, above), the Submitters provided the Secretariat with a copy of a document prepared by Sierra Legal Defence Fund, entitled "Britannia Beach: Summary of Documents and Evidence."<sup>237</sup> With reference to this document, the Submitters asserted

[...] the actions which Canada has undertaken cannot, in any sense of the word, be considered to fulfill Canada's obligation under section 5 of the NAAEC to "effectively enforce its environmental laws and regulations through *appropriate* governmental action" [emphasis added by Submitters]. As is shown in the enclosed document "Britannia Beach: Summary of documents and Evidence," Canada has, for over 20 years, engaged in the "softer" environmental enforcement approaches, with the result that no environmental improvement has occurred. The Submitters are not concerned, *per se*, with the specific approach chosen by Canada, as long as it is effective. However, the Submitters say that to continue to pursue the same enforcement options, when those options have clearly failed cannot be considered effective enforcement.<sup>238</sup>

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234. Letter from Ron Driedger, Deputy Director of Waste Management, British Columbia Ministry of Water, Land and Air Protection, to Anaconda/ARCO *et al.* (25 April 2001) Re: Britannia Mine Site Remediation.

235. Mike Hagen, Pollution Prevention and Assessment, Environment Canada, "Britannia Marine Sediment Contamination: Interim Status of Knowledge and Next Options" (2 March 2001).

236. *Ibid.*

237. Letter from Randy L. Christensen, Sierra Legal Defence Fund, to David Markell, Head, Submissions on Enforcement Matters Unit, CEC (18 April 2000) and attachment, "Submitters' Reply to the Canadian Response to Submission 98-004" [hereinafter "Submitters' Reply"].

238. *Ibid.* at 5.

The Secretariat kept this information on file pending an instruction from Council regarding the development of a factual record. In April 2002, as part of the information-gathering process for the factual record, the Secretariat asked the Sierra Legal Defence Fund for copies of materials used by the Sierra Legal Defence Fund to prepare the Britannia Beach document referred to above. On 29 April 2002, the Secretariat received from the Sierra Legal Defence Fund a banker's box containing copies of provincial government correspondence and other materials regarding the Britannia Mine. The dates of the correspondence range from the 1980s to 1998. Most of the information contained in this section of the factual record (especially ss. 5.5.1 and 5.5.2) is drawn from these materials. Post-1998 information is drawn mainly from the web site of the BC Ministry of Water, Land and Air Protection, which contains copies of correspondence issued by the BC Regulator regarding site remediation at Britannia (see s. 5.5.3, below).<sup>239</sup>

In response to the Secretariat's Request for Information (see Appendix 4), Canada provided the Secretariat with a memorandum prepared by Environment Canada, dated March 2002, entitled "Facts on the Britannia Mine." The memorandum contains information on characteristics of ARD at Britannia, Environment Canada monitoring activities, proposed effluent remediation measures, a list of federal/provincial enforcement and compliance promotion actions, information on financial resources expended by Environment Canada and Fisheries and Oceans Canada on enforcement and compliance promotion at Britannia, and an overview of current progress on remediation under the BMRP. The appendices to the memorandum contain detailed scientific reports by Environment Canada, Fisheries and Oceans Canada and others regarding the environmental impacts of Britannia effluent. Canada did not provide the Secretariat with certain types of information normally available under access to information legislation, such as copies of letters, memos, e-mails, agreements, inspection reports and other documents, unless specific documents were requested. In a telephone conversation, an Environment Canada employee confirmed that Environment Canada has not conducted an inspection or an investigation and thus has not had an enforcement file on the Britannia Mine since at least 1999.<sup>240</sup> In response to the Secretariat's 8 May 2002 Request for

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239. See online: BC Ministry of Water, Land and Air Protection <<http://wlapwww.gov.bc.ca/sry/p2/britannia/index.htm>> (date accessed: 22 October 2002).

240. Telephone conversation with Ken Wile, Head, Inspections, Environment Canada, Pacific and Yukon Region, 29 July 2002. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada stated: "Environment Canada has maintained numerous other files related to compliance promotion activities including the technical review of proposed treatment and site-remediation options."

Additional Information (see Appendix 5), Environment Canada provided some requested information in writing.<sup>241</sup> On 11 June 2002, Secretariat staff met with federal officials of Canada in regard to that request.

In “Facts on the Britannia Mine,” Environment Canada stated

[d]espite the constraints with proceeding with prosecutions under the *Fisheries Act*, Environment Canada and DFO have taken various actions since the 1970s to promote compliance with and enforce the *Fisheries Act* at the Britannia Mine site. These actions have included assessment and monitoring, public education, field and laboratory research, and maintaining effective partnerships with provincial ministries to address the water pollution problems.<sup>242</sup>

This section of the factual record contains relevant information obtained from the Submitters, from Canada and from the public regarding actions taken by Canada to enforce and promote compliance with s. 36(3) of the *Fisheries Act* at the Britannia Mine. To the extent that much of the information contained in this section concerns provincial government action, such information is relevant to a consideration of whether Canada is failing to effectively enforce s. 36(3) at the Britannia Mine because Canada has indicated that it has provided technical advice and expertise to the province of British Columbia to support the province’s enforcement efforts under the *Pollution Control Act* and its replacement, the *Waste Management Act*.<sup>243</sup> For a proper consideration of this information, this section should be read in conjunction with ss. 5.2 and 5.3, above.

Most documents referred to in this section are listed in Appendix 7 in chronological order. For ease of reference to Appendix 7, in this section of the factual record, documents are identified using the last name of the author, followed by the date (undated documents are listed at the end of Appendix 7). All references to conversations, meetings, etc. are

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241. Environment Canada provided the Secretariat with a copy of the 1994-95 Annual Report of the National Contaminated Sites Remediation Program (by fax on 27 May 2002); a copy of the application filed by the Fraser Basin Council to the Canada-B.C. Infrastructure Program for funding for treatment plant construction at Britannia (by fax on 7 June 2002); a copy of a submission filed by Canada with the Regulator under the provincial potentially responsible persons process in respect of pollution at the Britannia site (in person on 11 June 2002); a link to information on Mining-Watch Canada’s web site regarding the Multi-stakeholder Advisory Committee on Orphaned/Abandoned Mines, as well as a link to the Mine Environment Neutral Drainage Program of Natural Resources Canada (by e-mail on 22 May 2002); and a copy of the Settlement Agreement between the Province-as-PRP and the private PRPs (in person on 11 June 2002).

242. Facts on the Britannia Mine at 5.

243. *Ibid.*

based on information contained in documents listed in Appendix 7. In many cases, a reference is provided at the beginning of a paragraph only. Subsequent statements are covered by that reference, until a new reference is provided. Finally, for some documents, either the date or the name of the author were missing from the information provided to the Secretariat. Missing information is listed as “n/a” or “n/d”. For ease of reference, a timeline is provided in Appendix 8.

#### *5.5.1 1974-1994 / Relevant Historical Information*

In Council Resolution 01-11, the Council directed the Secretariat to consider, in developing the factual record, whether Canada “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on 1 January 1994.” The Council added “[i]n considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.” This section contains such facts.

On 25 October 1974, the Pollution Control Branch of BC Environment<sup>244</sup> ordered Anaconda Canada Ltd. (“Anaconda”) to “collect mine water and direct it to the 4100 portal and thence to Howe Sound at depth, after appropriate treatment (i.e. Cu removal).” Anaconda shut down the mine on 1 November 1974, citing low copper prices and dwindling reserves. BC Environment and Anaconda then spent several years negotiating an agreement on measures to comply with the 1974 order. BC Environment told Anaconda that any proposal would likely be subject to compliance with EPS [Environment Canada] standards for total metals (Brodie:10/22/74).

In February 1975, Environment Canada asked BC Environment for copies of plans prepared by Anaconda to comply with BC Environment’s 1974 order (Brodie: 3/4/77).

In 1976 BC Environment wrote to Anaconda (Brodie: 8/3/76), stating:

As you are aware there is evidence of very high levels of copper and zinc in shellfish all along Howe Sound. Lacking any evidence to the contrary, we must conclude that its source is the Britannia Mine water.

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244. To avoid confusion resulting from name changes over the years, in this section, the provincial environment ministry is referred to as “BC Environment” and the provincial mining ministry is referred to as “BC Mines.”

It is our assessment that there is no existing technology for removal of all contaminants of concern from the Britannia Mine water at a bearable cost, considering the large volume, the concentration of contaminants, the potential sludge disposal problem, and the non-operating position of the mine. However, the development of new technology may change this assessment and we cannot predict this likelihood.

Nevertheless, there may be some potential for more efficient removal of copper which would undoubtedly benefit the receiving waters assuming that the heads copper concentration does not significantly change from that of past years. If as you suggest the heads concentration is rapidly decreasing, we would appreciate a summary of historical copper levels to support this.

It is unlikely that we can provide any formal guarantee that further treatment of the mine water will not be required at some future date, however, we might be in a better position to informally provide assurance that such would be the case provided steps were being taken to improve copper recovery to the maximum extent possible with existing cementation technology, or else that evidence indicated rapidly decreasing contaminant levels.

It is our intention to review the proposals for handling mine water and domestic sewage with Environment Canada and other government agencies prior to finalizing our discussions in the form of a Permit. We will do so once we have your response to the above.

BC Environment met with Environment Canada and Fisheries and Oceans Canada in March of 1977 to obtain final comments on a proposal by Anaconda to direct all mine water to the 4100-level, channel it through copper launders<sup>245</sup> and then pipe it to a submerged outfall to be built deep in Howe Sound (Brodie: 3/4/77). A memo to file drafted by the Head of the Industrial Division of the Mining Section of the Pollution Control Branch of BC Environment summarizes the meeting. Because it covers many topics related to pollution and pollution control at Britannia and for ease of reference, the memo is reproduced in its entirety below. Environment Canada is referred to as "EPS."

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245. See explanation of copper-exchange ("cementation") process above, s. 5.4.

File: 0262100-AE-2194  
 Date: March 4, 1977  
 From: Industrial Division  
 Mining Section (JBB)

MEMO TO FILE

Meeting with EPS and Fisheries re Anaconda Ltd. (AE-2194)

Meeting was held on March 1, 1977 at the EPS offices in West Vancouver.  
 In attendance were:

Mack Ito	EPS
Rick Kussat	"
Claudio Guarnaschelli	EPS
Darcy Goyette	"
Rick Harbo	Fisheries
Hal Nelson	EPS
F.P. Hodgson	PCB
J.B. Brodie	"

It was explained that our purpose was to obtain any final comments from EPS on the proposal for discharge of mine water before directing the Company to proceed.

JBB reviewed the situation as follows:

The mine and mill have operated since around 1900 discharging various quantities of tailings to Howe Sound foreshore. Recent milling rate was 2200 T/D. In addition mine water has flowed to Britannia Creek, probably over most of the life of the mine. Recently, mine water high in Cu, Zn, Fe, Al, etc. at a low pH has flowed from the 2200 and 4100 levels. Before the mine shut down in November 1974, it was proposed to neutralize mine water with lime and discharge the product along with tailings to Howe Sound at depth.

Following the shut down, the PCB [Pollution Control Branch] proposed a pilot plant facility to find a means of treating the mine water at Britannia, having possible application at other locations. Budgetary and staff restrictions have essentially thwarted this proposal.

In October 1974, the Director ordered Anaconda to collect mine water and direct it to the 4100 portal and thence to Howe Sound at depth, after appropriate treatment (i.e. Cu removal).

A letter from EPS in February 1975 requested copies of plans.

We now have a proposal finalized which fulfills the requirement. To be disposed of is 1-15 x 10<sup>6</sup> IGPD of mine water containing 20 ppm Cu, 60 ppm Zn, Fe 225 ppm, Al 90ppm, Cd 0.40 ppm, pH 3.0 and 40,000 IGPD sewage treated by septic tank. Levels obviously do not come close to meet-

ing either PCB levels or Environment Canada standards. There is no further treatment known which is practical based on the sludge disposal problem and high cost. However, the proposed scheme will:

1. rehabilitate Britannia Creek by removing all mine water from it.
2. remove contaminants from the foreshore area.
3. improve aesthetics.
4. provide a vehicle for sewage disposal and its disinfection.

Data was passed around showing that Cu levels appear to be decreasing with time.

The plans were reviewed showing the piping and flow collection systems and the outfall. It was pointed out that the consultants calculate that for the 185 ft. deep outfall, a surface turbidity will be evident only when mine water flows exceed 5000 gpm, or 4.4% of the year on average. A copy of the plans was left with EPS; they are to be returned.

Discussion followed:

Q: Had air entrainment been considered?

A: Yes, in the design of the stilling wells, etc. but because tailing solids were not involved, and there was no deliberate aeration through flotation nor use of frothing agents, it was not expected to be a problem.

Q: Would conventional lime treatment be feasible?

A: If the sludge is discharged it will likely redissolve. If sludge is removed, the volume is extremely large—estimated 2 barge loads per day.

Q: Was instability of the bottom expected to cause problems?

A: Sclaire pipe was to be used because of its ability to conform to changes in the topography. Other locations had been considered but this was found to be most suitable.

Q: Is the mine water turbid?

A: It was when the mine was in operation and a settling pond was present for this purpose. Now it is not turbid and proposed to bypass pond.

Q: Was a security bond obtained?

A: It had not been considered because of the difficulty in determining a reasonable sum.

Q: Was there any requirement for Anaconda to continue to operate the copper plant?

A: No specific requirement in order, but it was our understanding it is to continue to operate. If it did not continue, we would likely have something to say.

Q: Was the operation of the copper plant profitable?

A: We understood it is, but to what extent is not known.

Q: Could some government agency step in to set up an investigation of possible treatment routes?

A: This is essentially what we had proposed but at this time, the PCB could not follow through.

Q: To what extent could Anaconda carry out investigations?

A: The Company had already indicated a willingness to contribute in some way but could not give a commitment until they were given more specific terms of reference or requirements.

Q: Could the Director require further treatment if suitable technology became available?

A: Yes.

Q: Was there any opportunity for increasing capacity and/or efficiency of Copper plants?

A: Undoubtedly but it is only 4.4% of the time that the flow is in excess of what the existing plant can handle. In addition, copper levels are decreasing at a rate which may make copper recovery rather inefficient in the near future. Also, these plants only remove copper and actually increase iron levels.

Q: What about sealing of mine?

A: Mine sealing has not been effective in the U.S. coal mines where the topography is more favourable. At this time, sealing off openings would merely force the water out at a higher level. FPH explained the layout of the mine and how water draining into old pits at the top of the mountain finds its way in through caved areas and old workings. Our discussion with Merritt (Assist. Chief Inspector of Mines) and previous mine manager at Britannia suggest sealing or reduction of water entering mine is not possible.

Q: Have the use of biocides been considered (to destroy the bacteria responsible for catalyzing the oxidation of sulfides).

A: Not possible to get application of biocides through active leaching areas.

J.B. Brodie

JBB:dp

cc: R/M – Lower Mainland

In April 1977, BC Environment informed Anaconda that Environment Canada had agreed that Anaconda's plan (described above) should proceed (Hodgson: 4/26/77). BC Environment noted that Environment Canada felt that "there may be opportunity for increased copper recovery," and stated that "[t]his aspect may be pursued at a later date but may be considered independently of the outfall." BC Environment told Anaconda that it did not think the Britannia mine was covered by the new federal *Metal Mining Liquid Effluent Regulations and Guidelines*.<sup>246</sup> BC Environment informed Anaconda that Anaconda would be required to carry out an effluent monitoring program. In response to a request from Anaconda for assurances that there would no additional remediation requirements, BC Environment stated "aside from possible upgrading of the copper plants, there is no intention of requiring further treatment in the foreseeable future."

In May 1977, Anaconda informed BC Environment that it would be installing a concrete plug at the 4100-level to regulate effluent flow from the mine. This measure was expected to optimize copper removal through the cementation process by reducing peak effluent flows from the mine (Brodie: 5/11/77).

In 1978, British Columbia Development Corporation considered purchasing the Britannia assets from Anaconda, with the possibility of reselling the land to a private concern. A representative of the British Columbia Development Corporation stated that any developers involved "[...] would have considerable financial resources—possibilities under consideration are a ship terminal, a pulp mill, or grain elevator" (Brodie: 2/21/78).

On 20 June 1979, CBE entered into an option to purchase (the "Option") the Britannia Mine from Anaconda for \$5M (Option to Purchase: 6/20/79). Two notable provisions of the Option include the requirement for the purchaser, within one year of the exercise of the Option, to convey at least 40 acres of relatively flat land at Britannia Beach to the "Britannia Beach Historical Society" for free (s. 14(B)), and an acknowledgment and agreement by the purchaser that "it will be after the Completion Date fully and continually responsible for environmental obligations [...]" (s. 15).<sup>247</sup> Under the Option, the Purchaser was

246. The Secretariat received no information regarding whether Anaconda consulted with federal authorities on this matter.

247. Specifically, s. 15 provided that "(a) The Seller shall have no liability for existing or prior environmental conditions, obligations, or responsibilities that are the result of the Seller's or its predecessor's activities on the Property under this Agreement. In the event an existing or prior environmental condition develops or expands, the

responsible for “obtaining any and all consents of governmental departments and agencies to the transfer of the Property” (s. 17).

CBE exercised the Option on 29 October 1979, purchasing Anaconda’s mineral claims, and surface and foreshore rights at Britannia, as a single block for \$4.9M. On the same day, CBE sold a small parcel of shorefront Britannia lands to Dome Petroleum for approximately \$6M, under an agreement reached with Dome Petroleum on 30 August 1979 (Fodchuk: 1/7/80).

In December 1979, Anaconda advised BC Environment that it was submitting its last monitoring report and the agency responded by reminding Anaconda of its continued obligations under provincial pollution control orders (Hamilton: 12/10/79).

On 14 January 1980, BC Environment met with representatives of CBE. As provided in the Option, CBE was requesting the transfer of waste discharge responsibilities from Anaconda to itself (Hamilton: 1/14/80). CBE indicated that it was interested in the Britannia assets for real estate development purposes. BC Environment explained to CBE that pollution control orders are not transferable and that therefore, a new order would have to be issued to CBE. BC Environment stated “[...] the Branch will want to insure continuity of responsibility over a long term therefore substantiation as to the company structure or posting of a bond may be required.”

At the 14 January 1980 meeting referenced above, CBE sought assurances from BC Environment that its responsibilities under any new order would be limited to obligations found in the existing orders issued against Anaconda (which required Anaconda to divert effluent from the 2200-level to the 4100-level, run the combine effluent through copper launders, and then discharge it at depth into Howe Sound). BC Environment stated that this could not be assumed and would not be confirmed,

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Purchaser shall be obligated to remedy or correct the cited environmental condition. Should correction of an existing or prior environmental condition require maintenance or repair, the Purchaser shall perform and continue such necessary maintenance or repair; (b) The Purchaser shall have full and continuing responsibility, legal obligation, and liability on any existing or future environmental conditions; (c) The Purchaser shall have full responsibility for continual operation of environmental controls now required or required in the future on the Property. This duty shall include the environmental facilities necessary as a result of the existing mine workings both surface and subsurface on the Lands; (d) The Purchaser will assume, pay and discharge any and all liabilities, claims or demands arising out of any environmental conditions in connection with the Property; (e) the Seller is not presently aware of any citations or complaints regarding existing or pending environmental conditions on the Property.”

since the Director had discretion to order changes to works to reflect the state of the art in environmental protection, and considering that discharge requirements for copper were determined on the basis of site-specific requirements.

On 18 January 1980, CBE wrote to BC Environment, requesting the transfer of the Anaconda orders to CBE, along with assurances that barring a significant change in the volume or physical and chemical characteristics of the mine water discharge, no improvements or alterations to the pollution control system would be required to meet current statutory standards (Hodgson: 2/21/80). In its letter, CBE stated that it was a private company incorporated under the British Columbia *Companies Act* on 22 March 1979 (Certificate No. 188, 389). CBE listed its address and the names of its officers, and attached a letter of reference from the Bank of Montreal stating that the company had no debt, that its cash reserves “are in the high five figure range,” that “assets total well in excess of \$1,000,000” and that “[t]he company is considered fully responsible in its financial affairs” (Bossons: n/a).

BC Environment replied that it wished “[...] to be sure that Copper Beach Estates Ltd. fully understands the implications of such action” (Hodgson: 2/21/80). BC Environment stated that

[...] there is no guarantee that an upgrading of the works will not be required. Major expenditures could be needed in a few years to replace some of the pipe sections. The potential for underground caving and the subsequent unacceptable increase of metal concentrations in the mine water should not be overlooked.

BC Environment again mentioned the posting of security, and added “[...] however, you may have an acceptable alternative.”

On 29 January 1981, CBE was ordered to

[...] collect and direct all mine drainage water to the discharge point known as the 4100 foot portal and to discharge this effluent to Howe Sound via the copper recovery plant and submerged outfall approved by the Director on 26 April 1977. In addition, you are directed to operate the copper recovery plant at all times when the dissolved copper level in the mine water exceeds 15 mg/L and discharge the treated water to the submerged outfall. During the periods when the mine water contains less than 15 mg/L dissolved copper, the copper recovery plant may be bypassed. [...] Additional treatment and/or monitoring may be required in the future, based on information collected by the Waste Management Branch (Ferguson: 1/29/81).

CBE was also required to implement a monitoring program involving monthly sampling of copper plant “heads” and “tails”<sup>248</sup> and analysis for dissolved copper, as well as quarterly sampling of effluent discharged to the submerged outfall, with analysis for pH, dissolved iron, zinc, lead, cadmium, sulfate, suspended solids and acidity. Reports were to be sent to the Regional Manager and the Director of the Pollution Control Branch of BC Environment. The order made no mention of any requirement for the posting of financial security. This order replaced and superseded the orders previously issued by BC Environment to Anaconda. The Secretariat received no information regarding whether Environment Canada was consulted regarding the issuance of this order.

In 1984, BC Environment wrote to CBE, informing CBE that recent analyses of the copper recovery plant effluent showed copper levels exceeding 15 mg/L and stating that at the 2200-level portal, effluent was discharging to Jane Creek instead of being re-routed inside the mine to the 4100 level, with copper values far in excess of 15 mg/L. Both sources of effluent were found to be highly toxic to fish (Apostoli: 2/13/84). CBE replied by saying it would look into the source of the leak at the 2200 level (Cumming: 3/23/84). CBE also pointed out that the 1981 order did not impose a standard of 15 mg/L for dissolved copper, but rather simply stated that treatment in the copper treatment plant was required if the “heads” of the copper treatment plant exceeded 15 mg/L (i.e. if copper levels in effluent entering the copper launders exceeded 15 mg/L).

A note to file by a person named Dennis Trudeau<sup>249</sup> indicates that three Government of Canada employees gathered information at the Britannia mine in mid-July 1984, as a follow-up to a September 1982 survey (Trudeau: 7/4/84). They took samples of effluent from the 2200-level portal and other locations, as well as at the copper launders, to determine their “effectiveness.” The Secretariat obtained no additional information regarding the origin, results, or outcome of this information-gathering exercise, what standards the “effectiveness” of the copper launders was measured against, or which federal government department was involved.

During the mid-1970s and mid-1980s, BC Environment, Environment Canada and the Department of Fisheries and Oceans carried out environmental studies into the effects of the mine’s effluent on the

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248. This meant that effluent had to be sampled before entering the copper launders and after discharge from the copper launders.

249. Title unknown.

receiving environment.<sup>250</sup> In 1986, BC Environment sent CBE a copy of an environmental assessment report indicating that dissolved metals concentrations were increasing in Britannia Creek and the adjacent marine waters, and that dissolved metals concentrations toxic to marine bacteria, brine shrimp, mussels and young chum salmon were occurring in Britannia Bay (Stringer: 5/7/86). The assessment recommended that CBE route all mine effluent to the submerged outfall; that CBE reduce dissolved metal loadings in the effluent by at least 50%; and that CBE retain a consultant to do the required work. BC Environment asked CBE to follow up on an earlier undertaking to obtain cost estimates for the mine drainage diversion work (from the 2200-level portal to the 4100-level).

In the late 1980s, BC Environment wrote to CBE several times, identifying harm to the environment being caused by the Britannia effluent and requesting that CBE comply with the 1981 order. CBE took no action. Effluent discharged directly from the 2200-level portal to Britannia Creek, and from there to Howe Sound. The copper launders had become filled with debris. Effluent was also bypassing the submerged outfall.

During this period, BC Environment twice considered taking enforcement action against CBE for failure to comply with the 1981 order, but enforcement was hampered by the wording of the order and by an interpretation contained in a letter from BC Environment to CBE that the order allowed the submerged outfall to be bypassed if copper concentrations in the effluent were lower than 15 mg/L (Britannia Reclamation Advisory Committee: 6/17/92). Also, the order did not reflect current provincial discharge standards. 15 mg/L was one hundred times higher than the current provincial standard for copper in that type of effluent (Robb: 7/30/90). Provincial tests later showed that effluent discharging to Britannia Creek from the 2200-level portal would continue to be acutely toxic to fish even when diluted 10,000 times with fresh water (Moore: 8/9/93).

BC Environment decided to continue studying the situation and employees of the Lower Mainland Region of BC Environment recommended issuing a new order. Some BC Environment employees were concerned that issuing a new order would result in CBE declaring bankruptcy, with liability defaulting to the province (Britannia Reclamation Advisory Committee: 6/17/92). To avoid this possibility, BC Environment considered naming former property owners to any new order.

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250. Facts on the Britannia Mine, Appendix B.

In the early 1990s, Environment Canada was represented on a provincial “Britannia Reclamation Advisory Committee” (Britannia Remediation Advisory Committee: 6/17/92). The committee was composed principally of provincial environment and mine ministry officials from the regional and the provincial capital offices. A document from that period states “[a] multi-agency committee has initiated two studies. One study is to characterize the mine wastes and the other is to determine the impact on the receiving environment” (n/a: 12/16/92).

On 20 April 1990, 372900 British Columbia Ltd. purchased a controlling interest in CBE (Drummond: 1/31/94). It appears that financing for this acquisition came from the immediate resale of CBE assets.<sup>251</sup>

First, CBE sold a large section of uncontaminated Britannia lands<sup>252</sup> to Tanac Development Canada Corp. (“Tanac”) for a golf course/condominium development project, for approximately \$17M (Fulber: 2/1/98; Fotheringham: 6/20/99). It appears that while legal counsel for Tanac consulted with provincial environmental officials as part of the pre-purchase due diligence process<sup>253</sup> (Dixon: 4/6/90), employees involved in the enforcement of the 1981 provincial remediation order at Britannia only became aware of the sale through the papers. A fax from late 1991 states

[t]he attached article is from last week’s Squamish Times. Copper Beach is apparently divesting (they are selling shares for a proposed golf course). We may be left “holding the bag” if we don’t act soon (Robb: 10/22/91).

Then in mid-1991, CBE proposed to sell a portion of the remaining Britannia assets, including the Britannia Beach lands, to 40091 British Columbia Ltd. (“40091”), also for real estate development purposes (Robb: 6/16/94). Pending the conduct of its due diligence (Alesi: 6/26/91), 40091 advanced \$5.8M to CBE and secured this loan with a mortgage on those assets (Robb: 6/16/94). After conducting its environmental due diligence, 40091 decided to withdraw from the deal but was unable to obtain the return of its funds from CBE. 40091 obtained a court order for the sale of the mortgaged assets, an order that remains in

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251. CBE remained the owner of the Britannia Mine, but control of CBE was now in the hands of the principals of 372900 British Columbia Ltd. It appears that those persons raised the funds to purchase the shares of CBE by negotiating to sell off valuable parts of the property once they had gained control of the company.

252. Certain pollution issues associated with these lands were later discovered.

253. In the context of business transactions, “due diligence” refers to the level of inquiry one can reasonably expect from a purchaser to satisfy itself that the business being purchased is worth the purchase price.

effect at the time of writing (October 2002) (Deputy District Registrar: 11/29/91).

