

Secretariat of the Commission for Environmental Cooperation

REQUEST FOR INFORMATION For Preparation of a Factual Record Submission SEM 98-004 (B.C. 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 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.

The Secretariat is now requesting information relevant to matters to be addressed in the factual record for the B.C. Mining submission, SEM-98-004. The following sections provide background on the submission and describe the kind of information requested.

II. The B.C. 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 these 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 / B.C. Mining) in all correspondence.

For any questions, please send an e-mail to the attention of Katia Opalka, at info@ccentl.org.