The regional office of B.C. Environment in Surrey notified officials in the provincial capital office in Victoria (which had issued the 1981 order) that a new order was needed urgently because CBE appeared to be

attempting to sell the valuable assets of the company (uncontaminated development property) and retain only the liabilities (the acid generating mine) for the people of British Columbia to inherit if they should declare bankruptcy (Robb: 11/8/91).

In August 1991, a flood at Britannia Beach severely damaged the submerged outfall. The damaged outfall was removed by employees of BC Environment (Wong: 5/26/93). Since the 1981 order could not be used to require CBE to replace the outfall, BC Environment did so in 1993-4. BC Environment's removal of the damaged outfall in 1991 was considered by provincial government officials to be another obstacle to the enforcement of the 1981 order (Wong: 5/26/93).

Late in 1993, BC Environment issued an additional order against CBE (Robb: 11/25/93). The new order stated that the province had discharge objectives applicable to mine effluents; that while such objectives were generally sufficient to prevent pollution, site-specific conditions also warranted consideration; and that drainage at Britannia could and did cause pollution.<sup>254</sup> CBE was ordered to hire a consultant to develop a plan to treat all mine drainage, including drainage from underground workings and surface run-off from waste rock piles, "to such an extent that the treated discharge does not cause pollution." The plan was to include a description of proposed treatment or other systems, quality and quantity of discharge, cost estimates and implementation schedule. CBE was also to apply for a provincial waste management permit and to submit audited financial statements. Terms of reference were due on 31 December 1993, and the plan was due on 31 July 1994.

No additional parties were named to the new order because CBE appeared to be willing to cooperate and take steps to resolve the effluent problem. In addition, CBE had filed a court action in an attempt to recover \$11M from former owners of the company. In addition, BC Environment felt that its legislation did not allow it to issue orders against

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254. Pollution is defined in the British Columbia *Waste Management Act* as the "presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment."

former owners who had not carried on mining at the site. As for former owners that had carried on activities at Britannia, company searches by provincial environmental authorities “failed to uncover any existing companies that have any ties back to the mining [at Britannia], and [counsel to the province] thinks it unlikely that further (more extensive) searches will be of any use” (MacDonald: 4/12/94).

The 1993 order was made “without prejudice to any legal action that may be taken under the *Waste Management Act*, or other relevant legislation, with respect to the discharges.” The Secretariat obtained no information regarding whether Environment Canada was consulted regarding the issuance and content of this order.

#### 5.5.2 1994-1996 / Orphan Sites Funding and the Search for a Buyer

In February 1994, provincial environmental officials classified the Britannia site using criteria developed under the National Contaminated Sites Remediation Program (“NSCRP,” see above, s. 5.3.4.1). Britannia scored 86 out of 100, 70 being the threshold for high risk. Provincial officials concluded that

[t]herefore the site would be eligible for Orphan Sites Funding if it were ever to become an “orphan,” which it currently is not. Gordon will send me a copy of the assessment, and he considers that item of the plan to be completed (n/a: 2/28/94).

The Secretariat obtained no information regarding the assessment undertaken to classify Britannia under the NSCRP or as regards the “plan” mentioned above.

In April 1994, apparently upon learning that CBE was engaging in logging at Britannia in violation of the mortgagee’s rights,<sup>255</sup> 40091 obtained a court order naming Coopers and Lybrand Ltd. receiver-manager of the Britannia assets. CBE thereby lost its principal source of income, rents from residents of Britannia Beach. CBE told provincial officials it could not comply with the 1993 order, partly because it no longer had control of the property. On application by provincial environment officials, the court order was amended in August of that year. Under the order, CBE employees had the right to access the property and the receiver-manager was given the power to carry out environmental investigations (Supreme Court of British Columbia: 8/2/94). To ensure continued delivery of utility services to the community, the receiver-

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255. Personal communication from Ralph Fulber, 23 May 2002.

manager was given full immunity from personal liability under provincial environmental laws in connection with the exercise of its powers and duties under the order (Doyle: 8/10/94).

In August 1994, counsel to the province clarified that CBE

is not bankrupt or in receivership, but simply that the court had appointed a receiver/manager to look after the property. CBE still owns the property, can still be ordered by the Ministry (presumably are still legally subject to existing orders), and could be charged/prosecuted (MacDonald: 8/29/94).

During 1994, several companies came forward expressing an interest in purchasing 40091's interest in the Britannia assets (MacDonald: 2/7/95). BC Environment consulted with Environment Canada regarding conditions to be attached to any sale.

Environment Canada supported BC Environment's intention to make compliance with the 1993 order a condition of sale, subject to possibly extending the deadline for filing the required plan to treat mine effluent at Britannia. Environment Canada also recommended attaching a restrictive covenant to the property titles to inform prospective buyers of pollution abatement responsibilities, and suggested preventing severing of surface and subsurface titles, or division of the contiguous mineral claim block overlying the whole area, to avoid weakening the clear link between the pollution problem and ownership of the mineral claims (Nassichuk: 6/16/94). BC Environment replied that a restrictive covenant required the consent of the owner, and that surface and subsurface titles were already separate, although BC Environment would object in court to any application to sell such titles to separate parties.

In July 1994, BC Environment applied to Environment Canada for joint funding under the NCSRP to deal with pollution issues at Britannia (Hubbard: 7/18/94). In September 1994, a BC Environment employee advised his colleagues that an Environment Canada employee had informed him that

"[...] there is now a signed agreement between the province and the feds with respect to Britannia. The agreement utilizes the federal *Fisheries Act* as a mechanism to recover funds—I believe the feds have authorized the expenditure of \$500,000 before March 31, 1995, on the condition that the province matches this amount" (Robb: 9/12/94).

Information gathered by the Secretariat did not include a copy of this agreement. The Secretariat obtained a copy of a signature page of a

document containing a “Resource Summary” that indicated projected expenditures from 1994 through 1996 totaling \$4.3M “(excl. plant construction)” and contained an explanatory note stating

[t]he above estimated costs are very rough \$ estimates. The cost of sealing and or relocating acid generating wastes located on surface will be contingent on the quantity and location of the wastes to be sealed or moved. Capital and operating costs for AMD treatment [...] for lime neutralization, approximately adjusted for inflation will approximate \$4M for construction and \$1.2M per year for operation. Capital and operating costs for other technologies are not available” (n/a: 1/9/94).

The signatures are for “Canada’s representative on the Management Committee” and “British Columbia’s representative on the Management Committee,” respectively. The British Columbia signature is dated 8/29/94 and the Canada signature is dated 1/9/94. Other documents reference such an agreement (McCracken: 4/11/95; Niemela: 4/13/95). A provincial document entitled “Britannia Beach Acid Mine Drainage Pollution” states “[a]t that time (29 August 1994), the federal government had up to \$2 million for a 50/50 federal/provincial remediation program, but this was later revised down to \$300,000, and eventually the federal funds were reallocated” (n/a: 11/27/95).

The Environment Canada employee referred to above scheduled a multi-agency meeting and had proposed to proceed with a remediation program in two stages, beginning with a request for proposals for an effluent treatment pilot project, followed by a request for proposals for the design and construction of an effluent treatment plant (Robb: 9/12/94). He also recommended naming a project manager to act as an intermediary between government agencies and consultants. BC Environment cautioned that this initiative would have to be brought to the attention of the court, as it could affect the purchase price for the Britannia assets.

A multi-agency technical committee was struck to prepare a budget and work plan for the use of NCSRFP funds at Britannia. In late 1994, the Environment Canada representative on this committee urged his provincial counterparts to obtain approval for immediate work on a pilot plant to test proposed effluent treatment methods at Britannia. He argued that significant progress in this direction would increase the likelihood of federal funding in the following fiscal year, and “[t]he sooner we can stop/treat the existing effluents, the better” (McCandless: 11/1/94).

The provincial chair of the technical committee subsequently wrote to the assistant director of the Industrial Waste and Hazardous Contaminants Branch of BC Environment, stating that

the Britannia Technical Committee which I chair is in danger of floundering unless it soon receives direction from an executive committee having the mandate to insure that progress in remediating the acidic drainage from the Britannia mine site is made in an expeditious manner (Ford: 11/3/94).

Provincial officials were concerned that spending federal and provincial funds at Britannia with the intention of recovering costs from a potential purchaser of the Britannia assets risked scaring away potential purchasers. One BC Environment employee noted that

[i]f we have already started to act, and intend to bill them for it, then they will have to pay our costs (which will almost undoubtedly be much more expensive than a private solution). This may well scare off purchasers, leaving no one to address the problem or recover money from (MacDonald: 9/12/94).

Officials at BC Environment also felt that cost recovery potential could be compromised if the purchaser was not given an opportunity to present its own remediation options or at least provide input to solutions being considered by government agencies. A lingering concern was that the province and the federal government might spend several million dollars studying the problem and identifying a solution, only to be left with no funds to implement the solution (Wong: 9/30/94).

The NCSRP required provinces to recover federal and provincial costs from “responsible parties.” In most cases, this meant that the provinces had to amend their environmental legislation to add new liability and cost recovery provisions.<sup>256</sup> In June 1993, the British Columbia legis-

256. See Core Group on Contaminated Site Liability, CCME, *Contaminated Site Liability Report – Recommended Principles for a Consistent Approach Across Canada* PN 1122 (Winnipeg: Manitoba Statutory Publications, 1993). Recommended Principle No. 7: “Remediation legislation should provide the necessary authority and means to enable the recovery of public funds expended on the remediation of contaminated sites from those persons deemed to be responsible for such sites. Furthermore, member governments should strive to achieve environmental priority over all other claims or charges on an estate that has entered receivership or bankruptcy.” Under the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended by S.C. 1997, c. 12, s. 15 (“BIA”), “for bankruptcies, proposals or receiverships in respect of which proceedings are commenced after 30 September 1997, any claim by the Crown in right of Canada or a province against a debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or

lature had given royal assent to legislation (“Bill 26”) amending the *Waste Management Act* to add a comprehensive framework for addressing the remediation of contaminated sites.<sup>257</sup> Bill 26 created wide-ranging order powers against past and present owners and operators, cost recovery provisions, and powers to prevent companies from reducing assets needed to pay for clean-up. To come into force, however, Bill 26 required the adoption of a contaminated sites regulation. The regulation was not adopted until April 1997 and the contaminated sites provisions of the WMA came into force on 1 April 1997.

Given that Bill 26 was not in force in 1994, BC Environment had to identify other legislation that could be used to recover clean-up costs. Section 42 of the *Fisheries Act* (see Appendix 6) was initially considered for this purpose, but was ruled out by counsel for British Columbia for a number of reasons (Macdonald: 8/29/94 and n/a: n/d<sup>258</sup>). One reason was that liability under that provision was seen as fault-based by counsel for the province, making it difficult to invoke against a current owner who had never carried on mining at the site.<sup>259</sup> Another concern was that s. 42 provides a defense to liability in cases where pollution is caused by “a natural phenomenon of an exceptional, inevitable and irresistible character”: counsel for the province remarked that from the perspective of CBE, the ARD discharging from the Britannia Mine might be seen as such a phenomenon.

The province decided to use s. 17 of its *Mines Act* instead (Wong: 10/3/94).<sup>260</sup> This provision allowed the province to secure cost recovery

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environmental damage affecting real property of the debtor is secured by a charge on the real property [...] and the charge [...] ranks above any other claim, right or charge against the property,” notwithstanding any other provision of the BIA or anything in any other federal or provincial law.

257. Bill 26, the *Waste Management Act Amendment Act*, was given royal assent on 18 June 1993.

258. Document does not list author or date.

259. In fact, s. 42 does not require proof of fault against the person having ownership or control of a substance, only those having caused the pollution.

260. In 1994, s. 17 read as follows:

Abandoned mine

17. (1) Where an inspector is of the opinion that work may be necessary in, on or about a closed or abandoned mine in order to avoid danger to persons or property or to abate pollution of the land and watercourses affected by the mine, he may enter on or below the surface of the mine and may cause work to be done to remove or alleviate the danger or remedy the pollution.

(2) The costs incurred for work done under this section shall be paid from the consolidated revenue fund without an appropriation other than this subsection.

(3) The amount expended plus interest at a prescribed rate is a debt due to the Crown and forms a lien and charge on the mine or mineral title in favour of the government.

by registering a lien against title, effectively blocking any transfer of title pending reimbursement of its clean-up costs.

While the text of s. 17 is fairly straightforward, using this provision in the Britannia context proved problematic. First, using s. 17 meant that BC Mines had to take the lead in the clean-up effort, something it was reluctant to do (Ford: 9/28/94). In addition, while s. 17 allows BC Mines to expend clean-up funds directly from the provincial consolidated revenue fund, BC Mines nevertheless insisted that the Britannia proposal be sent to the provincial treasury board for approval, which involved delays (Sihota: n/d). Finally, there were concerns that the cost of research required to develop solutions to the Britannia effluent problem might not be recoverable under s. 17 (as not being “work,” see text of s. 17, below), and that discharges to Howe Sound in particular might not fall within the scope of s. 17, as Howe Sound might not qualify as a “watercourse” pursuant to the *Mines Act* (MacDonald: 9/27/94).

During late 1994 and throughout 1995, the process of moving forward on securing provincial funding and beginning work under the auspices of the NCSRP was hampered by parallel procedures aimed at finding a buyer for the Britannia assets. The problem was explained by Master Patterson of the Supreme Court of British Columbia in delivering his reasons for adjourning foreclosure proceedings regarding the Britannia assets (Patterson: 10/19/94). According to Master Patterson, most offers filed with the court came from “shell” companies (with no assets) and provided for long due diligence periods to allow the potential purchaser to find and secure government approval for a solution to Britannia’s environmental problems before assuming ownership (Patterson: 10/19/94). 40091 felt that it could not accept any such offer, however reasonable, because during the due diligence period, the province and the federal government might incur significant environmental research costs at Britannia, which would then come off the top of any proceeds of sale. 40091 would therefore lose some, maybe even all, of its investment, and the purchaser would get a windfall (Bury: 9/20/94). The court agreed, and asked that the governments specify clean-up costs (Patterson: 10/19/94). The governments, in turn, did not possess sufficient information about the scope of the environmental problem and

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(4) Notice of the debt in the prescribed form may be registered as a charge in the land title office or in the office of the chief gold commissioner, and no transfer of title or other dealing with the mine shall take place until the debt is paid and the notice cancelled.

(5) The Minister may, with or without payment and on conditions the minister may impose, cancel the notice registered under subsection (4) and, on that happening, the mine may be transferred or otherwise dealt with.

possible solutions to be able to advance any dollar figure with certainty (Doyle: 11/23/94).

The province eventually agreed not to register clean-up costs as a first charge on any proceeds of sale. Instead, an order would be issued making any sale subject to s. 17 of the *Mines Act*, thereby allowing for cost-recovery negotiations between the province and the parties to any proposed sale (Doyle: 11/23/94).

In May 1995, the Regional Director General of Environment Canada wrote to the Deputy Minister of Environment of British Columbia expressing his “[...] concern with the lack of progress in addressing the severe pollution at the abandoned Britannia mine site” and indicating that “[w]e are prepared to work with your staff on this matter and provide any additional information you might require” (Anthony: 5/9/95). In June 1995, he advised the Assistant Deputy Minister of Environment of British Columbia that

[t]he federal government is prepared to provide whatever assistance we can in the way of technical and scientific support to ensure that this long outstanding problem is addressed and resolved (Anthony: 6/22/95).

In early June 1995, with the deadline for provincial treasury board approval of budget allocations fast approaching, BC Environment asked Environment Canada to drop its requirement for a private sector remediation proposal to be approved prior to federal disbursement under the NCSRP. It also advised that it seemed unlikely that the British Columbia Treasury Board would agree to allocate funding of several million dollars in the current fiscal climate (Gunton: 6/5/95). BC Environment noted that a private sector remediation proposal had been submitted and would take some time to review. In the interim, BC Environment proposed to obtain treasury board approval, by 30 June 1995, to cost-share an expenditure of \$600,000 for environmental research. It was felt that this would have the advantage of improving “private sector certainty and lead to site rehabilitation.”

At a national meeting on funding decisions for the final year of the NCSRP, the NCSRP Program Committee decided that federal funding commitments for Britannia would be withdrawn unless the province had confirmed matching funds in the amount of \$305,000 by 30 June 1995 and the province committed to

securing additional funds as soon as possible in order to complete a significant remedial project, such as piping the acid mine drainage to a submerged outfall, this fiscal year (Anthony: 6/22/95).

In the end, some federal funds were disbursed through the NCSRP to pay for monitoring work at Britannia (Niemela: 4/13/95),<sup>261</sup> but nowhere near the \$2M the federal government had initially set aside under the federal-provincial Britannia agreement (MacDonald: 10/27/94). In 1995, the outstanding federal commitment of \$300,000 lapsed (Niemela: 4/13/95; MacDonald: 4/19/95; Wong, 7/7/95).

The fact that little progress had been made in carrying out environmental investigations at Britannia during the first fiscal year (1994/95) in which the mine was eligible for funding under the NCSRP was a factor that contributed to the withdrawal of federal funding (Niemela: 4/13/95; Anthony: 5/9/95; Anthony: 6/22/95; McCracken: 7/7/95). Beginning in mid-1995, provincial attention again shifted to finding a purchaser for the site.

In 1995, a company named No. 357 Taurus Ventures Ltd. ("Taurus") obtained an option to purchase the mortgage held by 40091, and in May of that year, it began negotiations with the province on environmental matters. Taurus proposed to purchase the mortgage at a discount; commit a specific amount of money to pollution abatement; and, in return, obtain an indemnity from the provincial government for any environmental liability exceeding its fixed financial commitment (n/a: 11/27/95; MacDonald: 12/14/95).

This proposal was not satisfactory to BC Environment because there remained too much uncertainty regarding the scope of the Britannia pollution problem, how it could be addressed, and what the total cost would be. Funds committed by Taurus might be insufficient, resulting in the pollution continuing or the province footing the bill. Furthermore, increases in property value resulting from a provincial clean-up effort would accrue to Taurus, even though the province had paid for the work. As a result, the province considered doing an independent assessment of the development potential of the Britannia lands to determine whether to become the owner itself (n/a: 11/27/95).

Correspondence from early 1996 indicates that BC Environment was considering a "phased approach" to solving the Britannia problem, beginning with the installation of a surface pipeline to carry effluent from the 2200-level portal to the 4100-level portal for discharge to Howe Sound via the submerged outfall. This would stop discharges of effluent to Jane and Britannia Creeks (McCracken: 2/14/96). Environment Can-

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261. A letter indicates agreement by the federal government to pay for its half of an invoice for \$17,089.73 for analytical costs (Niemela: 4/13/95).

ada stated its agreement in principle with such an approach, noting, however, that “[t]he combined flows will still be toxic, and consequently a violation of the *Fisheries Act*” (Niemela: 4/24/96). Environment Canada stated that it supported a cooperative, phased approach for ultimate compliance with the *Fisheries Act*, provided that certain conditions be stipulated in any agreement with a developer of the Britannia mine site.<sup>262</sup>

### 5.5.3 1997-2001 / Scientific Advances, Remediation Proposals and Potentially Responsible Parties

The effluent monitoring work originally funded by Canada and British Columbia under the NCSRP (see above, s. 5.5.2) continued at Britannia (2200-level, 4100-level, Britannia Creek) through 1999 and beyond (Nassichuk: 2/12/99). Over the years, Environment Canada and BC Environment entered into contribution agreements respecting the purchase, installation, and operation of monitoring equipment (Nassichuk: 2/12/99). In 1999, Environment Canada entered into an agreement with CBE that contemplated CBE gradually taking over ownership and operation of such equipment (Nassichuk: 3/30/99). Environment Canada estimates that between 1991 and 2001, it incurred monitoring and engineering expenditures of approximately \$320,000 in operational costs at Britannia, excluding salary costs.<sup>263</sup> A three-year study conducted by Fisheries and Oceans Canada during 1997-2000 to provide Environment Canada with information on impacts of Britannia effluent on fish and fish habitat resulted in expenditures estimated at \$450,000, excluding salaries.<sup>264</sup>

In 1997, Environment Canada commissioned a report to assess a pipeline to carry the 2200-level ARD to the 4100-level for discharge through the submerged outfall. It commissioned a summary and overview of effects of the Britannia effluent on juvenile salmonids and the marine environment in Howe Sound (EVS Environmental Consultants: 04/00/97). It co-funded a study with BC Environment in which Cominco Engineering Services Inc. carried out pilot scale testing of a

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262. The document received by the Secretariat regarding Environment Canada’s review of BC Environment’s phase approach is incomplete. Environment Canada’s requirements in connection with this proposal are therefore unknown.

263. Facts on the Britannia Mine at 6.

264. *Ibid.* This study was financed through the Environmental Science Strategic Research Fund of Fisheries and Oceans Canada, which “supports targeted research aimed at yielding scientific advice on the conservation and protection of marine and freshwater ecosystems;” telephone conversation with Wayne Knapp, Water Quality Technician; Pacific and Yukon Region, Fisheries and Oceans Canada, 27 August 2002.

high density sludge (“HDS”) process using pulp mill ash and lime to neutralize and remove metals from the 4100 level ARD.<sup>265</sup> It also co-funded, with BC Environment, a pre-feasibility design and cost estimate for a treatment system for Britannia ARD and continued, into 1998, to look into ways to minimize effluent piping costs between the 2200- and 4100-level, and to monitor ARD to optimize treatment plant design.<sup>266</sup> Between 1997 and 2000, DFO published six papers concerning effects of Britannia ARD on various elements of the marine environment.<sup>267</sup> These papers concluded that mussels stationed within 2.1 km of Britannia Creek were observed to have significant adverse biological effects that were likely related to exposure to metals from contaminated mine waters, poor feeding conditions, and interaction with natural factors such as salinity and turbidity. They also stated that nearshore fishes, especially juvenile salmonids, were negatively impacted by ARD from Britannia Creek, and that in order to restore the productive capacity of the Britannia Beach estuary, contamination from ARD must be eliminated.<sup>268</sup> A 1997 PhD thesis (Chretien: 05/00/97) and a 1999 master’s thesis (Marsden: 04/00/99) added to the literature on pathways and effects of pollutants released by the Britannia ARD.

Proof of negative environmental effects is not required to take enforcement action under s. 36(3) of the *Fisheries Act*, but it is required to issue a remediation order under the *BC Waste Management Act*.<sup>269</sup> According to an employee of Fisheries and Oceans Canada, DFO and EC employees believed that generating information on environmental impacts of the Britannia effluent would create momentum toward finding a solution to the pollution problem at Britannia.<sup>270</sup> The federal emphasis on providing technical and scientific support to the province regarding Britannia, rather than pursuing independent enforcement of s. 36(3) against the owners of the Britannia Mine, was consistent with the spirit of ongoing, pan-Canadian, federal/provincial environmental

265. *Ibid.* at 4.

266. *Ibid.*, Appendix D ‘A Short Chronology of Enforcement and Monitoring at the Britannia Mine Site’ at 3.

267. Facts on the Britannia Mine, Appendix B ‘List of Howe Sound and Britannia Beach Sub-Tidal Marine Reports; Note to File 4484-37/C1235, Environment Canada, February 2002’ at 3.

268. C.D. Levings, “Effect of an Abandoned Mine on the Nearshore Ecosystem, Britannia Beach”; online: Fisheries and Oceans Canada <<http://www.pac.dfo-mpo.gc.ca/oceans/meq/MEHSD/mines.htm>> (last updated: 14 May 2001).

269. S. 27.1(3) of the WMA.

270. Telephone conversation with Wayne Knapp, Water Quality Technician, Pacific and Yukon Region, Fisheries and Oceans Canada, 27 August 2002 and Facts on the Britannia Mine at 6: “The results of these studies [...] provided a rationale for pursuing site remediation.”

harmonization efforts, which encouraged each level of government to contribute its particular expertise to the solution of environmental compliance problems (see s. 5.3.3, above).

On 1 April 1997, the WMA amendments came into force, with a new “Part 4” entitled “Contaminated Site Remediation”<sup>271</sup> and a detailed Contaminated Sites Regulation (“CSR”).<sup>272</sup> Part 4 of the WMA sets out rules for identifying contaminated sites; lists categories of persons liable (and those not liable) for clean-up at those sites; and sets out principles for implementing remediation. The CSR provides detailed information on the meaning and operation of the provisions of Part 4 of the Act.

In September of 1997, Coopers and Lybrand, the receiver-manager of the Britannia assets, filed a motion with the Supreme Court of British Columbia stating its intention to apply for permission to take delivery of contaminated soils at the Britannia site under a “reclamation” plan developed by CBE in July of that year. The plan consisted of using contaminated soils to cover “unsightly rock debris left over from mining activities” at the site (Biagi: 9/16/97). Part of the income from this venture would go toward achieving compliance with the 1981 environmental order. The plan included re-activating the copper launders, with the possibility of increasing their capacity. Coopers and Lybrand asked to be allowed to enter into soil management agreements under the WMA<sup>273</sup> “without any derogation from its exemption from environmental liability” under the 1994 court order (Biagi: 9/16/97).

BC Environment asked Environment Canada for comments on the receiver-manager’s proposal (Pomeroy: 9/23/97). Environment Canada advised that

DOE has no direct authority to assess plans by Coopers and Lybrand to receive and dispose of soil at the mine site because there is no apprehension of a risk to fish or fish habitat. We have read Coopers and Lybrand’s draft Order, and the supporting Affidavit which includes drafts of soils agreements and a geotechnical report. At this time we do not intend to instruct our Counsel to appear at any hearing, but request you consider our recommendations in instructing your own Counsel (Pomeroy: 9/23/97).

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271. R.S.B.C. 1996, c. 482 (Supplement).

272. B.C. Reg. 375/96.

273. As required by ss. 28.1 *et seq.* on “Contaminated soil relocation” in Part 4 of the WMA.

Environment Canada pointed out that the placement of contaminated soils at the Britannia site could hamper remediation efforts aimed at rehabilitating the mine site area. The letter stated: “As you are aware, this drainage violates the *Fisheries Act* and your Ministry’s legislation.” (Pomeroy: 9/23/97). Environment Canada recommended that access to portals not be blocked, and pointed out that if residential development had the greatest promise of yielding revenue from the site, contaminated soil disposal should avoid potential residential areas.

Environment Canada suggested advising the court that under the terms of the 1981 order, BC Environment could issue a new order at any time (Pomeroy: 9/23/97). Environment Canada advised that “[...] the cementation plant operation [i.e., copper launders] contemplated in that Order does nothing to improve water quality, but rather it would produce a copper-laden hazardous waste and cause disposal problems.”

Environment Canada questioned the percentage of revenue that the receiver-manager proposed to allocate to reclamation/environmental remediation, and stated its assumption that the province would be studying the requirement for a *Mines Act* reclamation permit, despite a 16 May 1997 letter from BC Mines to CBE stating that no such permit was required (Pomeroy: 9/23/97). Environment Canada made several comments on the sufficiency and correctness of information contained in a geotechnical report filed with the proposal. Environment Canada suggested meeting with BC Environment and BC Mines, stating that the issuance of an engineering report on treatment plant costs, expected in February 1998, would require a coordinated plan between the federal and provincial government to initiate action on site remediation “and deal with expected renewed interest from land developers” (Pomeroy: 9/23/97).

On 1 October 1997, Coopers and Lybrand informed the province that “in light of the provincial position on the issue of the environmental liability of the receiver-manager,” it was withdrawing its court application regarding the contaminated soils proposal (Biagi: 10/1/97).<sup>274</sup>

On 2 October 1997, counsel for CBE notified counsel for Coopers and Lybrand that CBE intended to take over the contaminated soils project, beginning with a first shipment the following day, and that the

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274. It appears that BC Environment refused to agree to extend the scope of the receiver-manager’s special immunity from environmental liability to cover the landfill operation being proposed by the receiver-manager.

receiver-manager had no power to prevent CBE from doing so. CBE assured the receiver-manager that no permits were required. Upon learning of CBE's intention, counsel for the province wrote to CBE, reminding CBE that he had told the company that *Mines Act* approvals could be required for reclamation work, and stating that he was not aware of any decision by the Regional Waste Manager regarding whether environmental permits were required.

On 8 October 1997, the BC Deputy Chief Inspector of Mines advised CBE that CBE had to apply for a permit under s. 10 of the *Mines Act* for its reclamation project (Errington: 10/8/97). He also issued a notice to CBE and others, stating that he had become aware that a fraudulent letter was in circulation, purporting to inform CBE, on behalf of BC Mines, that BC Mines had no interest "in the reclamation work described, as such works are not covered under Mining Legislation in the old minesite area" (Price: 5/16/97). The Deputy Chief Inspector of Mines denied that any such letter had ever been sent to CBE. He pointed out that the letter was written on obsolete ministry letterhead, had an incorrect file number, the wrong title for the author, and a fraudulent signature (Errington: 10/17/97).

On 22 October 1997, CBE wrote to BC Mines, acknowledging that it required a reclamation permit and proposing to file a reclamation plan for the entire mine site (Drummond: 10/22/97). The principal shareholder of CBE, Tim Drummond, stated that

I am now of the firm belief that the mine site has to be dealt with as a whole, and under the auspices of the Mines Department, taking into account all relevant legislation that would pertain to the site.

CBE proposed to incorporate completion of an effluent diversion pipeline from the 2200 portal to the 4100 level into this reclamation plan.

On 29 October 1997, Environment Canada wrote to the BC Chief Inspector of Mines, welcoming BC Mines' "renewed focus on the Britannia problem," and offering input on CBE's proposal (Nassichuk: 10/29/97). The letter stated

Britannia presents a very complex and expensive problem. Believing that no single party or government agency can solve it working alone, DOE [Environment Canada], with generous help from others, has taken steps towards designing the treatment plant necessary for the site to achieve compliance with the *Fisheries Act* (Nassichuk: 10/29/97).

Environment Canada invited BC Mines to attend a steering committee meeting with the consultants working on treatment plant design (Nassichuk: 10/29/97). BC Mines was requested to carry out assessments of the 4100-level concrete plug [built by Anaconda in 1977 to regulate effluent flow from the mine; see above, s. 5.5.1] and various portals to identify safety issues that might impede research on effluent treatment options (Nassichuk: 10/29/97). Environment Canada stated that

[w]e are aware of plans to deposit soil on the mine properties, and the disturbing irregularities in the initial approach taken by Copper Beach Estates Ltd. Despite this, we believe that the idea is environmentally sound, provided the soil deposition meets MELP requirements and has professional supervision. Earnings from receiving soil could allow work to begin on permanent reclamation and progress towards compliance with the *Fisheries Act*. Accordingly, DOE [Environment Canada] strongly supports a negotiated approach with Copper Beach Estates Ltd. that may secure your Ministry's approval for soil deposition at Britannia (Nassichuk: 10/29/97).

At this time, BC Environment requested its counsel to attempt to determine whether there remained any potentially responsible persons with respect to the contamination at Britannia (Driedger: 12/15/97). A December 1997 e-mail from the Deputy Director of Waste Management at BC Environment (the "Deputy Director"), states

Dennis has now completed his searches and although he has identified a possible successor to Anaconda, namely East-West Caribou Mines, and that he considers this firm and Copper Beach Estates to be potentially responsible persons under the WMA, neither company appear to have any accessible financial resources. It appears that the last real asset of the successor company was disposed in 1993. Dennis also looked into a possible connection between Arco Petroleum and Anaconda Canada, but he could not establish a linkage. [...] The results of this latest search unfortunately leave us with the singular situation that has existed for Britannia since Copper Beach was placed in receivership. There remains a significant environmental problem needing to be fixed, and there remains no obvious source of funding (Driedger: 12/15/97).

The Deputy Director noted that the province had recently contributed \$15,000 toward a federal/provincial initiative to explore the validity of some possible remedial actions, but that in light of the magnitude of the problem, considerably larger funding would be required to solve the problem. Regarding CBE's soil relocation proposal, he stated "[u]nfortunately, to date it appears that this proposal is more geared towards relieving creditors than with resolving the environmental

problems.” He also expressed concern over inaction by the receiver-manager on environmental matters at Britannia. He recommended applying to the court for cancellation of the receiver-manager’s immunity from environmental liability, given the revised WMA protected all receiver-managers from liability in connection with historical contamination, while making them responsible for contamination they caused or allowed to occur and requiring them to “expend available funds” to comply with WMA remediation requirements.<sup>275</sup>

The Deputy Director then stated that

[w]e cannot let this situation exist indefinitely, and if nothing else is available, we need to begin assessing what would be the costs to the federal and provincial governments if the site was treated as a high risk orphan site, what options exist to successfully contain and control the contamination, and what exists that is associated with the site to offset, either in the short or long term, some of these costs. In short, we have to begin to remove some of the legal barriers that are presently inhibiting action on our part, work out an action plan, and then try to figure out how we can cost-effectively achieve our goals. I recommend that we plan to meet in January [1998]. Our federal counterparts should also be at the meeting, as well as our legal counsel.

The new Part 4 of the WMA defined “orphan site” as

- (a) a contaminated site for which a responsible person cannot be found or is not willing or financially able to carry out remediation in a time frame specified by a manager, or
- (b) a contaminated site of which a government body has become the owner subsequent to the failure of the former owner to comply with a requirement to carry out remediation at the site.

The WMA allowed managers to determine that a contaminated site was a “high risk orphan site,” and under the WMA, the BC Minister of the Environment could decide that at a high risk orphan site, or at a contaminated site “that is not otherwise being adequately addressed,” the government would undertake remediation necessary to protect human health or the environment.<sup>276</sup> Under the CSR, the determination that a site is a high-risk orphan site is to be made on the basis of criteria set out in a protocol established by the Director.<sup>277</sup> No such protocol exists.

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275. S. 26 of the CSR.

276. Ss. 26(1) and 28.4(1) and (2) of the WMA.

277. Ss. 53 and 61 of the CSR.

An e-mail from a BC Environment Surrey Regional Office employee providing information about CBE's soil relocation proposal to persons scheduled to attend a January 1998 meeting indicates that the proposal was being considered in part because "[t]he ARD problem is a significant pollution concern for which BCMELP [BC Environment] and Environment Canada appear to have no means to address [sic] at this time. Furthermore, the contaminated soils could have the positive effect of reducing ARD generation by providing an earth cover that would reduce infiltration of water into acid-generating waste rock." The e-mail states that BC Environment would recommend making project approval subject to bonding,<sup>278</sup> given the financial condition of CBE (Azevedo: 1/16/98). It would also recommend a public meeting regarding the mine reclamation permit application.<sup>279</sup>

On 11 March 1998, the BC Chief Inspector of Mines notified CBE that CBE's application for a permit under s. 10 of the *Mines Act* was not approved, because its "pilot reclamation program" proposal for Britannia was still too conceptual. CBE was also advised that proof that the proposal complied with WMA requirements for the relocation of contaminated soils would be central to acceptance of the proposal by BC Mines (Hermann: 3/11/98). BC Environment notified the project proponents of its conditions for approval of the proposal on 12 March 1998 (Robb: 3/12/98). These conditions required the proponents to file an application for WMA approvals supported by detailed engineering assessments and facility design; post financial security; and engage in public consultations. Any permit application would be copied to other agencies, including Environment Canada, for their comments.

In May of 1998, BC Environment advised three corporations (CanZinco Ltd. ("CanZinco"), Arrowhead Metals, and Atlantic Richfield Corporation ("ARCO")) that they were being named as potentially responsible persons ("PRPs") in connection with pollution liability at the Britannia Mine pursuant to the WMA, and informed them that submissions on the issue of their liability and that of others would be accepted until February 1999.<sup>280</sup>

Throughout 1998, CBE's reclamation proposal continued to evolve. Contaminated soils would no longer be disposed of in different places across the site, but would be trucked up Mount Sheer for disposal in Jane Basin as part of a long-term landfill operation. It was hoped that

278. Using its new powers under s. 27.1 of the WMA, which included requiring the posting of security.

279. S. 27.5 of the WMA.

280. Facts on the Britannia Mine, Appendix D at 3.

over time, the accumulation of fill would prevent infiltration of water to the mine, thereby reducing effluent flow from the mine. The proposal to treat effluent using “copper launders” (as required by the 1981 provincial remediation order, see above, s. 5.5.1) was replaced by a plan to build an effluent treatment plant using HDS technology that had been proven to be effective at Britannia by consultants hired by Environment Canada and the province. On the recommendation of the Squamish Lillooet Regional District, the Fraser Basin Council was asked to facilitate public input into the regulatory process in connection with CBE’s reclamation/remediation proposal.

CBE filed applications for a mine reclamation permit, a waste discharge permit, and a refuse discharge permit in mid-March 1999. The Fraser Basin Council held three public information sessions and a regional forum in April and May of 1999. At these meetings, Environment Canada and DFO made presentations and fielded questions regarding the nature of the environmental problem at Britannia. Written comments from the public were accepted until mid-June. Over a hundred written submissions were received (Robb: 8/19/99).

A multi-stakeholder delegation, including representatives from the Fraser Basin Council, CBE, H.A. Simons; the District of Squamish; Environment Canada; Fisheries and Oceans Canada; BC Environment; BC Mines; and the Squamish-Lillooet Regional District fielded questions from the public at meetings of the Pemberton Council (6 April 1999); the Whistler Council (6 April 1999); the Squamish-Lillooet Regional District (15 April 1999); and the District of Squamish Council (13 April 1999). Meeting minutes recorded questions and answers, but do not indicate who asked and who answered the questions. It was explained that CBE’s treatment plant and landfill operation was expected to cost \$10-11M to build (including construction of an aboveground pipeline to divert effluent from the 2200-level portal to the 4100-level) and that the treatment plant would cost \$800,000/year (decreasing over time) to operate. \$10M was being raised by CBE through private backers. Revenue from tipping fees would be set aside toward a *Mines Act* reclamation fund (with an initial contribution of \$250,000). The fund was expected to increase to \$25M over twenty-five years, at which time interest from the fund was expected to cover treatment plant operating costs (Minutes, District of Squamish Council Meeting: 4/13/99).

In June 1999, the Fraser Basin Council released its public consultation report (Fraser Basin Council: 6/20/99). The report identified strong public support for a treatment plant, with concerns over sludge

disposal; qualified approval and outright opposition to the landfill proposal, including concerns regarding potential water pollution and transportation safety issues; considerable concern regarding the financial feasibility of the project, including suspicion regarding CBE, criticism regarding the vagueness of the business plan (potential fluctuations in tipping fees, supply of contaminated soils<sup>281</sup>), and a view shared by some landfill opponents that the federal and provincial governments should share the cost of the solution to the Britannia ARD problem. Britannia Beach residents supported the “social” component of CBE’s proposal, which consisted of giving the residents security of tenure by transferring community lands to a federal/provincial housing corporation.<sup>282</sup>

On regulatory matters, some members of the public were concerned about why CBE’s proposal had not triggered an environmental assessment under federal and provincial legislation.<sup>283</sup> Participants also wanted to know what standards would be specified in permits and how permits would be reviewed, and they asked to be given an opportunity to review permits prior to final approval. They suggested making construction and start-up of the treatment plant a condition precedent to approval of the landfill proposal, and they asked that local residents be given an active role in monitoring project compliance. On the issue of monitoring, they were told that Environment Canada would do periodic inspections (in addition to provincial inspections) (Draft Minutes of District of Squamish Council Meeting: 4/13/99). There was concern that the time allowed for public review was too short.

At the meetings, the public was told that CBE had filed suit against a number of past owners and was seeking compensation from them through civil action. They were also told that BC Environment had “filed

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281. In response to a question about whether soils would be accepted from outside of British Columbia, the public was apparently told that “[a] significant amount of the contaminated soil is being generated through federal government activities, and thus there is the possibility of ensuring that only this waste will be accepted at the landfill site” (Draft Minutes of District of Squamish Council Meeting: 4/13/99).

282. Britannia Beach is still a “company town,” not a municipality. Residents of Britannia Beach are tenants of CBE, with CBE providing all utility and other municipal-type services. When CBE bought the Britannia assets from Anaconda, “[s]ome 60 uneconomic, residential and industrial tenancies (many of the premises were of a dilapidated nature) were taken over by Copper Beach as part of the overall bargain” (Fodchuk: 1/7/80).

283. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada stated: “Federal reviewers considered the possible application of the *Canadian Environment Assessment Act* to the project, however, concluded that there was no automatic federal CEEA “trigger” (e.g. such as a habitat authorization or federal funding involved).”

action” to pursue some responsible parties, but that since legal costs would be extremely high and since CBE had proposed a solution, the province had put legal action on hold (SLRD Southern Planning Committee Meeting: 4/15/99).

The \$10M in private backing CBE had secured for the project was conditional on the project going forward as quickly as possible. To allow for work to proceed before winter, and on the basis that the public would have input into the process going forward, the public was given ten days to comment on draft permits (Robb: 8/19/99). Regional BC Environment employees told the public that spending time on an environmental assessment would result in CBE losing its financial backing for the project, but that it might be advisable for the public to contact the provincial premier’s office to facilitate inter-agency consultations on the public’s outstanding concerns related to CBE’s proposal (Gimse: 8/30/99).

At the time, Environment Canada and Fisheries and Oceans Canada were represented on a Britannia “Lower Mainland Mine Development Review Committee” (“LMMDRC”) chaired by a regional representative of BC Mines. At an LMMDRC meeting, Environment Canada and Fisheries and Oceans Canada expressed concern about the viability of CBE’s proposal from a financial perspective, but deferred to the province—and BC Mines in particular—on this issue (LMMDRC Minutes: 4/25/99; McCandless: 5/19/99). BC Environment stated “[t]he financial uncertainties of the remediation project are recognized, however BCMELP [BC Environment] does not have the mandate nor expertise to determine the financial viability of the project” (Robb:10/1/99). BC Environment claimed, however, that the WMA permits being prepared in connection with the project contained conditions to address these uncertainties, such as requiring environmental assessment and engineering studies, posting of financial security (in addition to that required by BC Mines under the *Mines Act*), and operation of the treatment plant prior to operation of the landfill. Furthermore, BC Environment was prepared to add other parties to the remediation order if CBE defaulted on its obligations.

BC Mines issued a reclamation permit to CBE under s. 10 of the *Mines Act* on 30 August 1999. BC Environment issued a remediation order, effluent permit and waste discharge permit to CBE on 8 September 1999. In its “Reasons for Decision for Issuance of Remediation Order OE-16097, Effluent Discharge Permit PE-12840, and Refuse Discharge Permit PR-15938,” BC Environment explained that the new remediation order replaced the 1981 and 1993 orders, and reflected a revised understanding of the site, changed regulatory criteria and the new powers and

guiding principles introduced in Part 4 of the WMA. The remediation order required CBE, as a responsible person under the WMA, to implement the effluent treatment proposal prepared by CBE, according to a fixed timetable. PRPs identified by BC Environment in 1998 would not be added to the order unless CBE failed to comply with the remediation order and permits.

BC Environment and BC Mines decided that to avoid overlap between the mining and environmental permits,

MEM [BC Mines] would defer to the MELP [BC Environment] permits with respect to design and operation of the treatment plant and landfill, and that the MEM permit would focus on the health, safety and geotechnical aspects of work systems for the various project components, as well as general reclamation requirements and financial security (LMMDRC: 8/16/99).

The *Mines Act* permit (BC Mines: 8/31/99) stipulated that it contained BC Mines requirements for reclamation, but that it was also compatible with the requirements of other provincial ministries for reclamation issues, and that the security required by BC Mines for the project would reflect the requirements of those ministries, without limiting their authority to set other conditions or to act independently under their respective permits and legislation. The *Mines Act* permit stated that decisions made pursuant to the permit would be made in consultation with other provincial ministries and federal departments and agencies.

In December 1999, BC Mines issued a proposal to exempt mines subject to a permit under s. 10 of the *Mines Act* from Part 4 of the WMA, citing regulatory duplication and stating that retroactive liability provisions in the WMA were not needed at those mines, because the Chief Inspector of Mines ensured that the mines would not be sold unless the buyer was capable of meeting the financial and technical requirements of reclamation and was able to post adequate security. Under the *Mines Act*, upon the sale of a mine site, all of the liability transferred to the new owner (Hermann: 12/14/99). This proposal became law when the WMA was amended in 2002 (see below, s. 5.6).

The remediation order and waste discharge permit issued by BC Environment under the WMA in September 1999 left certain key matters to be negotiated by CBE and the provincial government. For example, the permit for the landfill provided that “[p]rior to 31 July 2001, the permittee shall provide financial security in an amount and form acceptable to the Regional Waste Manager” (BC Environment/

PR-15938: 9/8/99). As regards sludge disposal from the treatment plant, the remediation order stated that

[s]olids, including filter cake or sludge, from the effluent treatment works shall be re-processed for metal recovery, or alternatively, shall be disposed of at a site and in a manner acceptable to the Regional Waste Manager (BC Environment/OE-16097: 9/8/99).

The remediation order required submission of detailed plans for treatment plant construction by March 2000, and operation of the treatment plant by August 2000. In November 1999, CBE applied for and obtained an extension for filing its March 2000 report. To honour the August 2000 deadline, CBE proposed to skip certain studies and make up for information gaps on effluent flow by building a bigger treatment plant (Robb: 1/7/00).

By April 2000, CBE had defaulted on several of its obligations under the WMA order and permits, and consequently the province revived the PRP submissions process launched in May of 1998 (see above) to determine whether other PRPs should be added alongside CBE as parties subject to the remediation order (Robb: 4/6/00). The province accepted submissions regarding “the technical components of the current order and the issue of responsibility.” In the following months, PRPs filed detailed arguments and evidence with the province.

CanZinco claimed that British Columbia was partly responsible for the pollution at Britannia, notably because provincial employees removed the submerged outfall after the flood of 1991 (Azevedo: 6/27/00) (see above, s. 5.5.1). BC Environment subsequently notified the Provincial Crown that it was a PRP (Driedger: 9/7/2000). To deal with the fact that the province was now both the “Regulator” and a PRP, the Deputy Director of Waste Management (“Deputy Director”) in Victoria assumed the role of “Regulator,” while the staff of the Lower Mainland Regional Office of BC Environment took on the role of the “Province-as-PRP” (Driedger: 9/7/2000).

On 7 September 2000, the Deputy Director notified the private PRPs that he had decided

to invite Environment Canada to participate in the submissions process in light of its obvious interest in seeing this significant site remediated and based on my view that I will be assisted by its participation, if it so chooses (Driedger: 9/7/2000).

PRPs were directed to copy Environment Canada on all further communications. Also on 7 September 2000, the Deputy Director issued a letter stating that “[w]ritten evidence and/or submissions from [...] Environment Canada will be due no later than 17 November 2000.”

In submissions filed on 18 and 29 September 2000, ARCO claimed that Canada was a PRP, because during World War II the federal government had a supply contract with the mine whose terms, according to ARCO, made Canada a *de facto* “operator” or “owner” of the mine as defined in the WMA (Driedger: 10/4/2000). The Secretariat did not obtain copies of these submissions. On 4 October 2000, the Regulator wrote to the Government of Canada, observing that

[u]ntil recently, the Government of Canada was involved in this process only by virtue of its regulatory interest in ensuring that the environmental problem at Britannia is addressed. As such, Environment Canada has expressed its willingness to participate in the “potentially responsible persons process” by offering its technical comment (Driedger: 10/4/2000).

He then referenced the ARCO submissions and invited the Government of Canada to provide,

in addition to its technical comments, any submission it has on the issue of its responsibility raised in Mr. Letcher’s recent correspondence.

On the basis of incoming submissions, the province named additional PRPs. In mid-November 2000, the Province-as-PRP, on behalf of itself and the Federal Crown, ALCOA, ARCO, CanZinco and Arrowhead/Ivaco, asked the Regulator for more time to file their submissions, given that they had just scheduled a two-day settlement conference. The Deputy Director agreed, but emphasized that such negotiations could not be used to hold up progress on compliance with the remediation order. The settlement conference resulted in an agreement in principle to address funding for a treatment plant, subject to approval by the province’s “Risk Management Branch” and the Regulator, and pending “ongoing negotiations involving Copper Beach and the federal Government” (Driedger: 12/19/2000).

In January 2001, the Regulator acknowledged that he had read a confidential agreement signed by “all parties” that was conditional upon “critical conditions that must be satisfied no later than 28 February 2001.” He declined to suspend the submissions process altogether, but agreed to grant a third extension for filing submissions. He noted that CBE was not privy to the agreement and that CBE was engaged in

separate, confidential negotiations with the provincial government, for which he had been given a status report. The Regulator had also been “[...] advised of the status of the Province-as-PRP’s ongoing discussions with the federal government. All of these discussions are at sensitive points and must of necessity remain confidential” (Driedger: 1/10/2001).

In October 2000, the Deputy Director had declined to consider amending the Britannia remediation order in the context of the ongoing PRP process to include investigating and addressing contamination beyond the problem of ARD discharging to Howe Sound (Driedger: 10/4/2000) (see s. 5.4, above). In January 2001, the Deputy Director stated that

[w]hile the present submissions process is focused on resolving the Acid Rock Drainage into Howe Sound, investigations will in due course have to be carried out regarding other potential contamination from former mine operations. Such investigations will likely be required in any order I issue if they have not already been carried out by that time (Driedger: 1/10/2001).

Negotiations continued and the PRPs, including the Province and Canada, repeatedly asked the Regulator for extensions on the due date for filing submissions, and finally, that he consider suspending the order process altogether.<sup>284</sup>

On 26 March 2001, the Province-as-PRP informed the Regulator that a “revised package” was ready for presentation to the provincial treasury board and cabinet and that the parties were revising the terms of their settlement agreement (Falzon: 3/27/01). The Regulator, now speaking through his legal counsel, stated that in order to agree to suspend the order process, he would require a

[...] letter and rationale consented to by all parties, as well as a meeting where he is thoroughly briefed on the agreement and on a calendar of specific remediation actions proposed to take place in the absence of an Order.

Upon being informed that a “private-public partnership agreement” had been reached on 12 April 2001, the Regulator informed the PRPs and CBE that in addition to final, signed copies of all agreements, he required

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284. See letters from Ron Driedger, Deputy Director of Waste Management, British Columbia Ministry of Water, Land and Air Protection to the Government of British Columbia *et al.*, dated 15 November 2000; 19 December 2000; 10 January 2001; 20 February 2001; 4 April 2001; 25 April 2001.

an outline and schedule of specific remediation actions proposed to take place in the absence of an order, and a work plan addressing the technical requirements of the pending remediation order as well as additional requirements listed by the Regulator.

Additional requirements included doing a feasibility assessment of alternative technologies for effluent treatment and an environmental impact assessment of the preferred technology, both of which were to consider all waste discharges to the environment from the effluent treatment plant. The Regulator indicated that in light of the recent discovery of serious ARD groundwater contamination in an area fanning out from Britannia Creek, supporting investigations and plant design would have to consider additional flows resulting from remedial measures recommended for this area, as well as for any other ARD sources identified during required site-wide investigations, which were to include the bed of Howe Sound offshore from the site. Upon receipt of this information, the Regulator would be reviewing the limits and specifications stipulated in CBE's waste discharge permit (suspended at the time) and effluent permit. The Regulator then stated his intention to complete the submissions process and indicated that no submissions would be accepted after 1 May 2001 (Driedger: 4/25/01).

The Secretariat received a copy of a document entitled "Submissions of the Federal Crown in Response to the ARCO Submission dated 22 March 2001" (Canada: n/d). As noted above, ARCO argued that the Federal Crown was liable for pollution at Britannia by reason of its World War II supply agreement with the mine. In addition, ARCO argued that the Federal Crown is not immune from liability under the contaminated sites regime of the WMA. The WMA lists persons responsible for remediation, such as current or previous owners or operators of a site,<sup>285</sup> and defines "person" as including "a government body." "Government body" is defined as "a federal, provincial or municipal body, including an agency or ministry of the Crown in right of Canada or British Columbia [...]."<sup>286</sup>

In its reply submission, Canada argued that in order for the Federal Crown to be liable under provincial legislation, damage must be caused either by the fault of a servant of the Federal Crown, or by a breach, by the Federal Crown, of a specific type of tort duty set out in a federal statute on Crown liability.<sup>287</sup> Canada argued that the WMA created no such

285. Section 26.5 of the WMA.

286. Section 26(1) of the WMA.

287. Section 3(b) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50: "The Crown is liable for the damages for which, if it were a person, it would be liable [...]"

“duty,” as it simply imposes liability on persons on the basis of their current or former status in relation to a contaminated site. Canada argued further that as a matter of longstanding constitutional law, provincial legislation such as the WMA cannot bind the Federal Crown.

The “public-private partnership” announced in April 2001 was formalized in a memorandum of agreement (“MOA”) dated 3 April 2001 between the Province-as-PRP and CBE (MOA: 4/3/01), and a settlement agreement (the “Settlement Agreement”) between the Province-as-PRP and the private PRPs (but not CBE) dated 12 April 2001 (Settlement Agreement: 4/12/01).

The BC Minister of Environment, Lands and Parks signed the Settlement Agreement on behalf of the Provincial Crown. The private PRPs who signed the Settlement Agreement are: ARCO; ARCO Environmental Remediation, L.L.C.; BP America, Inc.; BP Canada Energy Resources Company (successor to Dome Petroleum Limited); CanZinco; Intalco Aluminum Corporation; ALCOA Inc.; Alumax Inc.; Howmet Holdings Corporation; Pechiney Metals Corporation; Pechiney S.A.; and Ivaco Inc. The Regional Director General of the Pacific and Yukon Region of Environment Canada signed off on the Settlement Agreement, on behalf of the Federal Crown, under the caption “Acknowledged without objection.”

Under the Settlement Agreement, the private PRPs paid the Province-as-PRP \$30M to be used for remediation at Britannia, and the Province-as-PRP agreed to indemnify and save harmless the private PRPs in connection with any and all Britannia environmental liabilities, known and unknown, forever. The Province-as-PRP agreed never to sue the private PRPs for Britannia environmental liabilities, and the private PRPs agreed never to seek reimbursement of their respective shares of the \$30M settlement amount. According to the then Assistant Deputy Minister of BC Environment who negotiated the Settlement Agreement on behalf of the Province-as-PRP, the Settlement Agreement was preceded by a December 2000 letter of intent—of which no copy was included among the information gathered by the Secretariat—that provided for a payment of \$15M by the private PRPs, subject to the results of environmental investigations to be undertaken by Golder Associates Ltd. and the federal government at Britannia in the spring of 2001.<sup>288</sup> The Secretariat is unaware of the nature and results of any consequent federal

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in respect of (i) a tort committed by a servant of the Crown, or (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

288. 30 August 2002 telephone conversation with Jon O’Riordan, Deputy Minister of the BC Ministry of Sustainable Resource Management since June 2001.

government environmental investigation. Soil and groundwater investigations conducted by Golder Associates Ltd. on behalf of the Province-as-PRP at Britannia Beach revealed serious contamination. According to the provincial negotiator, on the basis of these results, the settlement amount was renegotiated. The amount of \$30M was arrived at as follows: the cost of remediating the site and building and operating an effluent treatment plant in perpetuity was estimated at \$70M, of which 30% (\$21M) was considered to be a contingency amount, to cover unexpected costs.<sup>289</sup> According to the provincial negotiator, the private PRPs stated that \$25M was the maximum amount they were willing, collectively, to contribute voluntarily, and the province was not inclined to pursue litigation.<sup>290</sup> The additional \$5M (for a total contribution by the private PRPs of \$30M) accounted for the indemnity granted to the private PRPs under the Settlement Agreement.<sup>291</sup>

Under the MOA between the Province-as-PRP and CBE, the province agreed to build an effluent treatment plant at Britannia, to be owned and operated by a “public-private partnership” (“P3”). Treatment plant construction would be financed through the Canada-B.C. Infrastructure Fund (as to two-thirds) and from settlement funds obtained from the private PRPs (as to one-third).

Under the MOA, CBE undertook to sell or obtain the sale of the land required for the treatment plant to the P3 for \$1, and to pay for the plant’s operating costs in perpetuity. CBE granted the province an option to purchase properties located north of Britannia Creek for \$1 as partial security for the commitment to pay the plant’s operating costs. CBE also agreed to contribute \$5M up front to a provincial Britannia remediation fund, with an additional \$8.4M to be contributed over time to cover maintenance and operation of the treatment plant as well as site remediation.

Under the MOA, fifty percent of the net profit from a 200-unit real estate development project south of Britannia Creek would be contributed to the remediation fund until the sum of \$8.4M was attained. In addition, all the housing units in that development and another, 1,400-unit development, both of which were to be completed with the assistance of the province in a 15-year time frame, would be subject to monthly levies to be paid into the fund. CBE agreed to pay for the cost of a road to transport sludge from the treatment plant to Jane Basin. It also agreed that in the event the remediation fund couldn’t cover the operat-

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289. *Ibid.*

290. *Ibid.*

291. *Ibid.*

ing and maintenance costs of the treatment plant, the P3 could access CBE revenue from a proposed five-megawatt hydroelectric project on Britannia Creek or “other CBE projects.”

Pursuant to the WMA, agreements reached by the Province-as-PRP with the private PRPs and CBE did not bind the Regulator. He continued to have the authority, under the WMA, to add any and all PRPs to the Britannia remediation order, provided that, “to the extent feasible without jeopardizing remediation requirements,” he took into account

private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to [him].<sup>292</sup>

Canada has stated “[i]n 2000, Environment Canada played a significant role in the negotiation of a settlement between the province and [the private PRPs] for the remediation of the site.”<sup>293</sup> The Federal Crown was not a party to either the Settlement Agreement or the MOA, although the Regional Director General of the Pacific and Yukon Region of EC signed off on the Settlement Agreement, with the caption “Acknowledged without objection.” Canada has also stated that Environment Canada provided advice to the province throughout the negotiations with the private PRPs and that concurrent with the announcement of the Settlement Agreement, “all parties” (including the Federal Crown) endorsed an application to the Federal-Provincial Infrastructure Fund, on behalf of the Squamish Lillooet Regional District, for \$9 million towards the capital costs of the required treatment plant.<sup>294</sup> This would have resulted in a \$3M federal contribution toward the cost of building the treatment plant. Environment Canada also agreed to provide ongoing technical assistance and to assess sediment contamination in Howe Sound.<sup>295</sup>

On 8 May 2002, the Secretariat requested additional information from Canada regarding Canada’s role in the provincial PRP process at Britannia (see Appendix 5), and particularly, regarding the basis for Environment Canada’s agreement to conduct sediment investigations in Howe Sound. At a meeting with Secretariat staff held in North Vancouver on 11 June 2002, Environment Canada explained that it provided technical advice to the province during the PRP process. Environment Canada provided the Secretariat with a copy of the Settlement Agreement and a copy of an undated submission by the Federal Crown to the

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292. Section 27.1(4)(a) of the WMA.

293. Facts on the Britannia Mine at 5.

294. *Ibid.*, Appendix D at 4.

295. *Ibid.*

provincial regulator (a copy of an earlier Federal Crown submission, dated 8 March 2001, referred to in the undated submission was not included among the information gathered by the Secretariat). The Secretariat obtained no additional information regarding the role of the Federal Crown in the negotiation of the Settlement Agreement. In March 2001, Environment Canada estimated that removing the contaminated sediments (estimated at 250,000m<sup>3</sup>) using clamshell dredging would cost about \$8M.<sup>296</sup> The preliminary estimate for the cost of disposing of these sediments on-site, in the Jane Basin (atop Mount Sheer, see s. 5.4, above), is between \$5 and 10 million.<sup>297</sup>

The MOA between the Province-as-PRP and CBE provided that its provisions would be embodied in a formal agreement to be prepared by CBE and negotiated and settled as soon as possible after provincial cabinet approval of the MOA, expected on 12 April 2001. Cabinet referred the MOA to the provincial treasury board for review.

In May 2001, Alex Tsakumis informed the province that he intended to acquire the shares of CBE from Tim Drummond (Thayer: 11/16/01). After the sale, Mr. Tsakumis failed to honour verbal undertakings made by him to pay the province \$25,000 and water license arrears for Britannia of \$257,821.51, and he never presented the province with the formal agreement contemplated in the MOA. On 16 November 2001, the Province-as-PRP gave CBE formal notice that it considered that CBE had repudiated the MOA, that it would not negotiate any further with CBE, and that it would be “pursuing all available alternate remedies to recover the shortfall in remedial costs to ensure that the taxpayers of the Province do not bear these costs.”<sup>298</sup>

British Columbia’s Report on the Economy, Fiscal Situation and Outlook for the Second Quarter of 2001/02 stated that

[a]ctual Britannia mine site clean-up and remediation expenditures could be higher than the province’s \$45-million estimated share of costs.<sup>299</sup>

296. Mike Hagen, Pollution Prevention, Environment Canada, “Britannia Marine Sediment Contamination: Interim Status of Knowledge and Next Options” (2 March 2001) at 9.

297. In its 14 May 2003 comments on the accuracy of the Draft Factual Record, Canada stated: “BC has allocated funds for sediment remediation should any be required.”

298. The copy of the MOA received by the Secretariat is dated 3 April 2001, while the MOA referenced by the province in its 16 November 2001 letter is dated 28 February 2001. The Secretariat did not receive a copy of the earlier MOA.

299. British Columbia, *Second Quarterly Report 2001/02 on the Fiscal Situation and Outlook*, Table A.3 – Main Expenditure Forecast Risks and Sensitivities—Consolidated Revenue Fund, Ministry of Water, Land and Air Protection.

### 5.6 *Whether Canada is Failing to Effectively Enforce s. 36(3) of the Fisheries Act in the Context of the Britannia Mine*

This section provides information gathered by the Secretariat that, read in conjunction with information contained in ss. 5.3, 5.4 and 5.5, above, is relevant to a consideration of whether Canada is failing to effectively enforce s. 36(3) of the *Fisheries Act* in the context of the Britannia Mine, including whether and how Canada's approach prevents *Fisheries Act* violations at the Britannia Mine in the long term.

#### 5.6.1 *Current Status*

In December 2001, consultants working for CBE plugged the 2200-level portal (see Figure 3 in s. 5.4, above).<sup>300</sup> This stopped the discharge of ARD to Jane and Britannia Creeks and brought CBE into compliance with one of the requirements of BC Environment's 1999 remediation order (see s. 5.5.3, above). It also ended alleged s. 36(3) violations as regards discharges of effluent to Jane and Britannia Creeks. The plug has the effect of re-routing effluent inside the mine to the 4100-level portal, where it is piped underground to the submerged outfall in Howe Sound. At the time of writing this factual record, in October 2002, the submerged outfall at Britannia continues to discharge large volumes<sup>301</sup> of untreated mine effluent that is acutely lethal to fish into the fish-bearing waters of Howe Sound every day.

The court-appointed receiver-manager (see above, s. 5.5.2) was discharged from its duties at Britannia on 31 July 2001,<sup>302</sup> returning management and control of the site to CBE, which remains insolvent. In the fall of 2002, 40091 sold its mortgage interest in the property to another real estate developer, who, like 40091 before it, has the option of foreclosing at any time.<sup>303</sup> The Pacific and Yukon Region of Environment Canada has no enforcement file regarding Britannia and has not had one since at least 1999, but it has maintained many compliance promotion files regarding the site.<sup>304</sup> An application by the Fraser Basin Council (endorsed by Environment Canada) to the Canada-B.C. Infrastructure Program for a \$6M grant (\$3M in federal funds) to construct a

300. Letter dated 27 January 2002 from Ron Driedger, Deputy Director of Waste Management, British Columbia Ministry of Water, Land and Air Protection, to Copper Beach Estates Ltd. *et al.*, Re: Britannia Mine Remediation—Completion of 2200 Level Plug.

301. See s. 5.4, above, for information on effluent flow.

302. Telephone conversation with Jim Titerle, Partner, McCarthy Tétrault and Counsel to 40091, 9 October 2002.

303. *Ibid.*

304. Telephone conversation with Ken Wile, Head, Inspections, Environment Canada, Pacific and Yukon Region, 29 July 2002.

plant to treat effluent from the 4100-level portal (see s. 5.5.3, above) and thereby achieve compliance with s. 36(3) at the Britannia Mine has still not been approved.<sup>305</sup>

A chart showing the current status of remediation funding is provided below.

**Remediation Funding Chart**

Funding under April 2001 Agreements				Situation in October 2002
Contributor	Source of Obligation	Cash	In kind contribution	
Private PRPs	Settlement Agreement	\$30M (\$3M to build treatment plant; \$22M site remediation; \$5M cost of indemnity)		\$30M received from private PRPs
CBE	MOA	\$13.4M + monthly levies on real estate development	Property for treatment plant; building road to Jane Basin for sludge disposal	CBE has repudiated MOA
Province-as-PRP	Settlement Agreement	Any shortfall in available funds	Carry out detailed site investigations; remediate site; build effluent treatment plant	Province has made a reserve of \$45M from the consolidated revenue fund for Britannia Remediation; expects more costs
Province-as-PRP	MOA	\$3M under Canada-BC Infrastructure Program to build treatment plant		Canada-BC Infrastructure Program has not ruled on application for funding to build treatment plant
EC (or Federal Crown)	Agreed to conduct sediment investigations in intertidal zone at Britannia Beach, continue to provide technical assistance in reviewing proposed remediation works, and endorse an application for \$3M in federal funding under the Canada-BC Infrastructure Program to build an effluent treatment plant			
The Secretariat received little information regarding the expected cost of implementing the BMRP, or the exact scope of work covered by any cost projections it did obtain. It appears that in April 2001, the cost of the BMRP was estimated at roughly \$50M (+ \$20M contingency). In August 2002, the Secretariat's consultant, Grant Feasby, estimated the total cost of the BMRP at \$73M, on the basis of communications with various sources involved in the BMRP.				

305. The Squamish Lillooet Regional District refused to file the application because funding for Britannia could significantly reduce funds available for other projects

5.6.2 *Whether Current Initiatives Will Stop the Deposit of Deleterious Substances at the Britannia Mine in the Shortest Possible Time and in the Long Term*

Under a “Britannia Mine Remediation Project” (“BMRP”) Action Plan and Work Plan issued in the fall of 2001 by consultants working for the Province-as-PRP, with input from many stakeholders, including Environment Canada and Fisheries and Oceans Canada (see s. 5.5.3, above), an effluent treatment plant is expected to be in operation at Britannia sometime between the spring and summer of 2004.<sup>306</sup> The effluent treatment plant would use high-density sludge (“HDS”) technology to treat the effluent from the 4100-level portal (see Figure 3 in s. 5.4, above) before it discharges to Howe Sound from the submerged outfall. In 1998, consultants working for Environment Canada identified HDS technology as being the most suitable to treat Britannia effluent. HDS technology is considered to be “best available technology” for the purposes of the MMER (see above, s. 5.2.2) and therefore capable, in principle, of

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in the area (telephone conversation with Pam Tattersfield, Squamish Lillooet Regional District, 31 July 2002). As a result, the Fraser Basin Council filed the application. It is not clear whether the Fraser Basin Council is an entity eligible to file this type of application (it must be filed by “local government”), and whether the project itself is one that is eligible for funding by the Canada-B.C. Infrastructure Program. Program priorities are identified as follows: “Infrastructure Canada’s first priority is green municipal infrastructure. The Infrastructure Canada-British Columbia agreement specifies a minimum 75 percent of the total value of all approved projects must be invested in green municipal infrastructure. Secondary priorities for the Infrastructure Canada-British Columbia program include cultural and recreational facilities, infrastructure supporting tourism, rural and remote telecommunications, high-speed Internet access for local public institutions, local transportation and affordable housing.” See the Infrastructure Canada web site, online: <[http://www.tbs-sct.gc.ca/ino-bni/Main/partners/bc\\_ip\\_e.asp](http://www.tbs-sct.gc.ca/ino-bni/Main/partners/bc_ip_e.asp)> (date accessed: 20 October 2002).

306. See British Columbia Ministry of Water, Land and Air Protection, Britannia Mine Remediation Project Homepage <<http://wlapwww.gov.bc.ca/sry/p2/britannia/index.htm>> (last updated: 11 December 2001). This web site contains copies of all official correspondence between the Regulator, CBE, and the private and public PRPs, as well as copies of technical reports, status reports and newsletters issued by the BMRP project manager, Golder Associates Ltd. On 13 May 2002, the Regulator advised CBE and the Province-as-PRP that the BMRP Work Plan Master Schedule only extended as far as the completion of a feasibility report for a treatment plant and that, according to the informal Action Plan, treatment plant operation was expected to begin in December 2004, a year later than initially estimated. He asked that every effort be made to move forward the projected plant start-up date. The Project Manager subsequently revised the Project Schedule, and start-up is now expected to occur between April and June 2004 (letter dated 10 May 2002 from Gerry O’Hara, Golder Associates Ltd. to Eric Partridge, Director of Waste Management, British Columbia Ministry of Water, Land and Air Protection, Re: Britannia Mine Remediation Project: Submission of Revised Project Schedule).

rendering Britannia effluent compliant with MMER standards, provided the plant has sufficient capacity to treat all of the effluent from the Britannia Mine all of the time, regardless of seasonal fluctuations in effluent flow.<sup>307</sup> At Britannia, compliance with MMER standards—especially the requirement that the effluent be non-acutely lethal to fish—would be considered by Environment Canada to signify one measure of compliance with the s. 36(3) general prohibition on depositing deleterious substances into waters frequented by fish.

The Secretariat retained the services of Grant Feasby, an expert on ARD treatment, to conduct a preliminary analysis of the likely effectiveness of the BMRP in stopping the deposit of deleterious substances at the Britannia Mine in the shortest possible time and in the long term, consistent with the *Fisheries Act* Compliance and Enforcement Policy.<sup>308</sup> In 1994, Mr. Feasby co-authored a report for Natural Resources Canada estimating the cost of reclamation liability associated with ARD in Canada as ranging from \$2-5B, depending on the sophistication of treatment and control technology being put in place (Feasby and Jones: 03/00/94). Subsequently, Mr. Feasby headed Natural Resources Canada's Mine Environment Neutral Drainage ("MEND") Program. Mr. Feasby has frequently served as an expert advisor at mine sites around the world where major ARD-related environmental accidents have occurred.

Mr. Feasby reviewed work being done by various engineering consultants, in consultation with the provincial and federal governments, under eighteen "work packages" included in the BMRP. Each work package centers on studying and solving one aspect of the pollution problem at the Britannia site, including many facets of water flow management on the site. In his report to the Secretariat,<sup>309</sup> Mr. Feasby stated: "All aspects that need to be investigated at the Britannia Mine site have been or are being investigated. The BMRP is comprehensive. Progress to date has been close to being on target." Mr. Feasby stated that effluent treatment is the only practicable option at Britannia, since there is no way of stopping the flow of effluent from the mine, and that the HDS process chosen for this purpose is the best choice under the circumstances.<sup>310</sup> He observed, however, that

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307. Feasby, *infra*, note 310 at 3.5 "Analysis of Chosen Effluent Treatment Technology."

308. This is the test established by the Compliance and Enforcement Policy for determining the appropriate response to a violation of the *Fisheries Act*. Here, Canada's response was to provide technical support the Province-as-PRP under the BMRP.

309. See *infra*, note 310 at 4.0.

310. D. Grant Feasby, "Review of the Effectiveness of Current B.C. Government Initiatives in Achieving Compliance with s. 36(3) of the *Fisheries Act* (Canada) at the

[t]wo years is a long time to have a plant built that is off-the-shelf technology. Given the pressing need to treat the effluent and the information base that has been accumulated, faster implementation is possible. A mining company could have a water treatment plant constructed and commissioned within 12-14 months.<sup>311</sup>

Several outstanding issues are holding up the province's tendering bids for treatment plant construction. CBE's repudiation of the MOA (see above, s. 5.5.3) has left the Province-as-PRP with the task of identifying a suitable location for the treatment plant and negotiating access or other rights with the landowner.<sup>312</sup> Also unresolved is the issue of who will own and operate the treatment plant, and under what terms. Ownership and operation of the treatment plant will result in potential liability for violations of s. 36(3).

Certain pending decisions also have the potential to affect treatment plant design.<sup>313</sup> First is the matter of sludge disposal. Effluent treatment will result in daily production of vast amounts of sludge consisting of the residue of lime used for treatment and metals that will have been removed from the effluent. The characteristics of this sludge will be variable, depending on levels of acidity and metals in the effluent, both of which fluctuate during the year at Britannia. Sludge characteristics—both chemical and physical—affect sludge disposal options. The dryer the sludge, the easier it will be to ship offsite, or up to the Jane Basin for landfilling. To dry the sludge, a filter press may need to be incorporated into treatment plant design. Chemical characteristics will determine whether the sludge can be disposed of in commercial landfills. Both physical and chemical characteristics will determine whether disposing of the sludge in the Jane Basin risks contributing to the effluent problem at the mine. Operation of the treatment plant requires a guaranteed sludge disposal method. The cost of sludge disposal will be significant.

The other issue is groundwater and surface water contamination. Significant groundwater contamination exists in the Britannia Beach area, resulting in part from historical use of tailings for landfilling and from the presence of waste rock piles that were never removed from the

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Britannia Mine, British Columbia," 29 October 2002, at 2.3 "Challenges to Preventing and Treating ARD at Britannia" and 3.5 "Analysis of Chosen Effluent Treatment Technology."

311. *Ibid.* at 3.7 "Timing and Constraints for Commissioning of Water Treatment Plant".  
312. One potential location is on CBE land; *ibid.*, at 3.3 "Comments on Information being Developed under the BMRP – H. Water Treatment Plant."  
313. *Ibid.* at 3.3 "Comments on Information being Developed under the BMRP – J. Sludge Management."

site. Surface water is also contaminated from coming into contact with exposed ore. It has not yet been decided whether these sources of water contamination will be removed from the site (at very considerable expense) or whether a groundwater and surface water collection system will be put in place to channel contaminated water to the treatment plant on a permanent basis.<sup>314</sup> Decisions on this issue could affect the overall budget for the BMRP.

Having considered the issue of timing of treatment plant construction, Mr. Feasby assessed the likeliness of the proposed treatment plant to prevent future deposits of deleterious substances into Howe Sound from the Britannia Mine. In his report, Mr. Feasby explained that HDS technology performs best when ARD iron and acidity levels in effluent are high, and that at Britannia, both iron and acidity levels are uncharacteristically low, which has the potential to affect plant performance.<sup>315</sup> He also stated that variable effluent characteristics at Britannia resulting from seasonal fluctuations in water flows through the mine will require close operational control to avoid potential deposits of deleterious substances.<sup>316</sup>

On the basis of information received from the Secretariat regarding funds available for the BMRP, Mr. Feasby analyzed whether available funds are likely to be sufficient to cover construction and operation of a treatment plant at Britannia in perpetuity, to avoid future deposits of deleterious substances. Mr. Feasby stated that assuming that funds available and budgeted for remediation at Britannia total \$75M (\$30M from the private PRPs and \$45M from the Province of British Columbia (see above, s. 5.5.3)), and assuming the province has made adequate provision for sludge disposal, and soil and groundwater remediation under the BMRP, the amount available to fund treatment plant construction and operation on a permanent basis is only marginally sufficient. Mr. Feasby's calculations, based on information about proposed BMRP expenditures he obtained from persons involved with the BMRP, are set out below.

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314. *Ibid.* at 3.3 "Comments on Information being Developed under the BMRP – K. Contaminated Sites."

315. *Ibid.* at 2.3.2 "Treatment Challenges Associated with ARD Chemistry at Britannia."

316. *Ibid.* at 4.0 "Conclusion."

### Estimated Cost of Implementing BMRP and Operating Treatment Plant in Perpetuity

The following are cost estimates<sup>317</sup> for the BMRP and the perpetual operation of a WTP:

	<u>\$ Millions</u>
Treatment Plant	12
Studies	3
Decontaminate site	6
Additional studies	<u>2</u>
Total	23
Operating cost <sup>318</sup> : \$0.55/m <sup>3</sup> , @ 500 m <sup>3</sup> /h	\$2.4 million/year
Net Present Value <sup>319</sup> @ 5% for 100 years	\$50 million
Total cost	\$73 million

There is considerable sensitivity to the above costs presented by two factors—the cost per cubic metre (treatment cost based on each cubic metre of effluent treated) and the real rate of return on investments. If the unit costs rise by \$0.20/m<sup>3</sup> (for example, poorer process control and high overhead costs) then total costs rise to \$91 million. If the real rate of return is 3%, instead of 5%, then the total costs will rise to \$130 million.<sup>320</sup> This illustrates the importance of having an efficient plant and efficient operators. These costs also show that there is less sensitivity to initial capital expenditure. The Province could spend more on the plant initially and possibly reduce unit costs marginally and save money overall.<sup>321</sup>

Recent amendments to the WMA (see above, s. 5.3.3) have likely made it impossible for the provincial Regulator to issue a remediation order or recover remediation costs against the private PRPs in connec-

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317. Estimates from personal communications of Grant Feasby with various sources involved in the BMRP.
318. Report of Technologies Applicable to the Management of Canadian Mining Effluents, SENES Consultants and Lakefield Research, March 1999.
319. Net Present Value (NPV) is the amount of money that needs to be in place today for funding a project that has annual costs. For indefinite funding, simply divide the annual cost by the interest rate, in this case  $2.4 / 0.05 = \$48$  Million. For shorter number of years, use the formula below:  

$$NPV = \text{annual cost} \frac{(1 + i)^n - 1}{i}$$
 (where n = number of years).
320. If, for example, a \$1 million addition to the plant of automation reduced the cost per cubic meter by \$0.05, the real rate of return on money invested is 5%, and 500 cubic meters per hour are treated, then the annual cost savings would be  $500 \times 24 \times 365 \times \$0.05 = \$220,000$ . This has a net present value of  $\$220,000 / 0.05 = \$4.4$  million if the cost is incurred annually and indefinitely. The net saving would be \$3.4 million.
321. *Ibid.* at 13-14.

tion with pollution at Britannia, because of the indemnity included in the Settlement Agreement (see s. 5.5.3, above).<sup>322</sup> The relevant statutory provision states “[...] a previous owner or operator of a producing or past producing mine site is not responsible for remediation at the site if the owner or operator [...] (b) obtains indemnification under the *Financial Administration Act*.”<sup>323</sup> Under the Settlement Agreement, the private PRPs obtained indemnification under the *Financial Administration Act*.<sup>324</sup> The practical consequence of these amendments, as regards Britannia, is that the provincial Regulator cannot require the private PRPs to make up for any eventual shortfall in funds available to address pollution issues at Britannia, including the cost of effluent treatment in perpetuity. These amendments also have the effect of removing from the purview of Part 4 of the WMA all closed mines, such as Britannia, at which a reclamation permit has been issued under s. 10 of the *Mines Act*. The *Mines Act* does not contain retroactive liability provisions.

At the time of writing, in October 2002, BC Environment has announced a full-scale review of the WMA, including Part 4, in part to further reduce duplication of effort between BC Mines and BC Environment.<sup>325</sup> In the context of this review, a provincial advisory panel on contaminated sites has urged that

[t]he province’s relationship with the Federal Government, particularly with Environment Canada and Fisheries and Oceans Canada, needs to be redefined. Presently, the relationship is poorly delineated and the role of each party is neither unique nor are the boundaries of responsibility and accountability clear. To rectify this problem, discussions must begin immediately at the Assistant Deputy Minister and Director-General level to clarify the roles and responsibilities of each agency relating to contaminated sites. Specifically, agreement should be sought for a clear Provincial

322. See *Waste Management Act Amendment Act, 2002*, S.B.C. 2002, c. 34 and British Columbia Ministry of Water, Land and Air Protection, “Contaminated Sites Provisions of the *Waste Management Act* Amended, 10 May 2002;” online: <[http://wlapwww.gov.bc.ca/epd/epdpa/contam\\_sites/updates/WMAA2002.pdf](http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/updates/WMAA2002.pdf)> (date accessed: 10 October 2002).

323. *Ibid.* at s. 7 (see 28.92(2) of the amended WMA).

324. S. 6.1(b) of the Settlement Agreement: “The Minister of Finance and Corporate Relations has, on behalf of the Province, given prior written approval to the giving of the indemnity in this Agreement pursuant to the *Guarantees and Indemnities Regulation* (B.C. Reg. 258/87), as amended, enacted pursuant to the *Financial Administration Act* (B.C.).”

325. See British Columbia. Advisory Panel on Contaminated Sites, *Interim Report*, 3 September 2002, at 5.8: “In addition, a resolution must be found to address the unnecessary duplication and lack of consistency between the closure and reclamation requirements under the *Mines Act* and *Safety, Health and Reclamation Code for Mines in British Columbia* and the contaminated sites requirements under the WMA and CSR that were not resolved by 9 May 2002 amendments.”

lead in administering and managing contaminated sites in British Columbia with federal involvement only as requested or necessary.<sup>326</sup>

The panel has also recommended that “[i]n accordance with CCME guidelines and the 1 July 2002 Federal Contaminated Sites Management Policy, more analysis is required on cost and benefits during the process for selecting an appropriate remedial action.”<sup>327</sup>

In late November 2002, the National Orphaned/Abandoned Mines Advisory Committee (see s. 5.3.4.2, above) created a Funding Models Task Group to develop recommendations on models for funding remediation of orphaned/abandoned mines in Canada that will be presented to the federal/provincial/territorial Mines Ministers for consideration at their September 2003 annual meeting.<sup>328</sup>

## 6. Closing Note

Factual records provide information regarding asserted failures to effectively enforce environmental law in North America that may assist submitters, the NAAEC Parties and other interested members of the public in taking any action they deem appropriate in regard to the matters addressed. Pursuant to Council Resolution 01-11, which determined its scope, this factual record provides information relevant to a consideration of whether Canada is failing to effectively enforce s. 36(3) of the *Fisheries Act* at the Britannia Mine in British Columbia, Canada. The Britannia Mine operated from 1904 to 1974. Since mine closure, metal-laden, acidic effluent that is acutely lethal to fish has discharged from the abandoned mine workings into the fish-bearing waters of Howe Sound. Copper Beach Estates Ltd. (“CBE”) purchased the property for real estate development in 1979 and is now insolvent. Environment Canada has taken no enforcement action at Britannia, and it has not had an enforcement file on Britannia since at least 1999, although it has maintained many compliance promotion files in regard to the site.

Federal Department of Justice policy allows prosecutors to consider whether the regulatory authority has a compliance program that might better serve the public interest than prosecution. A federal/provincial program for the remediation of orphaned/abandoned contaminated sites ended in 1995. Since then, regional employees of Envi-

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326. *Ibid.* at 5.10.

327. *Ibid.* at 5.11.

328. Canadian Environmental Network Weekly E-Bulletin, 29 November 2002, “Funding Models Task Group, National Orphaned/Abandoned Mines Advisory Committee.”

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Environment Canada and Fisheries and Oceans Canada have cooperated with regional employees of BC Environment on an *ad hoc* basis in seeking funding to study and solve the Britannia effluent problem.

The *Fisheries Act* Compliance and Enforcement Policy states that in responding to an alleged violation, an appropriate action is one that achieves “compliance in the shortest possible time and with no further occurrence of violations,” and may include supporting provincial enforcement action. Since 1997, Environment Canada has provided technical assistance to BC Environment in its enforcement of the BC *Waste Management Act* against CBE and past owners of the mine. In 2001, the province settled with past owners for \$30M. Environment Canada agreed to conduct a sediment investigation in Howe Sound and provide technical support for a provincial remediation plan. Under an agreement with CBE that CBE subsequently repudiated, the province committed to pay for the construction of an effluent treatment plant and CBE committed to provide \$14M+ to operate the plant in perpetuity. Under the current provincial clean-up program, expected to cost the province at least \$45M, start-up of an effluent treatment plant is scheduled for June 2004. An expert engaged by the Secretariat has stated that a plant could likely be in operation sooner, and that once in operation, close controls will be required to prevent s. 36(3) violations and ensure that the current \$75M budget can support plant operation in the long term.



## **APPENDIX 1**

**Council Resolution 01-11,  
dated 16 November 2001**



Montreal, November 16, 2001

COUNCIL RESOLUTION 01-11

**Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Canada is Failing to Effectively Enforce section 36(3) of the *Fisheries Act* (SEM-98-004).**

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

MINDFUL that Article 14(3) of the NAAEC states that where a Party has advised the Secretariat within 60 days of delivery to the Party of a request for a response from the Party, that a matter is the subject of a pending judicial or administrative proceeding, the Secretariat shall proceed no further;

CONSIDERING the submission filed on the above-mentioned matter by the Sierra Club of British Columbia, Environmental Mining Council of British Columbia and Taku Wilderness Association, the Secretariat's request of June 25, 1999 to the Government of Canada for a response, and the response provided by the Government of Canada on September 8, 1999;

NOTING that it would be inappropriate with respect to the submission to direct the preparation of a factual record on matters in the submission that are subject to pending judicial or administrative proceedings;

HAVING REVIEWED the notification by the Secretariat of May 11, 2001 that the development of a factual record is warranted in relation to the submission (SEM-98-004); and

HAVING BEEN INFORMED by Canada that at this time there are no pending judicial or administrative proceedings regarding the Britannia Mine and that proceedings relating to the Tulsequah Chief and Mt. Washington Mines are still pending;

**HEREBY UNANIMOUSLY DECIDES:**

TO INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* for the assertion that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* with respect to the Britannia Mine;

TO DIRECT the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan;

TO DIRECT the Secretariat to consider, in developing the factual record, whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on January 1, 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to January 1, 1994, may be included in the factual record; and

TO TERMINATE this submission process with respect to the assertions concerning the Tulsequah Chief and Mt. Washington Mines.

APPROVED BY THE COUNCIL

## **APPENDIX 2**

**Overall Plan to Develop a Factual Record,  
dated 14 December 2001**



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## Secretariat of the Commission for Environmental Cooperation

### Overall Plan to Develop a Factual Record

**Submission ID:** SEM-98-004

**Submitter(s):** Sierra Club of British Columbia  
Environmental Mining Council of British Columbia  
Taku Wilderness Association  
Represented by: Sierra Legal Defence Fund

**Party:** Canada

**Date of this plan:** 14 December 2001

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### Background

On 29 June 1998, the Submitters identified above presented to the Secretariat of the Commission for Environmental Cooperation (CEC) a submission in accordance with Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC). The Submitters assert “the systemic failure of the Government of Canada to enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia (B.C.).<sup>1</sup>” The Submitters allege that Canada fails to initiate prosecutions even though it is aware of ongoing violations of section 36(3) resulting from acid mine drainage. The Submitters refer to the Tulsequah Chief, Britannia and Mount Washington mines as examples.

On 16 November 2001, the Council decided unanimously to instruct the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, “for the assertion that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* with respect to the Britannia Mine.” The Council directed the Secretariat, in developing the factual record, to consider whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

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1. Submission, at 5.

Under Article 15(4) of the NAAEC, in developing a factual record “...the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”

#### **Overall Scope of the Fact Finding:**

The Submitters allege the systemic failure of the Government of Canada to enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in B.C. Section 36(3) prohibits the deposit of a deleterious substance in water frequented by fish. Section 40(2) of the *Fisheries Act* makes violation of section 36(3) an offence punishable by a range of fines and/or imprisonment. The Submitters allege that there have been no prosecutions of mining companies in B.C. for violations of section 36(3) for at least ten years, despite documented ongoing violations resulting from acid mine drainage. They attribute Canada’s alleged failure to effectively enforce section 36(3) in part to a severe shortage of staff and resources. They also contend that Canada has devolved responsibility for enforcing environmental laws to the provinces, and that this has resulted in deterioration of transparency and accountability. They cite the failure to enforce section 36(3) of the *Fisheries Act* as having contributed to the decline of salmon runs in B.C. They contend that the fact that the Tulsequah Chief, Britannia and Mount Washington mines have been allowed to continue polluting fish habitat for decades is *prima facie* evidence that enforcement mechanisms other than prosecution have failed.

The Submitters cite the Britannia Mine as an example. It operated from 1905 to 1974. According to the Submitters, although the mine is now abandoned, acid mine drainage and heavy metals continue to drain from the mine into Britannia Creek and Howe Sound in staggering quantities. They allege that Britannia Creek, once productive of salmon habitat, is now virtually devoid of life and that there is a marked absence of marine life in Howe Sound in the areas where Britannia Creek and an outfall pipe from the mine flow into the marine waters of the Sound. They also allege that elevated heavy metals levels have been found in crabs, mussels, oysters and shrimp up to 18 km away, along with significantly reduced numbers of these species. The Submitters allege that no *Fisheries Act* charges have ever been laid against the owners or operators of the Britannia Mine.

In its response, Canada describes its general approach to enforcing and assuring compliance with section 36(3) at acid-generating mines in B.C. and claims that this approach is effective both generally and in the specific case of Britannia. With respect to Britannia, Canada asserts that it has worked together with the B.C. government to study the acid mine drainage problem and that these efforts have resulted in a proposal to build an effluent treatment plant and landfill at the mine which are expected to reduce the concentration of metals in the mine effluent and render it non-acutely lethal to fish.

To prepare the factual record, the Secretariat will gather and develop information relevant to the facts concerning:

- (i) alleged violations of section 36(3) of the *Fisheries Act* in connection with the Britannia Mine;
- (ii) Canada's enforcement of section 36(3) of the *Fisheries Act* in connection with the Britannia Mine; and
- (iii) whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in the context of the Britannia Mine.

**Overall Plan:**

Consistent with Council Resolution 01-11, execution of the overall work plan will begin no sooner than 14 January 2002. All other dates are best estimates. The overall plan is as follows:

- Through public notices or direct requests for information, the Secretariat will invite the Submitters; JPAC; community members; the regulated community; and local, provincial and federal government officials to submit information relevant to the scope of fact finding outlined above. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested non-governmental organizations or persons or the JPAC to provide relevant information to the Secretariat (section 15.2 of the *Guidelines*). [January 2002]
- The Secretariat will request information relevant to the factual record from federal, provincial and local government authorities of Canada, as appropriate, and will consider any information furnished by a

Party (Articles 15(4) and 21(1)(a) of the NAAEC). [January 2002]  
Information will be requested relevant to the facts regarding:

- (i) alleged violations of section 36(3) of the *Fisheries Act* in connection with the Britannia Mine;
  - (ii) Canada's enforcement of section 36(3) of the *Fisheries Act* in connection with the Britannia Mine; and
  - (iii) whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in the context of the Britannia Mine.
- The Secretariat will gather relevant technical, scientific or other information that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. [January through April 2002]
  - The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record. [January through June 2002]
  - The Secretariat, as appropriate, will collect relevant technical, scientific or other information for the preparation of the factual record, from interested non-governmental organizations or persons, the JPAC or independent experts. [January through June 2002]
  - In accordance with Article 15(4), the Secretariat will prepare the draft factual record based on the information gathered and developed. [June through September 2002]
  - The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5). [end of September 2002]
  - As provided by Article 15(6), the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. [November 2002]
  - The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7).

**Additional information**

The submission, the Party's response, the Secretariat determinations, the Council Resolution, and a summary of these are available in the Registry on Citizen Submissions in the CEC home page [www.cec.org](http://www.cec.org) or upon request to the Secretariat at the following address:

Secretariat of the CEC  
Submissions on Enforcement  
Matters Unit (SEM Unit)  
393 St. Jacques St. West  
Suite 200  
Montreal QC H2Y 1N9  
Canada



## **APPENDIX 3**

**Comments of Canada and the United States  
on the Overall Plan to Develop a Factual Record,  
dated 14 and 23 January 2002**



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**Comments of Canada  
on the Overall Plan to Develop a Factual Record  
with regard to submission SEM-98-004**

Environment Canada  
Ottawa ON K1A 0H3

January 14, 2002

Ms. Janine Ferretti  
Executive Director  
Secretariat  
Commission for Environmental Cooperation  
393 St. Jacques Street West, Suite 200  
Montreal QC H2Y 1N9

Dear Ms. Ferretti:

Canada is pleased to offer its comments on the five work plans to develop factual records which were provided to the Parties on December 14, 2001.

First, we note that – unlike the work plans the Secretariat provided for the “B.C. Hydro” and “Metales y Derivados” factual records – these five are quite general, and that the Secretariat has chosen not to include specific information on the methods that will be used to gather the facts, or any criteria to determine the relevancy of those facts. As a result, Canada is limited in its ability to provide comments that may be helpful to the Secretariat in ensuring the timely and efficient development of factual records. Should the Secretariat provide the Parties with a more detailed account of what it intends to do to develop the factual records, Canada would be pleased to offer comments which would facilitate the fact gathering process.

In regard to the scope of the fact finding defined in each of the five work plans, it is Canada’s understanding that this scope is limited to the instructions provided by Council with respect to the specific cases identified in Council Resolutions 01-08, 01-09, 01-10, 01-11, and 01-12. As it is made clear in the scope of the fact finding for the Aquanova Factual Record, Canada understands that the facts in the other four factual records will also be gathered strictly with respect to the cases identified in the council resolutions, and not in any other factual context.

With respect to the scope of the fact finding and the overall plan for the Oldman River Factual Record, Canada notices that references are made to the “Sunpine Project”. To avoid any misunderstanding, Canada recommends that all references regarding this case be made to the “Sunpine Forest Products Forest Access Road case” referred to in Council Resolution 01-08 and in the background section of the work plan for the Oldman River Factual Record.

With regard to the scope of the fact finding and the overall plan for the B.C. Logging Factual Record, Canada notices that references are made to sections “35 and 36” of the *Fisheries Act*. Canada believes that this is inaccurate and that these references should be changed to sections “35(1) and 36(3)” of the *Fisheries Act* as is identified in Council Resolution 01-12.

Canada is pleased to submit the above comments for consideration by the Secretariat and offers its full assistance in providing any other relevant information which may facilitate the fact gathering process. We note in this regard that, in order to ensure full access to the appropriate Canadian governmental authorities (federal, provincial, and local) and expedite the compilation of facts, it would be preferable that all information requests made to the Canadian Party regarding the Oldman River, BC Mines, and BC Logging factual records be addressed to the following contact:

Ms. Jenna MacKay-Alie  
Director  
Americas Branch  
Policy and Communications  
Environment Canada  
10 Wellington Street, 23rd Floor  
Hull, Québec  
K1A 0H3

We will follow up with the Director of the Submission on Enforcement Matters Unit to determine if this offer is helpful in expediting the process.

Yours sincerely,

Assistant Deputy Minister  
Policy and Communications

c.c.: SEMARNAT  
US EPA

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## **U.S. Comments on the Overall plan to develop a factual record on SEM-99-002 submitted by the CEC Secretariat on December 14, 2001**

1/23/02

### **Background Section**

First paragraph, second sentence: The Secretariat's characterization of the requirements of Section 703 of the Migratory Bird Treaty Act with respect to "taking" is inaccurate. The U.S. proposes that this sentence be revised to read as follows:

"...which prohibits the killing or 'taking' of migratory birds and their nests or eggs, against loggers, logging companies, and logging contractors."

First paragraph, third sentence: We ask that the Secretariat revise this sentence to include language directly from the Submission (as opposed to re-characterizing statements in the Submission and then citing four pages and an appendix). We propose reworking the sentence to read as follows:

"The Submitters claim that logging operations consistently result in violations of the Act which have 'significant consequences, because logging directly kills or takes migratory birds by destroying nests, crushing eggs, and killing nestlings and fledglings.'"

First paragraph, fourth sentence: Please revise this sentence as follows:

"The Submitters assert that despite being aware of these alleged violations...."

### **Overall Scope of the Fact Finding Section**

While the Submitters' allegations are described in some detail, almost no information is provided regarding the U.S. government response. To maintain balance, the Secretariat should provide additional information describing the main elements of the U.S. government response to the MBTA submission.

For consistency, please revise bullet (i) to read as follows: “the alleged violations of section 703 of the MBTA in connection with the two cases that are referenced in Council Resolution 01-10”.

Bullet (iii) is unnecessary. Bullet (ii) is general in nature and effectively covers the substance addressed in bullet (iii), therefore, the third bullet should be removed.

### **Overall Plan Section**

In order to facilitate the fact finding as well as internal U.S. coordination efforts, it is requested that all communications between the Secretariat and U.S. federal government officials, as outlined under the first and second bullets, be in writing and go through the following primary points of contact, with an electronic copy to the U.S. Environmental Protection Agency/Office of International Activities (frigerio.lorry@epa.gov):

#### U.S. Department of Interior/ Fish and Wildlife Service

Kevin Adams  
Assistant Director, Law Enforcement  
U.S. Fish & Wildlife Service  
Mail Stop 3012  
1849 C Street NW  
Washington, D.C. 20240  
ph: 202-208-3809  
fx: 202-482-3716  
\*DOI does not have email access at this time

#### U.S. Department of Agriculture

Tom Darden  
Acting Director Wildlife, Fish, Watershed, Air, and Rare Plants Staff  
USDA Forest Service  
Sidney R. Yates Federal Building  
201, 14th Street at Independence Avenue, SW  
Washington, D.C. 20250  
ph: 202-205-1167  
fx: 202-205-1599  
email address to follow

Additionally, the contacts identified above should be copied on all communications between the Secretariat and U.S. state and local officials (including an electronic copy to the U.S. Environmental Protection Agency via frigerio.lorry@epa.gov).

Second bullet:

- The following sentence should be included after the first sentence in the first paragraph: “All requests for information from government authorities will be in writing.”
- Bullet (i) under the second bullet should be revised as outlined above.
- Bullet (iii) under the second bullet should be removed for the reasons stated above.

Fourth bullet: If the Secretariat obtains independent experts to develop information, the Secretariat should ensure that such experts represent a balanced point of view.

**U.S. Comments on the Overall plan to develop a factual record on SEM-97-006, 98-004, 98-006, and 00-004 submitted by the CEC Secretariat on December 14, 2001**

Since these four documents contain much of the same “boiler-plate” language, the comments outlined below apply to all four work plans.

**Overall Scope of the Fact Finding Section**

Bullet (iii) is unnecessary. Bullet (ii) is general in nature and effectively covers the substance addressed in bullet (iii), therefore, the third bullet should be removed.

**Overall Plan Section**

Second bullet:

- The following sentence should be included after the first sentence in the first paragraph: “All requests for information from government authorities will be in writing.”
- Bullet (i) under the second bullet should be revised as outlined above.
- Bullet (iii) under the second bullet should be removed for the reasons stated above.

Fourth bullet: If the Secretariat obtains independent experts to develop information, the Secretariat should ensure that such experts represent a balanced point of view.

## **APPENDIX 4**

**Request for Information, dated January 2002**



## Secretariat of the Commission for Environmental Cooperation

### REQUEST FOR INFORMATION for Preparation of a Factual Record Submission SEM 98-004 (BC Mining) January 2002

#### I. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (the NAAEC) by Canada, Mexico and the United States (together, the Parties). The CEC operates through three organs: a Council, made up of a top-level environmental official from each of the Parties; a Joint Public Advisory Committee (JPAC), comprised of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of the NAAEC allows any non-governmental organization or person in North America to file a submission with the Secretariat asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. This initiates a process of review of the submission that can result in the Council instructing the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Articles 15(4) and 21(1)(a) of the NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available; submitted by the JPAC or by interested non-governmental organizations or persons; or developed by the Secretariat or independent experts.

On 16 November 2001, the Council issued Council Resolution 01-11 unanimously instructing the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, “for the assertion that Canada is failing to effec-

tively enforce section 36(3) of the *Fisheries Act* with respect to the Britannia Mine.” The Council directed the Secretariat, in developing the factual record, to consider whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

The Secretariat is now requesting information relevant to matters to be addressed in the factual record for the BC Mining submission, SEM-98-004. The following sections provide background on the submission and describe the kind of information requested.

## II. The BC Mining submission

On 29 June 1998, the Sierra Club of British Columbia, Environmental Mining Council of British Columbia, and the Taku Wilderness Association, represented by the Sierra Legal Defence Fund (Submitters) filed a submission with the CEC alleging the systemic failure of the Government of Canada to enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia. Section 36(3) prohibits the deposit of a deleterious substance in water frequented by fish. Section 40(2) of the *Fisheries Act* makes violation of section 36(3) an offence punishable by a range of fines and/or imprisonment. The Submitters allege that there have been no prosecutions of mining companies in British Columbia for violations of section 36(3) for at least ten years, despite documented ongoing violations resulting from acid mine drainage. They attribute Canada’s alleged failure to effectively enforce section 36(3) in part to a severe shortage of staff and resources. They also contend that Canada has devolved responsibility for enforcing environmental laws to the provinces, and that this has resulted in deterioration of transparency and accountability. They claim that the failure to enforce section 36(3) of the *Fisheries Act* has contributed to the decline of salmon runs in British Columbia. They contend that the fact that the Tulsequah Chief, Britannia and Mount Washington mines have been allowed to continue polluting fish habitat for decades is *prima facie* evidence that enforcement mechanisms other than prosecution have failed.

The Submitters cite the Britannia Mine as an example. It operated from 1905 to 1974. According to the Submitters, although the mine is now abandoned, acid mine drainage and heavy metals continue to drain from the mine into Britannia Creek and Howe Sound in staggering

quantities. They allege that Britannia Creek, once productive of salmon habitat, is now virtually devoid of life and that there is a marked absence of marine life in Howe Sound in the areas where Britannia Creek and an outfall pipe from the mine flow into the marine waters of the Sound. They also allege that elevated heavy metals levels have been found in crabs, mussels, oysters and shrimp up to 18 km away, along with significantly reduced numbers of these species. The Submitters allege that no *Fisheries Act* charges have ever been laid against the owners or operators of the Britannia Mine.

In its response dated 8 September 1999, Canada describes its general approach to enforcing and assuring compliance with section 36(3) at acid-generating mines in British Columbia and claims that this approach is effective both generally and in the specific case of Britannia. With respect to Britannia, Canada asserts that it has worked with the British Columbia government to study the acid mine drainage problem and that these efforts have resulted in a proposal to build an effluent treatment plant and landfill at the mine which are expected to reduce the concentration of metals in the mine effluent and render it non-acutely lethal to fish.

### III. Request for information

The Secretariat requests information relevant to the facts concerning:

- (i) alleged violations of section 36(3) of the *Fisheries Act* in connection with the Britannia Mine;
- (ii) Canada's enforcement of section 36(3) of the *Fisheries Act* in connection with the Britannia Mine; and
- (iii) whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in the context of the Britannia Mine.

### IV. Examples of relevant information

Examples of relevant information include the following:

1. Information regarding the characteristics of acid mine drainage at the Britannia Mine, including annual and seasonal volumes and chemical composition.

2. Information on whether and to what extent acid mine drainage from the Britannia Mine renders water to which it is added deleterious to fish or fish habitat or to the use by man of fish that frequent that water, including:
  - monitoring or inspection results;
  - studies carried out by or on behalf of owners or operators of the Britannia Mine, universities, government, non-governmental organizations or others;
  - public complaints or petitions.
3. Information about remedial measures for controlling acid mine drainage, including:
  - whether such measures have been adopted at the Britannia Mine;
  - who is responsible for implementing such measures;
  - cost of such measures and who bears the risk of cost over-run;
  - effectiveness of such measures in ensuring compliance with section 36(3) of the *Fisheries Act* at the Britannia Mine.
4. Information on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, section 36(3) of the *Fisheries Act*, specifically ones that might apply to acid mine drainage from the Britannia Mine.
5. Information on federal, provincial or local enforcement or compliance-related staff or resources available for enforcing or ensuring compliance with section 36(3) of the *Fisheries Act* in connection with the Britannia Mine.
6. Information on Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* section 36(3) in connection with the Britannia Mine, including for example:
  - efforts to prevent violations, such as by providing technical assistance;
  - monitoring or inspection activity;

- 
- public consultations;
  - warnings, orders, charges or other enforcement action issued to owners of the Britannia Mine;
  - agreements entered into with owners or former owners or operators of the Britannia Mine;
  - actions to remedy impacts to fish habitat caused by acid mine drainage from the Britannia Mine; or
  - coordination between different levels of government on enforcement and compliance assurance.
7. Information on the effectiveness of Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* section 36(3) in connection with the Britannia Mine, for example their effectiveness in:
- remedying any violations of *Fisheries Act* sections 36(3) that occurred;
- or
- preventing future violations of that provision.
8. Information on barriers or obstacles to enforcing or ensuring compliance with section 36(3) of the *Fisheries Act* in connection with the Britannia Mine.
9. Any other technical, scientific or other information that could be relevant.

#### V. Additional background information

The submission, Canada's response, the determinations by the Secretariat, the Council Resolution, the overall plan to develop the factual record and other information are available in the Registry and Public Files section of Citizen Submissions on Enforcement Matters on the CEC website: <<http://www.cec.org>>. These documents may also be requested from the Secretariat.

**VI. Where to Send Information**

Relevant information for the development of the factual record may be sent to the Secretariat until 30 June 2002, to the following address:

Secretariat of the CEC  
Submissions on Enforcement  
Matters Unit (SEM Unit)  
393 St. Jacques St. West  
Suite 200  
Montreal QC H2Y 1N9  
Canada  
Tel. (514) 350-4300

\* Please reference the submission number (SEM-98-004 / BC Mining) in all correspondence.

For any questions, please send an e-mail to the attention of Katia Opalka, at [info@ccemtl.org](mailto:info@ccemtl.org).

## **APPENDIX 5**

**Request for Additional Information,  
dated 8 May 2002**



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## BC MINING (SEM-98-004) FACTUAL RECORD

### REQUEST FOR ADDITIONAL INFORMATION

8 May 2002

Please provide answers to and copies of – or access to – supporting information for each of the following questions. If requested information will not be provided (including on a confidential basis) because it is non-existent, confidential or privileged, or otherwise unavailable, please provide an explanation.

1. Please provide details regarding the extent to which Canada has taken any of the following actions in connection with enforcement of s. 36(3) of the *Fisheries Act* at the Britannia Mine since 1 January 1994:
  - a) Inspections to monitor or verify compliance;
  - b) Investigations of alleged violations;
  - c) Issuance of warnings, directions by Fishery Inspectors, authorizations, permits, licenses, or Ministerial orders, or other administrative orders of a preventive, curative or emergency nature;
  - d) Court actions, such as injunctions, prosecution (including pursuant to s. 78.2 of the *Fisheries Act*; please see # 3, below), court orders upon conviction, and civil suits for recovery of costs;
  - e) Appointing and training inspectors (please see # 4, below);
  - f) Seeking assurances of voluntary compliance or entering into compliance agreements;
  - g) Publicly releasing non-compliance information;
  - h) Issuing bulletins or other periodic statements on enforcement procedures;
  - i) Promoting environmental audits;

- j) Requiring record keeping and reporting (please see # 2, below);
  - k) Conducting searches and seizures.
2. *Guidelines for the Control of Liquid Effluents from Existing Metal Mines (Guidelines)* and *Environmental Code of Practice for Mines (Code)*, 1977, issued under the *Fisheries Act*
- Since 1 January 1994,
- a) Have the owners of the Britannia Mine complied with the reporting requirements stipulated in the Guidelines (s. 6 *et seq.* and Schedule II)? Please provide details.
  - b) Has the undiluted effluent from the Britannia Mine complied with the objectives set forth in the Guidelines (s. 5 and Schedule 1)? Please provide details.
  - c) If the answer to either 2a) or 2b) is no, please indicate whether a compliance schedule has been negotiated and implemented under the Guidelines.
  - d) The Explanatory Notes for the Guidelines indicate that “[f]ailure to comply with a guideline is not itself an offence; however, it may mean that the law itself (e.g. the general prohibition of deleterious discharges expressed in the *Fisheries Act*) is being violated.” Please explain the role of the Guidelines in the enforcement of s. 36(3) of the *Fisheries Act* at the Britannia Mine.
  - e) Has the owner of the Britannia Mine complied with the requirements of the Code, and in particular, s. 5.2 (“Long-Term Control of Contaminated Effluents”)? Please provide details.
  - f) Has the owner of the Britannia Mine been given notice that a provincial or other federal regulatory agency is performing functions of the Minister of the Environment under the Guidelines? Please provide details.
3. Please explain the role of the Department of Justice in enforcing s. 36(3) of the *Fisheries Act* with regard to the Britannia Mine, and

provide information regarding policies of the Department of Justice applicable to enforcement of s. 36(3) of the *Fisheries Act* at the Britannia Mine, such as, without limitation, criteria for determining when prosecution would be in the public interest and evidentiary criteria. Please also explain why Environment Canada contemplated bringing an action in public nuisance against the owners of the Britannia Mine and the reasons why the Department of Justice advised against this.

4. Please provide information regarding the human and financial resources expended by Environment Canada since 1 January 1994 for the enforcement of s. 36(3) of the *Fisheries Act* in British Columbia and the human and financial resources that were available in regard to enforcing or seeking compliance with s. 36(3) of the *Fisheries Act* at the Britannia Mine.
5. In a letter dated 4 October 2000, Canada was invited by the Deputy Director of Waste Management of the Province of British Columbia to make a submission under the provincial *Waste Management Act* “potentially responsible parties” process in connection with the Britannia Mine. Please provide copies (on a confidential basis, if necessary) of any submissions prepared and/or filed by Canada under that process, as well as copies of any settlement agreements a) reached by Canada with private potentially responsible parties, the Government of British Columbia, and/or the owner of the Britannia Mine, or b) to which Canada intervened in any way.
6. Federal-provincial cooperation on enforcement
  - a) Please identify and provide information about and/or copies of all past and present formal or informal agreements between the Government of Canada and the province of British Columbia providing for the enforcement of s. 36(3) (or former s. 33) of the *Fisheries Act* by the province and provide information regarding the basis for and functioning of such agreements, including, without limitation,
    - (i) the role of Chapter Fifteen of the *Internal Trade Agreement, 1995 (as amended)* and initiatives of the Canadian Council of Ministers of the Environment (CCME), such as, without limitation, the *Statement of Interjurisdictional Cooperation on Environmental Matters*, the *Canada-Wide Accord on Environmental Harmonization* and the *Sub-Agreement on*

*Inspections and Enforcement in the enforcement of s. 36(3) of the Fisheries Act at the Britannia Mine;*

- (ii) any requirement that the province (1) include conditions regarding compliance with s. 36(3) of the *Fisheries Act* imposed by the federal government in permits issued under the authority of provincial legislation or (2) subsequently enforce such conditions;
  - (iii) any provision for federal funding of provincial enforcement of s. 36(3) of the *Fisheries Act*; and
  - (iv) any requirement for the federal government to fund and/or carry out scientific investigations related to enforcing s. 36(3) of the *Fisheries Act*.
- b) Please explain whether and how any cooperative arrangements or agreements between Canada and British Columbia for the enforcement of s. 36(3) of the *Fisheries Act* have been successful in achieving compliance with the *Act* in the shortest possible time and with no further occurrence of violations at the Britannia Mine.
- c) Please explain whether and how the technical advice and expertise provided by Environment Canada to the Province of British Columbia to support the province's enforcement efforts has resulted in improved effectiveness in enforcing and achieving compliance with the *Act*.

7. Federal funding

- a) Please provide information regarding any federal initiatives, policies or programs applicable to mines such as the Britannia Mine that provide or provided funding for research and/or the remediation of contaminated sites or effluent treatment, including, without limitation, the National Contaminated Sites Remediation Program, the Canada-B.C. Infrastructure Program, and the MEND Program. Relevant information includes, without limitation, program objectives; criteria used to determine eligibility for funding and amount of funding; environmental assessment requirements under s. 5(1)(b) of the *Canadian Environmental Assessment Act*; and procedures established to ensure ongoing compliance with federal requirements and cost-recovery.

- 
- b) Please explain the connection, if any, between such programs and the enforcement of s. 36(3) of the *Fisheries Act* at the Britannia Mine.
8. Enforcement of s. 36(3) of the *Fisheries Act* and abandoned mine sites
- a) Please explain whether and how the enforcement measures in the *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* (Policy) have been applied at the Britannia Mine. Please indicate the particular enforcement measures that have been applied and the reasons for choosing those measures.
- b) In the conclusion to its response to the submission, dated 8 September 1999, Canada refers to the Britannia Mine as an “abandoned mine.” In the 1994-95 Annual Report of the CCME on the National Contaminated Sites Remediation Program, the Britannia Mine is listed as an “orphan site.” Please provide information regarding criteria used to identify the Britannia Mine as “abandoned” or “orphaned”, and explain whether and how this classification has affected application of the Policy at the Britannia Mine.
- c) Please explain the origins and mandate of the Multistakeholder Advisory Committee on Abandoned Mines (struck at the 2001 Mine Ministers Conference) and its role, if any, in addressing non-compliance with s. 36(3) of the *Fisheries Act* at abandoned mines in Canada such as the Britannia Mine.



## **APPENDIX 6**

**Section 42 of the *Fisheries Act*,  
R.S.C. 1985, c. F-14**



**Section 42 of the *Fisheries Act*,  
R.S.C. 1985, c. F-14**

42. (1) Where there occurs a deposit of a deleterious substance in water frequented by fish that is not authorized under section 36 or a serious and imminent danger thereof by reason of any condition, the persons who at any material time

- (a) own the deleterious substance or have the charge, management or control thereof, or
- (b) are persons other than those described in paragraph (a) who cause or contribute to the causation of the deposit or danger thereof,

are, subject to subsection (4) in the case of the persons referred to in paragraph (a) and to the extent determined according to their respective degrees of fault or negligence in the case of the persons referred to in paragraph (b), jointly and severally liable for all costs and expenses incurred by Her Majesty in right of Canada or a province, to the extent that those costs and expenses can be established to have been reasonably incurred in the circumstances, of and incidental to the taking of any measures to prevent any such deposit or condition or to counteract, mitigate or remedy any adverse effects that result or may reasonably be expected to result therefrom.

**Recovery**

(2) All the costs and expenses referred to in subsection (1) are recoverable by Her Majesty in right of Canada or a province with costs in proceedings brought or taken therefor in the name of Her Majesty in any such right in any court of competent jurisdiction.

**Liability to fishermen**

(3) Where, as a result of a deposit that is not authorized under section 36, a deleterious substance enters water frequented by fish, the persons described in paragraphs (1)(a) and (b) are, subject to subsection (4) in the case of the persons described in paragraph (1)(a) and to the extent determined according to their respective degrees of fault or negligence in the case of the persons described in paragraph (1)(b), jointly and severally liable for all loss of income incurred by any licensed commercial

fisherman, to the extent that the loss can be established to have been incurred as a result of the deposit or of a prohibition to fish resulting therefrom, and all such loss is recoverable with costs in proceedings brought or taken therefor in any court of competent jurisdiction.

#### Defences to liability

(4) The liability of any person described in paragraph (1)(a) is absolute and does not depend on proof of fault or negligence but no such person is liable for any costs and expenses pursuant to subsection (1) or loss of income pursuant to subsection (3) if he establishes that the occurrence giving rise to the liability was wholly caused by

- (a) an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) an act or omission with intent to cause damage by a person other than a person for whose wrongful act or omission he is by law responsible.

#### Exception

(5) Nothing in this section limits or restricts any right of recourse that any person who is liable pursuant to this section may have against any other person.

#### Limitation

(6) No proceedings may be commenced under subsections (1) to (3) at any time later than two years after the occurrence to which the proceedings relate could reasonably be expected to have become known to Her Majesty in right of Canada or a province or to any licensed commercial fisherman, as the case may be.

#### Exception

(7) Subsections (1) to (3) do not apply in respect of any deposit of a deleterious substance that, within the meaning of Part XV of the *Canada Shipping Act*, constitutes a discharge of a pollutant caused by or otherwise attributable to a ship.

**Other civil remedies not affected**

(8) No civil remedy for any act or omission is suspended or affected by reason only that the act or omission is authorized under this Act, is an offence under this Act or gives rise to civil liability under this Act.

R.S., c. 17 (1st Supp.), s. 3; 1976-77, c. 35, s. 7.



## **APPENDIX 7**

### **List of Information Gathered by the Secretariat**



**Information Gathered for the Development of a Factual Record  
on Submission SEM-98-004 (BC Mining)**

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
36	5/8/1973	Pollution Control Branch, Water Resource Service, Department of Lands, Forests, and Water Resources, BC	Application for a permit under the Pollution Control Act, 1967 (Effluent), Anaconda Canada Limited	EC
37	10/22/1974	Brodie, J.B., Head, Mining Section, Industrial Division, Pollution Control Branch, Water Resource Service, Department of Lands, Forests and Water Resources, BC	Memo to File re meeting with Anaconda on 17 October 1974	EC
38	4/3/1975	Brodie, J.B., Head, Mining Section, Industrial Divi- sion, Pollution Control Branch, Water Resource Service, Department of Lands, Forests and Water Resources, BC	Memo to File re meeting with Anaconda on 1 April 1975 re proposal for submerged outfall	EC
39	5/27/1975	Brodie, J.B., Head, Mining Section, Industrial Division, Pollution Control Branch, Water Resource Service, Department of Lands, Forests and Water Resources, BC	Memo to File re 23 May 1975 telephone conversation with Dan Cumming of Anaconda	EC
40	8/3/1976	Brodie, J.B., Head, Mining Section, Industrial Divi- sion, Pollution Control Branch, Water Resource Service, Department of Lands, Forests and Water Resources, BC	Letter to Anaconda re review of Britannia proposal and requirements re effluent treatment	EC
41	3/4/1977	Brodie, J.B., Head, Mining Section, Industrial Division, Pollution Control Branch, Water Resource Service, Department of Lands, Forests and Water Resources, BC	Memo to file re meeting with EPS and Fisheries re: Anaconda Ltd. (AE-2194)	EC
43	4/26/1977	Hodgson, F.P., Chief, Industrial Division, Pollution Control Branch, Water Resource Service, Department of Lands, Forests and Water Resources, BC	Letter to Anaconda re approval of Britannia plan	EC

**LEGEND**

BC: British Columbia

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EC: Environment Canada

S: Submitters

SEC: Secretariat

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
42	5/11/1977	Brodie, J.B., Head, Mining Section, Industrial Division, Pollution Control Branch, Water Resource Service, Department of Lands, Forests and Water Resources, BC	Memo to file re outfall and hydrostatic bulkhead planned for the mine	EC
115	2/21/1978	Brodie, J.B., Mining Section, Industrial Division	Memo to File Re: Anaconda, File: 0262100-AE-2194	S
149	6/20/1979	Option to Purchase	Option to purchase the Britannia Mine entered into by Anaconda Canada Exploration Ltd. and Copper Beach Estates Ltd.	Ralph Fulber
44	12/10/1979	Hamilton, W.G., Regional Manager, Pollution Control Branch, Lower Mainland Region, Ministry of Environment, BC	Letter to Anaconda re ongoing requirements pursuant to Pollution Control Act covering discontinuance of operations at the Britannia Mine	Ralph Fulber
45	1/14/1980	Hamilton, W.G., Regional Manager, Pollution Control Branch, Lower Mainland Region, Ministry of Environment, BC	Memo to file re transfer of waste discharge responsibilities at Britannia to Copper Beach Estates Limited	Ralph Fulber
97	1/25/1980	Fodchuk, B.W.F., Russell & DuMoulin	Letter to Registrar, Land Title Office, Re: Sale - Anaconda Canada Exploration Ltd. to Copper Beach Estates Ltd. / Application Numbers G79906 - G70023	S
46	2/21/1980	Hodgson, F.P., Manager, Pollution Control Section, Waste Management Branch, Ministry of Environment, BC	Letter to Copper Beach Estates re request for transfer of orders from Anaconda to Copper Beach	EC
47	1/9/1981	n/a	"Monitoring Program for Copper Beach Estates Ltd. - AE-2194"	EC
48	1/29/1981	Ferguson, R.H., Director of Pollution Control, Waste Management Branch, Ministry of Environment, BC	Requirements Pursuant to Pollution Control Act Covering Discontinuance of Operations at the Anaconda Britannia Mine	EC
49	2/13/1984	Apostoli, P.A., Waste Management Officer, Waste Management Branch, Lower Mainland Region, Ministry of Environment, BC	Letter to Copper Beach Estates re reviewing past communications regarding transfer of discharge responsibilities at Britannia	EC

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
50	3/23/1984	Cumming, R.D., Property Manager, Copper Beach Estates Ltd.	Letter to P. Khone, Head of the Industrial Section, Waste Management Branch, Lower Mainland Region, B.C. Ministry of Environment, re standard for dissolved metals in January 1981 order and breach of dam at 2200 level	EC
51	5/11/1984	Khare, P., Head, Industrial/Air Section, Waste Management Branch, Lower Mainland Region, Ministry of Environment, BC	Letter to R.D. Cumming, Property Manager, Copper Beach Estates Ltd., re information on flows from 2200 portal	EC
52	7/5/1984	Trudeau, Dennis M., Project Technologist, Field Programs, Government of Canada	Memo to file re field trip to Britannia with Gordon Thompson and Lisa Cox to supplement September 1982 survey	EC
154	12/5/1984	Munro, Margaret, Vancouver Sun	"Britannia Beach Microbes Won't Quit - Old mine poses pollution threat"	EC
53	5/7/1986	Stringer, M.J., Waste Management Officer, Industrial Section, Waste Management Branch, Lower Mainland Region, Ministry of Environment, BC	Letter to R.D. Cumming, Property Manager, Copper Beach Estates Ltd., re copy of environmental impact assessment for Britannia	S
65	4/6/1990	Dixon, Christine, Smith, Lyons, Torrance, Stevenson	Letter to H.G. Maxwell, Waste Management Officer, B.C. Ministry of Environment, Waste Management Branch, Surrey, B.C. Re: Copper Beach Estates Ltd.	S
92	7/30/1990	Robb, Raymond H., Sr. Waste Management Officer, Ministry of Environment, BC	Memo to P. Khare, Head, Industrial/Air Section Re: Recommended Ministry Action for Copper Beach Estates Order	S
66	6/26/1991	Alesi, Joseph, Thurber Environmental Consultants Ltd.	Letter to Gerry Armstrong, Deputy Minister of the Environment, Ministry of Environment, Victoria, B.C. re: Britannia Beach Remediation Cooperative Agreement Proposal	S
94	11/8/1991	Robb, Raymond H., Sr. Waste Management Officer, Ministry of Environment, BC	Memo to H.Y. Wong, Regional Environmental Protection Manager, Re: Revision of Copper Beach Order	S

**LEGEND**

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
55	11/29/1991	Deputy District Registrar, Supreme Court of British Columbia	Order for the Conduct of Sale, Vancouver Registry No. H910653	S
56	7/17/1992	Britannia Reclamation Advisory Committee	Meeting minutes from 17 July 1992 Meeting	S
69	12/16/1992	n/a	Re: MLA David Mitchell's letter of December 16, 1992 requesting a status report on Britannia Beach	S
27	3/25/1993	Core Group on Contaminated Site Liability, CCME	"Contaminated Site Liability Report - Recommended Principles for a Consistent Approach Across Canada" - PN 1122	SEC
67	5/26/1993	Wong, Mike, Regional Environmental Protection Manager, Lower Mainland Region, Ministry of Environment, Lands and Parks, BC	Memo to Wilf Dreher, Regional Water Manager, re: Replacement of Submerged Outfall Pipe at Britannia Beach	S
93	8/9/1993	Moore, Brent, Biologist, Environmental Protection, B.C. Environment, Lands and Parks	Memo to M. Gow-Head, Environmental Section Re: Legal Bioassay, Copper Beach Estates; File: 77500-01	S
29	11/00/1993	CCME	"A National Commitment to Pollution Prevention"	S
57	11/25/1993	Robb, R.H., Assistant Regional Waste Manager, Ministry of Environment, Land and Parks, BC	Pollution Prevention and Pollution Abatement Order Under the Waste Management Act	S
63	1/9/1994	n/a	Signature Page	S
64	1/31/1994	Drummond, Tim, Copper Beach Estates Ltd.	Letter to R.H. Robb, Assistant Regional Waste Manager, Lower Mainland Region, Ministry of Environment, British Columbia, Re: Pollution Prevention and Pollution Abatement Order Under the Waste Management Act / File OE12635, X-Ref AE02194	S
70	2/28/1994	n/a	Call form / Person contacted: Gordon Ford / File No. AE-2194	S
30	03/00/1994	Feasby, Grant (CANMET) and R.K. Jones, Mining Sector, Natural Resources Canada	"Report of results of Workshop on Mine Reclamation, Toronto, Ontario, March 10-11, 1994"	S

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
68	4/12/1994	Ian MacDonald	E-mail to Ray Robb re: Questions re Britannia Acid Drainage	S
62	6/2/1994	Nassichuk, M.D., A/Manager, Pollution Abatement Division, Environmental Protection, Pacific & Yukon Region, Environment Canada	Letter to Mike Wong, Regional Manager, Environmental Protection Branch, Ministry of Environment, Lands & Parks, British Columbia, re: File 0E12635, X-REF AE02194, Copper Beach Estates Ltd	S
61	6/16/1994	Robb, R.H., Head, Industrial and Air Section, Lower Mainland Region, Ministry of Environment, Land and Parks, BC	Letter to M.D. Nassichuck, A/Manager, Pollution Abatement Division, Environment Canada, re: "Britannia Beach – Acid Mine Drainage"	S
72	7/18/1994	Hubbard, L.T., Director, Industrial Waste and Hazardous Contaminants, Environmental Protection Division, Industrial Waste and Hazardous Contaminants Branch, Ministry of Environment, Lands and Parks, BC	Letter to Earle Anthony, Regional Director General, Pacific and Yukon Region, Environment Canada Re: Application for joint funding under the BC/Federal Orphan Site Agreement	S
58	8/2/1994	Supreme Court of British Columbia	Order naming Coopers & Lybrand Limited the Receiver-Manager for the Britannia Assets	S
71	8/10/1994	Doyle, Dennis A., Barrister and Solicitor, Ministry of Attorney General, Legal Services Branch, BC	Letter to Lanny T. Hubbard, Deputy Director of Waste Management, Environmental Protection Division, Ministry of Environment, Land and Parks, British Columbia, Re: Copper Beach Estates	S
73	8/29/1994	IRM	Notes from discussion with Dennis Doyle Aug. 29, 1994	S
59	9/12/1994	Robb, R.H., Assistant Regional Waste Manager, Lower Mainland Region, Ministry of Environment, Land and Parks, BC	E-mail to Dennis Doyle, AG:CE, Fred Barnes, Ian MacDonald, Jim McCracken, Dave Robertson, Mike Wong, Gordon Ford, Lanny Hubbard, and Harry Vogt re: "Britannia: Fed/Prov Meeting"	S
60	9/12/1994	McDonald, Ian	E-mail to Fred Barnes, Jim McCracken, Ray Robb, Dave Robertson, Mike Wong, Gordon Ford, Lanny Hubbard, Harry Vogt, Dennis Doyle re: "Britannia: Fed/Prov Meeting"	S

**LEGEND**

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
78	9/20/1994	Bury, Andrew, Owen Bird	Letter to Dennis A. Doyle, Ministry of Attorney General, Legal Services Branch, British Columbia, Re: Britannia Beach	S
152	9/27/1994	MacDonald, Ian	Note to file Re: Britannia Beach: Meeting Notes September 23, 1994	S
79	9/28/1994	Ford, Gordon	Email to Harry Vogt, Ian MacDonald, Dennis Doyle Re: B.C. Funding for Britannia Orphan Sites Agreement	S
85	9/30/1994	Wong, Mike	Email to Lanny Hubbard, cc. Gordon Ford, Ray Robb, Jim McCracken, Ian MacDonald, Re: Britannia	S
151	10/3/1994	Wong, Mike	E-mail to Lanny Hubbard re: Britannia stating "the Deputy Minister has approved an approach to use Section 17 of the Mines Act to access Consolidated Revenue for funding of our half of \$1.0 million for studies."	S
122	10/19/1994	Patterson, Master	40091 British Columbia Ltd. v. Copper Beach Estates Ltd., Britannia Creek Gold Course Ltd., James Timothy Scott Drummond, R.V. Services Ltd., Richard K.F. Ng, Bennett and Associates, Regional Waste Manager, Vancouver Registry H910653, Oral Reasons for Judgment, Pronounced in Chambers	S
95	10/27/1994	MacDonald, Ian	Email to Ray Robb, cc. Dennis Doyle, Murray Galbraith, Dave Robertson, Gordon Ford, Jim McCracken, B. Marty Roberts Re: Britannia Mega Budget	S
86	11/1/1994	McCandless, Robert G., Pollution Abatement Division, Industrial Programs Section, Environmental Protection, Environment Canada	Fax to Ian MacDonald, BC MELP, Surrey	S
87	11/3/1994	Ford, Gordon, P. Eng., Technical Advisor, Mining and Smelting, Technical Services and Special Waste, Environmental Protection Division, Ministry of Environment, Lands and Parks, BC	Memorandum to H.J. Vogt, A/Director, Industrial Waste & Hazardous Contaminants Branch, Re: Policy Direction for Britannia Technical Advisory Committee	S

**LEGEND**

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
81	11/23/1994	Doyle, Dennis A., Barrister and Solicitor, Ministry of Attorney General, Legal Services Branch, BC	Letter to Owen Bird, attn: Andrew Bury, Re: Copper Beach Estates	S
32	00/00/1995	CCME	"The National Contaminated Sites Remediation Program - 1994-95 Annual Report"	SEC
80	2/7/1995	MacDonald, Ian	Email to Donna Humphries Re: Revisions to Treasury Board Submission	S
74	4/11/1995	McCracken, J.W., Regional Director, Lower Mainland Region, BC Environment	Letter to Vic Niemela, Pacific and Yukon Region, Environment Canada, Re: BC/Federal Orphan Site Agreement - Britannia Beach	S
75	4/13/1995	Niemela, V.E., Regional Director, Environmental Protection Branch, Pacific and Yukon Region, EC	Letter to J.W. McCracken, Regional Director, Lower Mainland Region, B.C. Ministry of Environment, Land and Parks, Re: BC/ Federal Orphan Site Agreement - Britannia Beach	S
89	4/19/1995	MacDonald, Ian	Memo to Jim McCracken, Regional Director, Lower Mainland Region, Environmental Protection, Ministry of Environment, Lands and Parks, British Columbia, Re: Federal Funding/Invoices for Britannia	S
82	5/9/1995	Anthony, E.D., Regional Director General, Pacific and Yukon Region, EC	Letter to Dr. Thomas Gunton, Deputy Minister, Ministry of the Environment, Lands and Parks, British Columbia, Re: File 4484-37/C1235.	S
76	5/19/1995	Wong, Mike	Excerpt from an email message referencing conversation with Dennis Doyle about other cost recovery mechanisms attached to an email from Mike Wong to Jim McCracken	S
96	6/5/1995	Gunton, Thomas, Deputy Minister	Copy of letter to E.D. Anthony, Regional Director General, Environment Canada File Number: 280-30; Ref: 50308 Britannia Mine Site	S

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
83	6/22/1995	Anthony, E.D., Regional Director General, Pacific and Yukon Region, EC	Letter to Dr. Jon O'Riordan, Assistant Deputy Minister, Ministry of Environment, Land and Parks, BC	S
84	7/7/1995	McCracken, Jim	Email to Mike Wong, Ray Robb, Ian MacDonald, cc. Jon O'Riordan, Donna Humphries, Re: Britannia	S
88	11/27/1995	n/a	Draft Ministry of Environment, Lands and Parks Decision Issue, File No. AE-2194, Re: Britannia Beach Acid Mine Drainage Pollution	S
108	12/14/1995	MacDonald, Ian	Email to Brent Moore, re: Britannia AMD Project	S
90	2/14/1996	McCracken, J.W., Regional Director, Lower Mainland Region, BC Environment	Letter to Vic Niemela, Regional Director, Pacific and Yukon Region, Environment Canada, Re: Proposals to Control Acid Mine Drainage at Britannia Mine	S
91	4/24/1996	Niemela, V.E., Regional Director, Environmental Protection Branch, Pacific and Yukon Region, EC	Letter to J.W. McCracken, Regional Director, Lower Mainland Region, B.C. Ministry of Environment, Land and Parks (Missing Page 2).	S
31	05/00/1996	CCME	"A Strategy to Fulfil the CCME Commitment to Pollution Prevention" – PN 1225	SEC
33	04/00/1997	CCME	"Guidance Document on the Management of Contaminated Sites in Canada" – PN 1279	SEC
20	04/00/1997	EVS Environment Consultants	"Summary and Overview of Environmental Effects of the Anaconda Britannia Mine on Juvenile Salmonids and the Marine Environment in Howe Sound" prepared for EC, North Vancouver, EVS Project No. 3/047-58	EC
18	05/00/1997	Chretien, Andre Remy Nicolas	"Geochemical Behaviour, Fate and Impacts of Cu, Cd and Zn from Mine Effluent Discharges in Howe Sound" – Ph.D. Thesis, Department of Earth and Ocean Sciences, UBC	EC

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
104	5/16/1997	Price, William, Reclamation Engineer	Letter to Copper Beach Estates Ltd., att: Mr. Tim Drummond, cc. Ecospirit Land Reclamation Ltd.; R. Bone, Nanaimo; G. Ford, Victoria, re: Britannia Mine.	S
98	9/16/1997	Biagi, Eric A., Manager, Coopers & Lybrand Limited	Affidavit filed in support of an application for directions from the Supreme Court of British Columbia, 40091 British Columbia Ltd. v. Copper Beach Estates Ltd., Britannia Creek Golf Course Ltd., James Timothy Scott Drummond, P.V. Services Ltd., Richard K.F. Ng, Bennett and Associates; Vancouver Registry No. H910653	S
153	9/16/1997	Biagi, Eric A., Manager, Coopers & Lybrand Limited	Affidavit filed in support of an application for directions from the Supreme Court of British Columbia, 40091 British Columbia Ltd. v. Copper Beach Estates Ltd., Britannia Creek Golf Course Ltd., James Timothy Scott Drummond, P.V. Services Ltd., Richard K.	S
99	9/23/1997	Pomeroy, Martin, Head, Industrial Section, Environmental Protection Branch, Pacific and Yukon Region, EC	Letter to Ray Robb, Environmental Protection, Ministry of Environment, Lands and Parks, BC, File: 4484-37/C1235	S
100	10/1/1997	Biagi, Eric A., Manager, Coopers & Lybrand Limited	Letter to Dennis A. Doyle, Ministry of Attorney General, Legal Services Branch, British Columbia, cc. R. Driedger, Pollution Protection, Victoria; R.H. Robb, Assistant Regional Waste Manager, Surrey; R. McCandless, Environment Canada	S
101	10/2/1997	Cole, Allen L., Walker & Company	Letter to Geoffrey Thompson, Ladner Downs, cc. Dennis Doyle, Ministry of Attorney General, re: Copper Beach Estates, Reclamation Project	S
102	10/2/1997	Doyle, Dennis A., Barrister and Solicitor, Ministry of Attorney General, Legal Services Branch, BC	Letter to Allen L. Cole, Walker & Company, cc. Geoff Thompson, Ladner Downs; Barry Azevedo, B.C. Environment, Surrey; Ron Driedger, B.C. Environment, Victoria, Re: Copper Beach Estates, Reclamation Project	S

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
103	10/8/1997	Errington, John C., Deputy Chief Inspector of Mines, BC	Letter to Tim Drummond, President, Copper Beach Estates, cc. Ted Hall, Regional Manager, Nanaimo; Dennis Doyle, Ministry of Attorney General, Victoria; Ron Driedger/Rob McLenehan, BC Environment, Victoria; Ray Robb, BC Environment, Surrey; Rob McCandless, Environment Canada, Vancouver; Receiver Manager c/o Geoffrey Thompson, Ladner Downs, Vancouver; Squamish-Lillooet, Regional District, Pemberton; Re: Reclamation of Lands at Britannia	S
105	10/17/1997	Errington, John C., Deputy Chief Inspector of Mines, BC	Letter to Tim Drummond, President, Copper Beach Estates, cc. Paul Jarman, Ministry of Attorney General, Victoria, Peter Ostergaard, Assistant Deputy Minister, Energy and Minerals Division, MEI; Fred Hermann, Chief Inspector of Mines, Mines Branch, Victoria; Ted Hall, Regional Manager, Nanaimo; Bill Price, Senior Reclamation Agrologist, Mines Branch, Smithers; Dennis Doyle, Ministry of Attorney General, Victoria; Ron Driedger/Rob McLenehan, BC Environment, Victoria; Gordon Ford, BC Environment, Victoria; Ray Robb, BC Environment, Surrey; Rob McCandless, Environment Canada, Vancouver; Receiver-Manager, c/o Geoffrey Thompson, Ladner Downs, Vancouver; Coopers & Lybrand Limited, Vancouver; Squamish-Lillooet Regional District, Pemberton, Re: Reclamation of lands at Britannia	S
106	10/22/1997	Drummond, Tim, Copper Beach Estates Ltd.	Letter to John C. Errington, Government of British Columbia, Mines Branch, Ministry of Employment and Investment	S
107	10/29/1997	Nassichuk, M.D., Manager, Pollution Prevention and Assessment Division, Environmental Protection Branch, Pacific & Yukon Region, EC	Letter to Fred Hermann, Chief Inspector of Mines, Ministry of Employment and Investment – Energy and Minerals Branch, cc. T. Hall, J. McCracken, V. Niemela, T. Perry, File: 4484-37/C1235	S

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109	12/16/1997	Driedger, Ron	Email to Dick Roberts Re: Update on Britannia – Funding Possibilities and Remedial Options	S
14	00/00/1998	Grout, J.A. , C.D. Levings, B. Nidle, B. Piercey, D. Marsden, DFO Science, West Vancouver	“Beach Seine Data from near Britannia Mines and in Howe Sound, British Columbia, during 1997” – Canadian Data Report of Fisheries and Aquatic Sciences 1044	EC
110	1/16/1998	Azevedo, Barry	Email to Jim McCracken, cc. Dave Robertson; Douglas T. Pope; Dick H. Roberts; Ray Robb; Valerie Z. Cameron; re: Britannia Soil Relocation Proposal	S
148	2/1/1998	Fulber, Ralph	“Britannia Beach-Copper Beach Estates Ltd.-Anaconda”	S
111	3/11/1998	Hermann, F.W., Chief Inspector of Mines, BC	Letter to Tim Drummond, Copper Beach Estates Ltd., cc. Ted Hall, Regional Manager, Nanaimo; John Errington, Manager, Reclamation and Permitting, Victoria; Tim Eaton, Manager, Geotechnical Engineering, Victoria; Rob McCandless, Environment Canada, Vancouver; Robert McLenehan, Head, Contaminated Sites Remediation Unit, Victoria; Barry Azevedo, Industrial Pollution Prevention Officer, Surrey; Bob MacPherson, Manager, Planning/Development, Squamish-Lillooet Regional District; Eric Biagi, Coopers & Lybrand, Vancouver; re: Pilot Reclamation Program at the Britannia Mine	S
112	3/12/1998	Robb, R.H., Head, Industrial Section, Lower Mainland Region, Ministry of Environment, Land and Parks, BC	Letter to The Clarke Group, att. Louis Clarke, cc. Ted Hall, Ministry of Employment and Investment, Nanaimo; Rob McLenehan, Contaminated Sites Remediation Unit, Victoria; re: Waste Soil Disposal Proposal at Britannia Mine	S
34	10/00/1998	EC	“The Government Response to the Third Report of the Standing Committee on Environment and Sustainable Development (“Enforcing Canada’s Pollution Laws: The Public Interest Must Come First!”)”	SEC

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15	00/00/1999	Grout, J.A., C.D. Levings, G.E. Piercey, B. Mossop, DFO Science, West Vancouver	"Biological Data From Near Britannia Mine and in Howe Sound, British Columbia, During 1997-1998" – Canadian Data Report of Fisheries and Aquatic Sciences 1055	EC
116	2/12/1999	Nassichuk, M.D., Manager, Pollution Prevention and Assessment Division, Environmental Protection Branch, Pacific & Yukon Region, EC	Letter to Jim McCracken, Regional Director, Lower Mainland Region, Ministry of Environment, Lands and Parks, BC	S
117	2/12/1999	Nassichuk, M.D., Manager, Pollution Prevention and Assessment Division, Environmental Protection Branch, Pacific & Yukon Region, EC	Letter to Ron Driedger, Pollution Prevention and Remediation Branch, Ministry of Environment, Lands and Parks, BC, cc. Jim McCracken	S
118	3/30/1999	Environment Canada & Copper Beach Estates Ltd.	Agreement for cooperation between Environment Canada and Copper Beach Estates Ltd. to carry out until September 30, 1999, or later, continuous monitoring of drainage flows in streams at the closed Britannia Mine, near Vancouver, BC	S
19	04/00/1999	Marsden, A.D.	"The Effects of Acid Mine Drainage at Britannia Beach, B.C., on Fucus Gardneri and Associated Intertidal Algae" – M.Sc. Thesis, Department of Botany, UBC	EC
119	4/13/1999	District of Squamish	13 April 1999 Council Meeting / Questions and Answers (Draft)	S
120	4/15/1999	Squamish-Lillooet Regional District	15 April 1999 Southern Planning Committee Meeting / Questions and Answers (Draft)	S
124	4/25/1999	Lower Mainland Mine Development Review Committee	Copper Beach Estates Ltd. – Britannia Mine Reclamation and Remediation Project / Minutes of 14 April 1999 Meeting	S
113	5/6/1999	Environment Canada	"Pollution at the Britannia Mine"	S
125	5/19/1999	McCandless, Rob	Email to Ted Hall, Barry Azevedo (MELP), George Headley, Gregg Stewart, Re: Draft DOE comments on Britannia	S

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No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	SENDER
114	6/20/1999	Fraser Basin Council	Britannia Mine Reclamation and Remediation Proposal Report on Public Consultation	S
147	6/20/1999	Fotheringham, Brady, North Shore News	"Investors claim a big loss – Civil case on Britannia deal dropped"	S
130	8/16/1999	Lower Mainland Mine Development Review Committee	Minutes of 5 August 1999 Meeting – Britannia Remediation Project	S
121	8/19/1999	Robb, R.H., Assistant Regional Waste Manager, Pollution Prevention Program, Lower Mainland Region, Ministry of Environment, Lands and Parks, BC	Technical Rationale for Draft Remediation Order OE-16097, Draft Effluent Discharge Permit PE-12840 and Draft Refuse Discharge Permit PR-15938 (under the Provisions of Section 27.1 and Section 9 of the Waste Management Act, R.S.B.C. 1996, Chapter 482)	S
123	8/30/1999	Gimse, Susan, Chair, Squamish-Lillooet Regional District	Letter to Dan Miller, Premier, British Columbia, cc. Pam Tattersfield, Area Director D-SLRD; MLA Ted Nebbling; SLRD Board of Directors; Ray Robb, Ministry of Environment; Ted Hall, Ministry of Mines; Rick Beauchamp, Administrator-SLRD; Bob Purdy, Fraser-Basin Council; Re: The Britannia Mine Industrial Waste Landfill Proposal	S
131	8/31/1999	B.C. Ministry of Energy and Mines	Permit M-214 Approving Work System and Reclamation Program Issued Pursuant to Section 10 of the Mines Act, R.S.B.C. 1996, c. 293	S
127	9/8/1999	B.C. Environment / PR-15938	Ministry of Environment, Lands and Parks Permit PR-15938 under the provisions of the Waste Management Act / Copper Beach Estates Ltd. and Mt. Sheer Mine Reclamation Inc. are authorized to discharge refuse to the land at an industrial landfill located approximately seven kilometers east of Britannia Beach, British Columbia, subject to the conditions listed below	S
128	9/8/1999	B.C. Environment / OE-16097	Ministry of Environment, Lands and Parks Remediation Order OE-16097 issued under the Waste Management Act to Tim Drummond, Copper Beach Estates Ltd.	S

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126	10/1/1999	Robb, R.H., Assistant Regional Waste Manager, Lower Mainland Region, Ministry of Environment, Land and Parks, BC	Letter to R.A. Beauchamp, Squamish-Lillooet Regional District, Re: Remediation Order OE-16097, Effluent Discharge Permit PE-12840, Refuse Discharge Permit PR-15938, issued 8 September 1999, as part of the Britannia Mine Reclamation Project proposed by Copper Beach Estates Ltd.	S
132	12/14/1999	Hermann, F.W., Chief Inspector of Mines, Mines Branch, Energy and Minerals Division, Ministry of Energy and Mines, BC	Letter to Alan Young, Executive Director, Environmental Mining Council of British Columbia and attached "Proposed Exemption of Mines from Part 4 of the Waste Management Act" dated 14 December 1999	S
12	00/00/2000	Barry, Karen L., Jeffrey A. Grout, Colin D. Levings, Bruce H. Nidle, G. Elizabeth Piercey	"Impacts of acid mine drainage on juvenile salmonids in an estuary near Britannia Beach in Howe Sound, BC"	EC
16	00/00/2000	Marsden, A.D., Department of Botany, UBC, R.E. DeWreede, DFO Science, West Vancouver	"Marine macroalgal community structure, metal content and reproductive function near an acid mine drainage outflow"	EC
17	00/00/2000	Varela, D.E., K.L. Barry, M. Guo, G.E. Piercey, N.M. Mehlenbacher, P.J. Harrison, and C.D. Levings, DFO Science, West Vancouver	"Water Quality and Oceanographic Data Near a Deep Water Outfall Discharging Acid Mine Drainage from Britannia Mine into Howe Sound, British Columbia" – Canadian Data Report of Fisheries and Aquatic Sciences 1063	EC
129	1/7/2000	Robb, R.H., Assistant Regional Waste Manager, Ministry of Water, Land and Air Protection, BC	Letter to Copper Beach Estates Ltd., att: Mr. Tim Drummond, Re: Remediation Order OE-16097 as Amended 7 January 2000, under the Provisions of Section 27.1 of the Waste Management Act – Britannia Mine Site	SEC
133	4/6/2000	Robb, R.H., Assistant Regional Waste Manager, Ministry of Water, Land and Air Protection, BC	Letter to Ivaco/Arrowhead Metals Ltd., Anaconda/Arco, Canzinc Ltd., Copper Beach Estates Ltd., cc. Joyce Thayer, BC Ministry of Attorney General, Mike Nassichuk, Environment Canada, Ted Hall, BC Ministry of Energy and Mines	SEC

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134	6/27/2000	Azevedo, Barry	Email to Lisa Sumi along with attached body of submissions of Canzinc Ltd., excluding appendices	BC Ministry of Water, Land, and Air Protection
139	9/7/2000	Driedger, Ron J., Deputy Director of Waste Management, Ministry of Water, Land and Air Protection, BC	Letter to Anaconda/ARCO, Canzinc Ltd., Copper Beach Estates Ltd., Invaco/Arrowhead Metals Ltd., Re: Britannia Mine Remediation – Reclamation Order OE-16097	SEC
140	9/7/2000	Driedger, Ron J., Deputy Director of Waste Management, Ministry of Water, Land and Air Protection, BC	Letter to Alcoa, Her Majesty the Queen in Right of British Columbia, Re: Britannia Mine Remediation – Reclamation Order OE-16097	SEC
135	10/4/2000	Driedger, Ron J., Deputy Director of Waste Management, Ministry of Water, Land and Air Protection, BC	Letter to Her Majesty the Queen in Right of Canada, c/o Department of Justice att: Michelle Ball, re: Britannia Mine Remediation – Remediation Order 16097	SEC
138	10/4/2000	Driedger, Ron J., Deputy Director of Waste Management, Ministry of Water, Land and Air Protection, BC	Letter to Government of British Columbia, Her Majesty the Queen in Right of Canada, Anaconda/ ARCO, Ivaco/Arrowhead Metals Ltd., Alcoa, Intalco Aluminum Corporation, Alumax Inc., Howmet Holdings Corporation, Canzinc Ltd., Re: Britannia Mine Remediation,	SEC
136	12/19/2000	Driedger, Ron J., Deputy Director of Waste Management, Ministry of Water, Land and Air Protection, BC	Letter to Government of British Columbia, Her Majesty the Queen in Right of Canada, Anaconda/ ARCO, Ivaco/Arrowhead Metals Ltd., Alcoa, Intalco Aluminum Corporation, Alumax Inc., Howmet Holdings Corporation, Canzinc Ltd., Re: Britannia Mine Remediation, Remediation Order OE-16907	SEC
10	00/00/2001	Piercey, G.E., C.D. Levings, J.A. Grout, DFO Science, West Vancouver	“Metal Analyses from Water Samples Collected Near Britannia Mine and in Howe Sound, British Columbia, 1997 and 1998” – Canadian Data Report of Fisheries and Aquatic Sciences 1082	EC

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13	00/00/2001	Grout, J.A. , C.D. Levings, DFO Science, West Vancouver	"Effects of acid mine drainage from an abandoned copper mine, Britannia Mines, Howe Sound, British Columbia, Canada, on transplanted blue mussels (Mytilus edulis)	EC
137	1/10/2001	Driedger, Ron J., Deputy Director of Waste Management, Ministry of Water, Land and Air Protection, BC	Letter to Government of British Columbia, Her Majesty the Queen in Right of Canada, Anaconda/ ARCO, Ivaco/Arrowhead Metals Ltd., Alcoa, Intalco Aluminum Corporation, Alumax Inc., Howmet Holdings Corporation, Canzinc Ltd., Re: Britannia Mine Remediation,	SEC
4	2/15/2001	Knight Piesold Ltd.	"Environment Canada / Britannia Beach Mine / Review of Effluent Treatment Costs / Ref. No. 11846/1-1"	EC
35	03/00/2001	Friends of the Earth	"Primary Environmental Care – An Assessment of Environment Canada's Delivery: Volume II: Ten Year Record of Environmental Prosecutions 1989-1999"	SEC
5	3/2/2001	Hagen, Mike, Pollution Prevention and Assessment, EC	"Britannia Marine Sediment Contamination: Interim Status of Knowledge and Next Options"	EC
141	3/27/2001	Falzon, Frank A.V., Barrister and Solicitor	Letter to Lovett & Wetmacott Re: Britannia Mine Remediation	SEC
144	4/3/2001	BC Environment	Memorandum of Agreement made the 3rd day of April, 2001, between Her Majesty the Queen in Right of the Province of British Columbia, represented by The Minister of Environment, Parks and Lands and Copper Beach Estates Ltd.	BC Ministry of Water, Land, and Air Protection
21	4/12/2001	Government of BC	"Britannia Mine Cleanup Agreement Announced" – News release no. 330-30: ELP2001-150 issued by MELP and MEM	EC
22	4/12/2001	Government of BC	"Britannia Clean-Up Agreement" – Backgrounder issued by MELP	EC
23	4/12/2001	Government of BC	"Treatment for Acid Rock Mine Drainage at Britannia" – Backgrounder issued by MELP	EC

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145	4/12/2001	BC Environment	Settlement Agreement	EC
142	4/25/2001	Driedger, Ron J., Deputy Director of Waste Management, Ministry of Water, Land and Air Protection, BC	Letter to Anaconda/ARCO, Canzinc Ltd., Copper Beach Estates Ltd., Invaco/Arrowhead Metals Ltd., Government of British Columbia, Alcoa, Intalco Aluminum Corporation, Alumax Inc., Howmet Holdings Corporation, Her Majesty the Queen in Right of Canada, Re: Britannia Mine Site Remediation	SEC
6	08/00/2001	McCandless, Robert G., EC	"The Britannia Mines Problem: Rocks, Architecture and Footprint"	EC
7	9/14/2001	Coastal and Ocean Resources Inc. & Archipelago Marine Research Ltd.	"Seabed Reconnaissance for Substrate and Habitat Mapping at Britannia Beach, British Columbia" – Report prepared for EC, Industrial Programs, North Vancouver, B.C., CORI Project: 2001-31	EC
146	11/16/2001	Thayer, Joyce, Barrister & Solicitor, Legal Services Branch, Ministry of Attorney General, BC	Letter to Walker & Company, Copper Beach Estates Ltd., Kambas Galbraith, Re: "Memorandum of Agreement dated 28 February 2001 (the "MOA" between Copper Beach Estates Ltd. ("CBEL") and the Province	BC Ministry of Water, Land, and Air Protection
3	12/14/2001	O'Hara, Gerry, Golder Associates Ltd.	Work Plan for the Britannia Mine Remediation Project submitted to MWLAP, Pollution Prevention and Remediation Branch	EC
155	01/00/2002	n/a	"Britannia Mine – recent observed flows and concentrations to January 2001"	EC
26	02/00/2002	Hagen, Mike, Pollution Prevention and Assessment, EC	"List of Howe Sound and Britannia Beach Subtidal Marine Sediment Reports" Note to File 4484-37/C1235, EC	EC
8	2/5/2002	Bornhold, Brian D., Coastal and Ocean Resources Inc.	"Interpretation of Sidescan Sonographs, Britannia Beach, British Columbia" prepared for Geological Survey of Canada Pacific	EC
1	2/8/2002	Johnson, Terry	Fax response to information request	BC Museum of Mining

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9	2/13/2002	Kus, John, CH2MHill	Memo to Gerry O'Hara (Golder) re Britannia – Inspection of Marine Outfall Pipe	SEC
2	03/00/2002	EC	"Facts on the Britannia Mine"	EC
24	03/00/2002	n/a	"A Short Chronology of Enforcement and Monitoring at the Britannia Mine Site" – 1905-2002	EC
25	03/00/2002	n/a	"Environment Canada's expenditures: Britannia monitoring, engineering 1992-2001"	EC
11	n/a	Levings, C.D., DFO Oceans Directorate	"Effect of an Abandoned Mine on the Nearshore Ecosystem, Britannia Beach"	EC
28	n/a	CCME	"Statement of Interjurisdictional Cooperation on Environmental Matters"	SEC
54	n/d	Bossons, D.R., Commercial Development Manager, Bank of Montreal	Letter to Director of Pollution Control, Parliament Buildings, Victoria, re financial condition of Copper Beach Estates Ltd.	S
77	n/d	Sihota, Moe, Ministry of Environment, Lands and Parks, BC	Draft Treasury Board Submission requesting approval for an amount of \$537,500 to be used along with an equal amount provided by the federal government under the federal-provincial orphan sites agreement, to develop solutions and lessen the impact of the ongoing acid mine drainage pollution at Britannia Beach, BC. References 9/26/94 decision note approving government intervention	S

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150	n/d	n/a	Page 2 of an e-mail stating "Dennis also noted that s. 42 provides a defense against liability for costs in cases where the occurrence was caused by a natural phenomenon of an exceptional, inevitable and irresistible character, which Dennis feels applies to AMD. I suggested that AMD is not inevitable, since there didn't have to be a mine. He felt that CBE's defense would be that the mine has been there for years, they didn't put it there, and ever since the mine was established the AMD became inevitable. [...] In addition, s. 42 liability is based on fault and does not attach to the title."	S
143	n/d	Canada	"Submissions of the Federal Crown in Response to the ARCO submission dated March 22, 2001" (Doc. No. 369081)	EC
156	n/d	n/a	Map showing claims owned by Copper Beach Estates Ltd.	Copper Beach Estates Ltd.

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# **APPENDIX 8**

## **Timeline**





### Timeline\*

Actions of Canada		Actions of Mine Owners & BC
	1904	Mine begins operating; acid rock drainage (ARD) and tailings are discharged to Britannia Creek and Howe Sound
Federal Crown enters into wartime commercial supply agreement with mine owners	194?	
	1974	<p>Mine closes down; ARD continues discharging to Britannia Creek and Howe Sound from 2200- and 4100-level portals (see Figure 3)</p> <p>BC Environment orders Anaconda Canada Ltd. ("Anaconda") to "collect mine water and direct it to the 4100-level portal and thence to Howe Sound at depth, after appropriate treatment (i.e., Cu removal)"</p>
Environment Canada (EC) meets with BC Environment regarding Anaconda's plans to implement 1974 BC order	1977	BC Environment orders Anaconda to channel all mine effluent to the 4100-level portal, run it through a copper cementation plant and discharge it to Howe Sound at depth
	1979	Copper Beach Estates Ltd. (CBE) exercises an option to purchase all the Britannia Mine lands from Anaconda for \$5M; the same day, CBE sells a small parcel of shorefront Britannia land to Dome Petroleum for \$6.5M
	1981	BC Environment orders CBE to channel all mine effluent to the 4100-level portal, run it through a copper cementation plant and discharge it to Howe Sound at depth; no requirement to meet effluent standards
	1980s	Effluent begins spilling out of 2200-level portal, contaminating Britannia Creek

\* This timeline is provided for ease of reference only. A complete description of information gathered by the Secretariat regarding Canada's actions to enforce and promote compliance with s. 36(3) of the *Fisheries Act* at the Britannia Mine is provided in s. 5 of the factual record.

	1990	Control of CBE is sold to a numbered company for approximately \$21M; concurrently, CBE sells development property at Furry Creek to third parties for \$17M and obtains a \$5.8M advance toward a potential sale of development property at Britannia Beach
	1991	Court order for sale of the Britannia lands resulting from CBE's failure to repay a \$5.8M advance on a potential sale of development property at Britannia Beach that fell through after environmental due diligence Flood at Britannia Beach causes damage to submerged effluent outfall; 1981 remediation order cannot be used to order CBE to repair outfall, so BC Environment removes outfall (replaces it in 1993-94)
	1993	BC Environment issues additional order against CBE, requiring submission of financial statements and a plan to collect and treat mine effluent; no requirement to meet effluent standards
		<i>BC Waste Management Act (WMA)</i> amended to add joint, several and retroactive liability for contaminated sites; provisions come into effect in 1997
Canada's Obligations under NAAEC take effect 1 January	1994	Court appoints Coopers & Lybrand as receiver-manager of Britannia assets; receiver-manager given immunity from liability for environmental matters under provincial legislation; CBE insolvent
Under National Contaminated Sites Remediation Program (NCSRP), Canada and BC agree to spend \$2M each on solving Britannia effluent problem		
		BC Mines hesitates to approve use of <i>Mines Act</i> to recover federal and provincial clean-up costs at Britannia; refers matter to BC Treasury Board; delays cause NCSRP funding for Britannia to lapse

<p>EC agrees with staged approach to achieving compliance; studies pipeline option to remove pollution from Britannia Creek</p>	1995	<p>Potential purchaser proposes staged approach to achieving compliance, beginning with a surface pipeline to carry ARD from 2200- to 4100-level for discharge through submerged outfall</p>
<p>Fisheries and Oceans Canada (DFO) begins three-year study into effects of Britannia effluent on marine environment</p> <p>EC provides comments on CBE soil relocation proposal; notes that cementation operation mentioned in 1981 order does nothing to improve water quality</p>	1997	<p>1993 WMA amendments and Contaminated Sites Regulation take effect; province can add past owner/operators to remediation order</p> <p>CBE proposes to raise money to comply with 1981 order by taking delivery of contaminated soils onsite as part of a "reclamation" plan; applies for <i>Mines Act</i> reclamation permit</p>
<p>EC invites BC Mines to Britannia steering committee meeting</p>		<p>BC Mines releases proposal to remove sites with <i>Mines Act</i> reclamation permits (such as Britannia) from purview of WMA (enacted in 2002 WMA amendments)</p>
<p>Consultant working for EC with involvement by BC Environment issues report identifying high density lime sludge process as best technology for treating Britannia effluent</p>	1998	<p>Under the WMA, BC Environment names parent companies of former mine owners as potentially responsible persons (PRPs) in connection with pollution at Britannia</p>
<p>EC and DFO participate in public consultations and provide detailed comments on a draft provincial remediation order, effluent permit, landfill permit, and <i>Mines Act</i> reclamation permit</p>	1999	<p>BC Environment issues effluent and landfill permits to CBE, and a remediation order (replacing 1981 and 1993 orders) that requires use of effluent treatment technology identified by EC consultant in 1998. Effluent permit lists effluent standards</p>

		Financing for landfill project falls through and CBE defaults on remediation order; effluent permit lapses
EC lends technical assistance to province in PRP process for Britannia; Provincial Regulator subsequently names Federal Crown as a PRP because of WWII supply contract with the mine	2000	BC Environment is named a PRP in connection with Britannia because of removal of submerged outfall in 1991; to avoid conflict of interest, entity is split into "Regulator" and "Province-as-PRP"
EC files submissions with BC Regulator denying that wartime supply agreement makes it a PRP and stating that the Federal Crown is not subject to the WMA	2001	Province-as-PRP signs settlement agreement (not binding on Regulator) with private PRPs, releasing them from all Britannia environmental liabilities in exchange for \$30M; Province-as-PRP undertakes to take over site investigation and remediation
EC involved in negotiation of settlement agreement with private PRPs; does not sign agreement but agrees to carry out sediment investigations offshore at Britannia		
EC endorses application by Squamish-Lillooet Regional District to Canada-BC Infrastructure Program for \$3M in federal funds toward construction of an effluent treatment plant at Britannia (no decision on application as at October 2002)		
		Province-as-PRP signs memorandum of agreement with CBE. CBE agrees to operate a treatment plant at Britannia in perpetuity using revenue from future Britannia real estate development
		New principal of CBE repudiates memorandum of agreement with Province-as-PRP
		CBE plugs 2200-level portal, stopping discharge of ARD to Britannia Creek
EC conducts sediment investigation in intertidal zone at Britannia Beach (no information regarding who will pay for any recommended sediment remediation)	2002	Amendments to WMA likely prevent Regulator from holding private PRPs responsible for shortfalls in remediation funding for Britannia because of indemnity in settlement agreement; amendments remove sites with <i>Mines Act</i> reclamation permits from purview of WMA
	2004	Expected start-up of effluent treatment plant under remediation program headed by Province-as-PRP

# **APPENDIX 9**

## **Acronyms and Defined Terms**





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**Acronyms**

ARD	acid rock drainage
ARCO	Atlantic Richfield Company
BC	British Columbia
BMARC	Britannia Mines and Reclamation Corp. (see also CBE)
CBE	Copper Beach Estates Ltd. (BMARC since May 2002)
CCME	Canadian Council of Ministers of the Environment
CEC	Commission for Environmental Cooperation
CEPA	<i>Canadian Environmental Protection Act</i>
CESD	Commissioner for the Environment and Sustainable Development (Canada)
CSR	Contaminated Sites Regulation adopted under the WMA
DFO	Fisheries and Oceans Canada
EC	Environment Canada
EIG	Environment Issue Group of the WMI
HDS	high-density sludge
IIED	International Institute for Environment and Development
LMMDRC	Lower Mainland Mine Development Review Committee (BC Mines)
MMER	<i>(2002) Metal Mining Effluent Regulations</i> adopted under the <i>Fisheries Act (Canada)</i>
MMLER	<i>(1977) Metal Mining Liquid Effluent Regulations</i> adopted under the <i>Fisheries Act (Canada)</i>
MMSD	Mining, Minerals and Sustainable Development initiative of the WBCSD
MOA	3 April 2001 Memorandum of Agreement signed by CBE and Province-as-PRP
MWLAP	Ministry of Water, Land and Air Protection (BC)
NCSRP	National Contaminated Sites Remediation Program (Canada)
PRP	Potentially Responsible Person under the WMA
WBCSD	World Business Council on Sustainable Development
WMA	<i>Waste Management Act (BC)</i>
WMI	Whitehorse Mining Initiative

## Defined Terms

Anaconda	Term used to describe subsidiaries of the Anaconda Mining Company that have owned the Britannia Mine in the past
BC Environment	Term used to describe environment ministry of BC Government
BC Mines	Term used to describe BC government mining ministry
Bill 26	<i>Waste Management Amendment Act</i> , given royal assent 18 June 1993
CanZinco	CanZinco Ltd.
CanZinco Submission	Submission filed by CanZinco with BC Environment under WMA PRP process
Compliance and Enforcement Policy	<i>Fisheries Act</i> Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy adopted by DFO and EC in 2001 but in use, in draft form, since at least 1998
Decision to Prosecute	Chapter 15 of Part V (“Proceedings at Trial and on Appeal”) of the <i>Federal Prosecution Service Deskbook</i> , Justice Canada, 2000
Deputy Director	Deputy Director of Waste Management of BC Environment (see also Regulator)
Facts on the Britannia Mine	Memorandum, dated March 2002, submitted to the Secretariat by EC in response to the Secretariat’s February 2002 Information Request
Harmonization Accord	<i>Canada-Wide Accord on Environmental Harmonization</i> signed January 1998 by federal and provincial ministers of environment, except Quebec
Minerals and Metals Policy	The Minerals and Metals Policy of the Government of Canada
Option	Option to Purchase the Britannia Mine, signed by CBE and Anaconda on 20 June 1979
P3	Public-Private Partnership announced by BC Government on 12 April 2001
Province-as-PRP	BC Environment in its capacity as a person liable for cleaning up pollution at Britannia under the WMA

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Regulator	BC Environment in its capacity as government authority responsible for enforcing the WMA (see also Deputy Director)
Secretariat	Secretariat of the CEC
Settlement Agreement	12 April 2001 agreement between Province-as-PRP and private PRPs regarding environmental clean-up at Britannia
Statement	1990 <i>Statement on Interjurisdictional Cooperation on Environmental Matters</i> adopted by the CCME
Status Report	September 2002 report on progress of federal/provincial plan for a large-scale program for rehabilitating orphaned and abandoned mine sites in Canada
Sub-Agreement	Sub-Agreement on Inspections and Enforcement under Harmonization Accord, endorsed by CCME Council 1 May 2001
Submitters' Reply	Reply of Submitters to Canada's Response to the Submission
Tanac	Tanac Development Canada Corp.
Taurus	No. 357 Taurus Ventures Ltd.
1995 Government Response	The Government Response to the Fifth Report of the Standing Committee on Natural Resources ("Lifting Canadian Mining Off the Rocks")
1998 Government Response	The Government Response to the Third Report of the Standing Committee on Environment and Sustainable Development ("Enforcing Canada's Pollution Laws: The Public Interest Must Come First!")
40091	40091 British Columbia Ltd.
2200-level	See Figure 3
4100-level	See Figure 3



# **ATTACHMENT 1**

**Council Resolution 03-14**





7 August 2003

COUNCIL RESOLUTION 03-14

**Instruction to the Secretariat of the Commission for Environmental Cooperation to make public the Factual Record for Submission SEM-98-004 (BC Mining)**

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

HAVING RECEIVED the final factual record for Submission SEM-98-004;

NOTING that pursuant to Article 15(7) of the NAAEC, the Council is called upon to decide whether to make the factual record publicly available; and

AFFIRMING its commitment to a timely and transparent process;

HEREBY DECIDES:

TO MAKE PUBLIC and post on the registry the final factual record for Submission SEM-98-004; and

TO ATTACH to the final factual record comments provided by the Parties to the Secretariat on the draft factual record.

APPROVED BY THE COUNCIL:

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Judith E. Ayres  
Government of the United States of America

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Olga Ojeda Cárdenas  
Government of the United Mexican States

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Norine Smith  
Government of Canada



# **ATTACHMENT 2**

**Comments of Canada**





Ottawa ON K1A 0H3

14 May 2003

Mr. Victor Shantora  
Acting Executive Director  
Secretariat  
Commission for Environmental Cooperation  
393 St. Jacques Street West, Suite 200  
Montréal QC H2Y 1N9

Dear Mr. Shantora:

Further to Article 15(5) of the *North American Agreement on Environmental Cooperation* (NAAEC), the Canadian government has reviewed the draft Factual Record in relation to Submission on Enforcement Matters 98-004 (the “BC Mining” submission) with great interest.

In order to assist the Secretariat in the development of the final Factual Record for this submission, I would like to provide Canada’s comments, which you will find enclosed.

Canada appreciates the Secretariat’s thoroughness in preparing the draft Factual Record for this submission. As you know, Canada is of the view that the purpose of a Factual Record is for the Secretariat to prepare an objective, independent presentation of the facts to allow the reader of the Factual Record to draw their own conclusions with respect to the alleged failure of a Party to effectively enforce its environmental law.

In addition to the enclosed comments, I would like to note the following issues which, in Canada’s view, affect the objectivity of the document and therefore may influence the views of the public in an inappropriate way.

- Throughout the entire draft Factual Record, the Secretariat uses language that states that s. 36(3) of the *Fisheries Act* has been violated (e.g., section 1, paragraph 5, sentence 2 “Despite ongoing violations of s. 36(3) at the Britannia Mine [...]”). In our view, such a conclusion is inappropriate as there is only an alleged violation of s. 36(3) of the *Fisheries Act*. Violations can only be established by a court following a successful prosecution. As such, we request that the Secretariat use the words “potential”, “alleged” or “suspected” prior to the word “violation(s)” throughout the entire document.
- Canada recognizes the Secretariat’s authority to retain an independent expert in the preparation of a Factual Record, as needed. However, Canada considers the mandate given to the expert on Acid Rock

Drainage (ARD) treatment, which is, as stated on page 4 “[...] to consider the effectiveness of the current provincial remediation program in achieving compliance with s. 36(3) at the Britannia Mine in the shortest possible time and with no further occurrence of violations, as provided by the *Fisheries Act* Compliance and Enforcement Policy.” to go well beyond the scope and purpose of a Factual Record. It is Canada’s view that independent experts should not be drawing conclusions, or passing judgement on the actions taken by a Party. For example, the expert should not be assessing the effectiveness of the provincial remediation program nor should the expert pass judgement on the timing of the treatment plant project. Therefore, we request that the Secretariat review the information that has been attributed to the ARD expert, and remove any and all judgements, conclusions and/or opinions since they go beyond a compilation of facts.

- Regarding Canada’s co-operation in the development of this Factual Record, the Secretariat appears to suggest, on pages 80-81, 101, and 103 for example, that Canada has not been forthcoming, open or fully co-operative in providing information to the Secretariat. This is of concern, as Canada has fully disclosed all requested and available information in as timely a manner as possible. We request that the Secretariat review the above-noted pages to remove any unintentional negativity with respect to how Canada conducted itself in providing information for this Factual Record. Canada welcomes a meeting with the Secretariat to discuss how Canada might better help the Secretariat in obtaining information for the preparation of Factual Records.

In order to facilitate our review of the final Factual Record and increase the timeliness of making a decision on publication, it would be appreciated if the Secretariat could provide Canada with an electronic version of the final Factual Record in “revision mode”.

Canada notes that, as a matter of procedure, comments of a Party are not to be made public unless and until Council votes to make the final Factual Record publicly available pursuant to Article 15(7) of the NAAEC.

Yours sincerely,

Norine Smith  
Assistant Deputy Minister  
Policy and Communications

c.c.: Ms. Judith E. Ayres  
Ms. Olga Ojeda  
Mr. Geoffrey Garver

CANADA'S COMMENTS ON THE DRAFT FACTUAL RECORD  
FOR SEM-98-004 (BC MINING)  
14 MAY 2003

General Comments

Canada would like to inform the Secretariat that the Compliance and Enforcement Policy referenced in the draft Factual Record (e.g. Section 3, Summary of Canada's response, p. 7, etc.) is no longer a draft but is now final. We have attached the document for your convenience.

With regards to section 4 entitled "Scope of the Factual Record", Canada considers the discussions surrounding the Secretariat's view of the Council's instruction regarding the scope of the Factual Record to be unnecessarily long. This information is already known by the public given the fact that the Secretariat's determination and the Council Resolution are posted on the CEC website. Therefore, we suggest that the Secretariat limit this discussion to the information that will be the subject of the Factual Record. We also request that the Secretariat include the reasons why Council voted to limit the scope of the Factual Record, and we also suggest that reference be made to Article 14(3)(a) of the NAAEC. By doing so, context and meaning will be provided to the reader who would otherwise be uninformed as to the reasons why the Council limited the scope of the Factual Record. This additional information should be included after the end of the first sentence of paragraph 5 which begins with: "In addition, in Council Resolution 01-11, [...]"

The draft Factual Record suggests that the Crown does not have to prove that Acid Rock Drainage (ARD) is deleterious and does not have to prove that the deposit caused harm to fish (e.g. section 5.2.3.2 entitled "Prosecution"). This is inaccurate. The Crown would still have to prove failure of an LC50 (acute lethality test) or demonstrate that other constituents of the effluent are deleterious as defined in the *Fisheries Act*. The proof of damage to fish in the environment would be used to influence the size of the penalty when considering a sentence.

In order for the public to understand why the option for Environment Canada to prosecute for alleged violations of s. 36(3) at Britannia, is not and has not been a viable option, we request that the following explanation be added in section 1, paragraph 10, and subsequently reflected when this issue is discussed in section 5.2.3.2, paragraph 6 and in section 5.3.2, paragraph 2:

“Environment Canada asserts that until 1991, a contravention of subsection 36(3) was a summary conviction offence (misdemeanour) under the *Fisheries Act* that was required to be prosecuted within two years of the occurrence of the offence (i.e. the deposit of substances deleterious to fish). The pollution problem at the Britannia Mine began in 1906 and continued throughout operation of the mine, which ended in 1974, to the present day. Over those years, the mine site has been owned and operated by a number of different mining companies. These factors made it very difficult for Environment Canada investigators to determine whether the pollution they were targeting had occurred within the two year limitation period for prosecuting an offence under s. 36 (3), and to identify which company was responsible for causing the pollution. The requirement for the Crown to prove, beyond a reasonable doubt, all elements of a charge under the *Fisheries Act* made it very unlikely that a prosecution would have been successful.

As a result of a substantive amendment to the *Fisheries Act* in 1991, a violation of section 36(3) became a hybrid offence which could be prosecuted by summary conviction (misdemeanour) or by way of indictment (felony), and the two year limitation period for prosecuting offences was dropped. This amendment, however, did not have retrospective application. This means that no person could be prosecuted after 1991 for a violation of s.36 (3) which occurred before 1991. Because the substances causing the pollution were deposited by the mining companies before 1991, these companies could not be prosecuted under the *Fisheries Act* after it was amended in 1991.

Regarding sections 5.4 through 6 of the draft Factual Record, we commend the Secretariat for the quality of the work in setting out a detailed recording of the facts.

### **Specific Comments**

#### **Section 1 Executive Summary**

**Paragraph 4:** The opening sentence is inaccurate and should read: “Regulations adopted in 1977, and updated in 2002, under s. 36(4) of the *Fisheries Act* [...]”. The following underlined text should also be included at the end of the paragraph: “All that is required to establish a violation of s. 36(3) is proof that a deleterious substance like ARD is ~~discharging~~ deposited into water frequented by fish. Violations can only be established by a court following a successful prosecution.”

**Paragraph 5:** In order to accurately reflect the activities undertaken by Environment Canada, the following sentence should be included at the

end of the paragraph: “Environment Canada has maintained numerous other files related to compliance promotion activities including the technical review of proposed treatment and site-remediation options.”

**Paragraph 8:** For clarity, we suggest that the second sentence include the following underlined text: A federal/provincial program for the remediation of orphaned/abandoned contaminated sites in Canada ended in 1995.

**Paragraph 11:** We request the Secretariat delete the first two sentences of the paragraph given the more fulsome explanation provided above in the general comments.

**Paragraph 11:** Environment Canada maintains that a successful prosecution would not stop the pollution of Howe Sound. As such, the Secretariat should add the following underlined text to clarify this point: In light of the fact that the present owner of the mine is insolvent and therefore lacks the means to implement any court-ordered remediation, a successful prosecution would not stop the pollution of Howe Sound.

**Paragraph 12:** In order to correctly reflect the interaction between CBE and both the provincial and federal governments, the following modifications to this paragraph should be made:

“CBE has been insolvent since 1994 and there is a court order for sale of the Britannia lands. Since 1997, CBE has advanced ~~and received considerable federal and provincial government technical assistance with several “reclamation/remediation” proposals aimed at financing site remediation through redevelopment of the Britannia site, none of which have materialized.~~ The technical aspects of these proposals were evaluated by federal and provincial agencies in advance of the drafting of *Waste Management Act* permits. [...]”

**Paragraph 13:** Canada would like to clarify the following point: Environment Canada and BC Environment jointly funded \$130K for effluent monitoring at the site. As such, we suggest that this passage read as follows:

“To promote compliance with s. 36(3) at the Britannia Mine, in 1994–95, Environment Canada and BC Environment attempted to obtain financing for research into environmental impacts from, and treatment methods for, Britannia effluent through the National Contaminated Sites Remediation Program. ~~Several millions of dollars in funding was allocated but lapsed.~~ (Is the Secretariat suggesting that several millions of dollars in funding was allocated to the orphaned contaminated sites in B.C. but lapsed; or to

the Britannia Mine specifically?) Beginning in 1995, Environment Canada and BC Environment jointly funded \$130K for effluent monitoring at the site.

**Paragraph 14:** Since prosecution was not viable, the focus became remediation of the site. In order to reflect this, we request the Secretariat replace the following text: “enforce the requirements of s. 36(3) and provincial laws at Britannia” and replace it with the following underlined text “To facilitate the remediation of the Britannia mine site [...]”

**Paragraph 14:** Regarding the Federal Crown’s participation in the Settlement Agreement, the following stricken text should be deleted and the underlined text should be added to ensure accuracy:

“The Federal Crown participated in negotiating the Settlement Agreement but did not sign it. ~~At the outcome~~ During the course of these negotiations as part of Environment Canada’s on-going cooperative efforts with BC to facilitate site remediation, Environment Canada ~~agreed~~ made a verbal agreement to conduct offshore sediment investigations at Britannia and provide technical reviews of remediation works including the waste water treatment plant.”

**Paragraph 15:** Canada would like to inform the Secretariat that the Federal requirements, as outlined in the 1999 Waste Management Act permit (as explained in footnote 136) indicate that the effluent requirements for this site will be consistent with the limits set in the MMER and include a requirement for non-acutely lethal effluent. This position was restated in recent correspondence (please see attached letter dated March 2003 from EC to WLAP). As such we request that the above underlined text be included before the last sentence of the paragraph.

The last sentence of this paragraph is inaccurate. The federal position on effluent quality is not “risk-based”. Footnote 136 explains the approach taken by EC regarding effluent quality. As such, the characteristics of treated Britannia effluent must be consistent with the *MMER* including the requirement for non-lethality. Consequently, we request that the last sentence be changed to better reflect the information in the footnote.

### Section 3 Summary of Canada’s response

**Paragraph 2:** Canada would like to inform the Secretariat that the plan in question added over \$40 million to the enforcement program, increasing our number of enforcement officers and operating funds base. As such, we would like this that this information be included.

**Paragraph 9:** We ask that the following underlined text be included: Canada acknowledges that there are ongoing discharges of acutely lethal effluent in potential violation of s.36(3) at the Britannia, Tulsequah Chief and Mt. Washington mines [...].

**Paragraph 9:** To ensure accuracy, the Secretariat should remove the following stricken text and add the underlined text in order to clearly illustrate the actions that were taken:

“At Tulsequah Chief, Canada issued a Warning and conducted follow-up inspections. As a result of continued discharge of ARD, an Inspector’s Direction was issued in July 2002 to cease the deposit of ARD by September 30, 2003. At Mt. Washington, Canada collected effluent samples and ~~wrote a~~ issued Inspector’s Directions to those ~~letter to four persons with~~ ownership or other interests in the property, advising them that the effluent violated s. 36(3) of the *Fisheries Act* and requiring the deposit to cease by November 30, 2003.”

#### Section 5.2.2 s. 36(3) and Mining

**Paragraph 1:** In order to accurately reflect the current status, the Secretariat should change the first sentence to include the following modifications: “Operating and closed ~~often~~ mines can generate effluent that ~~can~~ may violate s. 36(3) of the *Fisheries Act*.”

**Paragraph 4:** An important clarification needs to be made regarding the last sentence. We ask that the sentence read: “However, mines that closed before ~~June 6, 2002~~ 1977, including thousands of so-called “abandoned mines” such as Britannia, are not covered by the MMER.”

**Paragraph 5:** To clarify this paragraph the Secretariat should remove the stricken text and add the following underlined text:

~~“In the absence of standards set out in regulations~~ Mines and other discharges not subject to *Fisheries Act* regulations, (e.g. effluent from mines such as Britannia) ~~are is covered by~~ subject to the “general prohibition” against depositing deleterious substances into water frequented by fish found in s. 36(3). At these mines, an acute lethality test is routinely used ~~as but one~~ to measure of compliance with s. 36(3). This test involves exposing rainbow trout to undiluted effluent for ninety-six hours. A mortality rate of fifty percent or more means the effluent is acutely lethal to fish and has been considered by the courts to be an indication of the presence of deleterious substances for the purposes of the *Fisheries Act*. Under the *Fisheries Act*, discharging or permitting the discharge of a deleterious substance into water frequented by fish is a potential violation

of s. 36(3) and an offense pursuant to s. 40. Violations are proven and decided by the courts.

### Section 5.2.3 Responses to alleged violations of s. 36(3) provided for under the *Fisheries Act*

**Paragraph 1:** To ensure accuracy, the Secretariat should include the following underlined text to the first sentence to include the appropriate terminology:

“The Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* lists a range of potential responses to alleged or apprehended violations of s. 36(3), including Inspector’s Directions, information requests and orders from the Minister of Fisheries and Oceans of Canada [...]”

#### Section 5.2.3.2 Prosecutions

**Paragraph 1:** For clarity, the Secretariat should include the following underlined language to replace the stricken language:

“Another potential response to an alleged violation of s. 36(3) is to initiate a prosecution against ~~the a named~~ person responsible for the alleged violation. To succeed in a prosecution, the Crown must be able to prove beyond a reasonable doubt that ~~the a person named~~ “deposited” or “permitted the deposit of” a “deleterious substance” into or near “water frequented by fish.”

**Paragraph 2:** The Secretariat should add the following underlined sentence at the end of the paragraph to ensure that the public be aware that a potential violation may also occur if deposited into waters which may enter waters frequented by fish: “Deposit of a deleterious substance may also be a potential violation if deposited into waters which may enter waters frequented by fish.”

**Paragraph 5:** The following underlined text should be added for clarity: “Canada has stated that prosecution for a violation of ~~under~~ s. 36(3) is not, and has not been, a viable option for addressing the pollution problem at the Britannia Mine.

**Paragraph 6:** Regarding the first three sentences, it is important for the Secretariat to include that, in addition to mine tailings, ARD effluent was also deposited.

### Section 5.3.2 The Decision to Prosecute

Regarding the last paragraph of this section, Canada requests that the following changes be made in order to explain why Canada did not provide additional information on the matter discussed:

“Canada has stated that at one time, Environment Canada considered inquired into the possibility of bringing an action in public nuisance against the current owners of the Britannia Mine, but that the Department of Justice “did not recommend this course of action.” ~~Canada provided no additional information on this matter~~ As a matter of course, legal advice provided by the Department of Justice to other federal government departments is not released outside the federal government. However, in this case as noted earlier, Canada was of the view that the federal Crown had no standing to bring such an action.”

### Section 5.3.3 Streamlining Environmental Protection

It is important to note that the referenced relationship with British Columbia is incorrect. There has been an informal “one-window” approach with BC whereby federal regulatory requirements and fishery resource information are conveyed to BC for its consideration within the provincial effluent permitting system. While the regulated community does deal with provincial officials on matters related to provincial legislation, policies and procedures it also deals with federal (EC) officials on federal regulatory and policy matters. The federal government is directly responsible for all matters pertaining to enforcement of federal environmental laws and regulations. As such, we request that this section reflect these points.

#### Section 5.3.3.1 Federal-Provincial Harmonization

**Paragraph 3:** The last sentence of this paragraph indicates that no agreement exists with BC. This is inaccurate. In September 1994 a federal (EC and DFO) BC “Agreement on the Administration of Federal and Provincial Legislation for the Control of Liquid Effluents from Pulp and Paper Mills in the Province of British Columbia” came into force. This agreement expired in 1996 and was not renewed because both the Province and the Federal governments decided to pursue other compliance priorities pursuant to their respective environmental legislation. As such, the last sentence should read: No such agreement is presently in force for British Columbia, although the *Canada- BC Pulp and Paper Effluent Agreement* was followed between 1994-1996.

**Paragraph 7:** To ensure accuracy, the third sentence should conclude with the underlined text and read : “Under the WMA, the province has discretion in determining appropriate effluent standards for Britannia based on impacts of Britannia effluent to the receiving environment, although there must also be compliance with federal statutes like the *Fisheries Act*.”

**Paragraph 15:** It would appear that this paragraph is not relevant and we suggest that it be stricken given our earlier comment on Canada-BC PPER agreement.

**Paragraph 17:** This paragraph states that the report to Parliament “makes no mention of EC activities at Britannia”. This annual report was prepared by Fisheries and Oceans Canada, not Environment Canada. By their very nature, these annual reports are not expected to address every activity by DFO, EC or any other government department across the country. As such, the Secretariat should remove the last sentence.

#### **Section 5.3.3.2 Environmental Harmonization and Mining**

**Paragraph 1:** Canada would like to emphasize that BC has not taken the lead for enforcement of s. 36(3) of the *Fisheries Act* and Canada has consistently recommended effluent quality standards consistent with the MMER which are not “risk-based”. [See above comments under section 1, paragraph 15 and footnote 136.] In order to reflect this point, we request that this paragraph be revised.

#### **Section 5.3.4.1 The National Contaminated Sites Remediation Program**

**Paragraph 1:** In 1995, EC and BC Environment each contributed \$65K for site monitoring at Britannia. As such, the Secretariat should include this additional information after the second sentence.

The last paragraph should be revised in order to reflect the cooperative relationship between the province and the federal government. As such the Secretariat should include the following underlined language to the second sentence:

“As part of the on-going cooperative effort to remediate the Britannia site, the Province-as-PRP also entered into a verbal agreement agreed with

Environment Canada ~~that under which~~ Environment Canada would conduct sediment investigations in Howe Sound, continue to contribute technical expertise to the review of remediation works, and would support an application for \$3M in federal funding for treatment plant construction.”

**Section 4 Alleged violations of s. 36(3) at the Britannia Mine**  
[underlined text needs to be added to the title, as well as in throughout the draft Factual Record.]

After Figure 3, paragraph 3 which begins with “MMER standards [...]”, the following correction must be made by replacing the last sentence with the following text:

“The determination of a deposit of a deleterious substance is complex and does not necessarily reference MMER limits or limits of other *Fisheries Act* regulations, but relies on site-specific evidence gathered by an inspector or fishery officer designated under the *Fisheries Act*, and other expert testimony presented to the court at trial.”

**Section 5.5 Canada’s Actions in regard to alleged violations of s. 36(3) of the *Fisheries Act* at the Britannia Mine**

**Paragraph 3:** This paragraph is incorrect. As such, we request that the following underlined text be included:

“In a telephone conversation, an Environment Canada employee confirmed that Environment Canada has not conducted an inspection or an investigation and thus has not had an enforcement file on the Britannia Mine since at least 1999. Environment Canada has maintained numerous other files related to compliance promotion activities including the technical review of proposed treatment and site-remediation options.”

**Paragraph 5:** Contrary to what is stated in this paragraph, Canada’s approach to achieving compliance with s. 36(3) of the *Fisheries Act* has not centered on supporting provincial enforcement action. Environment Canada provided scientific and technical support toward a resolution of the Britannia Mine pollution problem. This approach recognized the benefits that could accrue through use of BC’s regulatory regime for contaminated sites which were realized via the negotiated settlement agreement. As such, we request that this clarification be reflected in the text.

**Section 5.5.2 1994-1996 / Orphan Sites Funding and the Search for a Buyer**

**Last paragraph:** In order to use the same language as that used in the legislation, the word “toxic” should be replaced with the term “acutely lethal” in the third sentence.

**Section 5.5.3 1997-2001 / Scientific Advances, Remediation Proposals and Potentially Responsible Parties**

**Paragraph 28:** In order to be accurate, the Secretariat should add the following underlined sentence after the first sentence: “On regulatory matters, some members of the public were concerned about why CBE’s proposal had not triggered an environmental assessment under federal and provincial legislation. Federal reviewers considered the possible application of the *Canadian Environmental Assessment Act* to the project, however, concluded that there was no automatic federal CEAA “trigger” (e.g. such as a habitat authorization or federal funding involved).” [...]

**Fourth paragraph prior to section 5.6** [which begins with On 8 May 2002, [...]] In line 4 of this paragraph a meeting in West Vancouver is referenced. This is incorrect; the meeting was held in North Vancouver.

**Section 5.6 Whether Canada is Failing to Effectively Enforce s. 36(3) of the *Fisheries Act* in the context of Britannia Mine**

**Paragraph 1:** In light of the instructions that were provided to the Secretariat by the Council, the first sentence is inaccurate and leads the reader to believe that this Factual Record “is warranted to examine in greater detail the effectiveness of the enforcement approach taken in relation to each mine [Mount Washington, Britannia, and Tulsequah Chief], whether those approaches serve as models for effective enforcement with respect to mines in British Columbia generally, and whether and how Canada’s approach prevents the *Fisheries Act* violations at the mines in the long term.” A Factual Record is an objective, independent presentation of the facts and should not analyze, in a subjective manner, the effectiveness of an enforcement approach taken by a Party and whether those approaches should serve, or not, as models for effective enforcement. As such, we request that this sentence be removed and/or revised to read:

“On 16 November 2001 Council instructed “the Secretariat to prepare a factual record in accordance with Articles 15 of the NAAEC [...] for the assertion that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* with respect to the Britannia Mine.”

### Section 5.6.1 Current Status

**Paragraph 2:** To appropriately reflect EC activities in relation to the Britannia Mine, the following underlined text should be included at the end of the second sentence and should read:

“The Pacific and Yukon Region of Environment Canada has no enforcement file regarding Britannia and has not had one since at least 1999, although it has maintained numerous other files related to compliance promotion activities including the technical review of proposed treatment and site-remediation options.”

Regarding the chart showing the current status of remediation funding, it is confusing and erroneous.

Under “Contributor” there is a reference to Environment Canada “EC (or Canada-as-PRP). Canada is not a PRP and we ask that this be omitted.

Under “Source of Obligation” is “Verbal Agreement” See our previous comments (in the Executive Summary and elsewhere) and your footnote 305 : Environment Canada agreed to conduct a sediment investigations in Howe Sound and review proposed remediation works as part of their on-going technical support for Britannia remediation plan.

Under “Cash” is “\$3M under Canada-BC Infrastructure Program to build treatment plant” This is not linked to “Verbal Agreement”.

Under “Situation in October 2002” is “See above re: Infrastructure Program.... It is not clear who will pay for any recommended sediment remediation”. Not only is this confusing we question the relevance of “sediment investigations” to the issue of enforcement related to the discharge of mine water into Howe Sound. BC has allocated funds for sediment remediation should any be required.

**Section 5.6.2**      **Whether current initiatives will achieve compliance with s.36(3) at the Britannia Mine in the Shortest Possible Time and with no further occurrence of Alleged violations [the word alleged should be included for the reasons previously mentioned].**

**Paragraph 1:** To ensure that the last sentence is accurate the following underlined text should be included :

“At Britannia, [...] would be considered by Environment Canada to signify only one measure of compliance with the s. 36(3) general prohibition on depositing deleterious substances into waters frequented by fish.”

**Paragraph 2:** Please refer to previous comments on MMER standards in previous and proposed effluent discharge permits for Britannia and letter from EC to WLAP March 2003.

**Paragraph 4:** The citation provided by the Secretariat fails to illustrate and appreciate the difficulties associated with implementing treatment at a multi-owner contaminated site, in contrast to a green-field mine under the control of a single owner-operator. As such we request that the Secretariat reflect the extensive work that has been undertaken by the provincial and federal governments, and the private sector, on locating, designing, constructing and operating an optimum treatment plant for Britannia, while designing and implementing a site remediation plan. All of this work has been subject to critical analysis and peer review.

**Paragraph 5:** To ensure accuracy, the last sentence should conclude with the following text : “[...] and exceedences of the site’s *Waste Management Act* permits.”

#### **Section 6 Closing Note:**

**Paragraph 1:** To accurately reflect EC actions at the Britannia Mine, we request that the paragraph conclude with the following text: “[...] , although it has maintained numerous other files related to compliance promotion activities including the technical review of proposed treatment and site-remediation options.”

**Paragraph 2:** The third sentence is inaccurate and it should read as follows: “In 2001, the province settled with past owners for \$30M. Environment Canada agreed verbally to conduct a sediment investigations in Howe Sound and review proposed remediation works in Howe Sound as part of their on-going technical support for Britannia remediation plan.”

# **ATTACHMENT 3**

**Comments of the United States of America**



Mr. Geoffrey Garver

Secretariat of the Commission for Environmental Cooperation  
Submissions on Enforcement Matters Unit (SEM Unit)  
393, rue St-Jacques west, bureau 200  
Montreal QC H2T 1N9

Dear Mr. Garver,

Thank you for providing the United States with a copy of the Draft Factual Record for Submission SEM-98-002 (BC Mining) (the "BC Mining Factual Record"), which was received on March 31, 2003. We appreciate the Secretariat's assiduous efforts in preparing this document.

The accuracy of developed factual records is vital to fulfilling their intended purpose of providing the public with objective assessments of environmental law enforcement. The United States strongly supports the submissions process and seeks to ensure that factual records are accurate in their scope and purpose. We provide the following comments to assist the Secretariat in the development of the BC Mining Factual Record.

Although the term "factual record" is not defined in the North American Agreement on Environmental Cooperation (NAAEC), Article 15 of the NAAEC and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation both provide guidance regarding the type of information a factual record should contain. Specifically, a factual record should include factual information relevant to the matter(s) at issue, and enable readers to draw their own conclusions as to whether a Party is effectively enforcing its environmental laws.

As to the latter point of guidance, the United States believes that overall, the Secretariat's draft BC Mining factual record provides the information necessary to enable readers to draw their own conclusions as to whether Canada is failing to effectively enforce its environmental law.

As to former point of guidance - whether the factual record includes factual information relevant to the matter(s) at issue - the United States provides two comments. The United States generally supports text which discusses the scope of the factual record. However, as we asserted previously in our comments to the MBTA draft factual record, the discussion of the scope should be limited to information relevant to the

Council's actual instruction to the Secretariat. The discussion should not include for example, a detailed explanation of what is not addressed in the factual record. For this reason, we propose removal of text in Section 4 which discusses what is not addressed in the BC Mining factual record.

We also take note of some of the text in the first paragraph of Section 5.6 - Whether Canada is Failing to Effectively Enforce s. 36(3) of the Fisheries Act in the Context of the Britannia Mine (p. 94). That paragraph states:

This section provides information, gathered by the Secretariat that, read in conjunction with information contained in ss. 5.3, 5.4, and 5.5., above, is relevant to a consideration of whether Canada is failing to effectively enforce s. 36(3) of the Fisheries Act in the context of the Britannia Mine, *whether Canada's approach to achieving compliance with s. 36(3) at the Britannia Mine serves as a model for effective enforcement with respect to mines in British Columbia generally, and whether and how Canada's approach prevents Fisheries Act violations at the Britannia Mine in the long term.*" (Emphasis added)

The United States believes it is beyond the scope of this factual record for the Secretariat to examine "whether Canada's approach to achieving compliance with s. 36(3) at the Britannia Mine serves as a model for effective enforcement with respect to mines in British Columbia generally." Therefore, we recommend deletion of this phrase.

Thank you again for the opportunity to review this draft record. The success of the CEC is dependent upon the close cooperation of the Council, Secretariat, and Joint Public Advisory Committee, and upon the strong interest and participation of the citizens of the member nations. The submission process remains an important mechanism by which the public is able to participate through the CEC in the protection of our shared North American environment.

Should you have any questions, please contact Jose Aguto (202-564-0289) or David Redlin (202-564-6437).

Sincerely,

Jerry Clifford  
Deputy Assistant Administrator  
Office of International Affairs  
United States Environmental Protection Agency