

**THE GOVERNMENT OF CANADA'S FAILURE TO ENFORCE THE *FISHERIES*  
ACT AGAINST MINING COMPANIES IN BRITISH COLUMBIA**

**A SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL  
COOPERATION PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN  
AGREEMENT ON ENVIRONMENTAL COOPERATION**

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## **TABLE OF CONTENTS**

- I. SUMMARY OF THE SUBMISSION
- II. THE SUBMISSION
  - A. FACTS
    - 1. WATER POLLUTION FROM MINING IN BRITISH COLUMBIA
      - a) Acid Mine Drainage
      - b) Heavy metal contamination
      - c) Pollution from processing chemicals
      - d) Erosion and sedimentation
      - e) The magnitude of the problem
    - 2. THE DECLINE IN SALMON RUNS IN BRITISH COLUMBIA
    - 3. SPECIFIC EXAMPLES OF ONGOING *FISHERIES ACT* VIOLATIONS WHERE NO ENFORCEMENT ACTION HAS BEEN TAKEN BY THE GOVERNMENT OF CANADA FOR DECADES
      - a) Tulsequah Chief Mine
      - b) Britannia Mine
      - c) Mount Washington Mine
    - 4. INADEQUATE STAFF AND RESOURCES TO ENFORCE THE LAW
  - B. MARKET DISTORTIONS CAUSED BY CANADA'S LACK OF ENFORCEMENT OF ENVIRONMENTAL LAWS AND CANADA'S LACK OF CERTAIN BASIC ENVIRONMENTAL LAWS
  - C. THE GOVERNMENT OF CANADA'S FAILURE TO ENFORCE THE *FISHERIES ACT*
  - D. EFFORTS TO HAVE THE GOVERNMENT OF CANADA ENFORCE THE *FISHERIES ACT*
  - E. THE CONCERNS OF THE SUBMITTING PARTIES
  - F. THE ISSUES RAISED IN THIS SUBMISSION MERIT THE PREPARATION OF A FULL FACTUAL RECORD
    - 1. This Submission is within the jurisdiction of the NACEC

2. This Submission merits a request that the Government of Canada respond

G. CONCLUSION

**LIST OF EXHIBITS**

1. "Acid Mine Drainage: Mining and Water Pollution Issues in B.C." by the Environmental Mining Council of B.C., Victoria, 1998
2. "Digging Up Trouble: The Legacy of Mining in British Columbia" by the Sierra Legal Defence Fund, Vancouver, May 1998
3. Slaney, Hyatt et al. "Status of Anadromous Salmon and Trout in British Columbia and Yukon" in *American Fisheries Society*, Vol. 21, No. 10, (October 1996)
4. Letter from M.D. Nassichuk, Manager, Pollution Abatement Division, Environment Canada to the B.C. Ministry of Environment, October 20, 1995
5. Deniseger, John H. "Water Quality Assessment and Objectives for the Tsolum River Basin", B.C. Ministry of Environment, Land and Parks, 1995
6. AGRA Earth and Environmental Limited, "Opportunities Relating to the Remediation of Acid Mine Drainage at Mount Washington and the Restoration of the Tsolum River Watershed" (July 1996)
7. Report of the Standing Committee on Environment and Sustainable Development, "Enforcing Canada's Pollution Laws: The Public Interest Must Come First" (May 1998)
8. Letter from Counsel for the Submitting Parties to the federal Minister of Fisheries and Oceans on June 1, 1998 requesting an explanation for the Government of Canada's failure to enforce the *Fisheries Act* against the mining industry in B.C.

## **I. SUMMARY OF THE SUBMISSION**

This submission is made pursuant to Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC”) by the Sierra Legal Defence Fund, representing the Sierra Club of British Columbia, the Environmental Mining Council of British Columbia and the Taku Wilderness Association (the “Submitting Parties”). The Submission identifies 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. Sections 36(3) and 40(2) of the *Fisheries Act* make it an offence to deposit a toxic substance in water that is frequented by fish.

Water pollution is one of the major environmental impacts caused by mining. Although there are four different types of mining impacts on water quality, the worst impacts are caused by Acid Mine Drainage and heavy metal pollution. Acid Mine Drainage occurs when mining operations expose sulphide-bearing rocks to air and water, creating sulphuric acid. The sulphuric acid, in turn, dissolves the metals in the surrounding rock. These toxic substances then flow into water systems, harming fish, other aquatic species, fish habitat, water quality and human health.

There are at least three egregious examples of mines that have been leaching toxic, deleterious substances into salmon-bearing waters in British Columbia for over 25 years. The Tulsequah Chief Mine in the Taku River valley, near the B.C.-Alaska border, has been discharging acutely toxic effluent laced with high levels of lead, copper and zinc into prime salmon habitat since the 1950s. The Mount Washington Mine on Vancouver Island is depositing so much copper into the Tsolum River that once healthy salmon runs have all but disappeared. The Britannia Mine, located 50 km north of Vancouver, has been described as the worst single point source of metal pollution in North America by Environment Canada, and deposits up to a tonne of copper into Howe Sound daily.

These notorious mines, well known to the Government of Canada, are violating s. 36(3) of the *Fisheries Act* every day, and have been breaking the law for decades, yet have never been prosecuted. In fact, the Department of Fisheries and Oceans and Environment Canada, the federal departments responsible for environmental enforcement in B.C., have not prosecuted any mining companies in B.C. for violations of s. 36(3) of the *Fisheries Act* for at least ten years.<sup>1</sup> Although this Submission will focus on the Tulsequah Chief, Mount Washington and Britannia mines, there are at least twenty other acid-generating mines in B.C. where violations of

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<sup>1</sup> The Submitting Parties have searched legal databases for prosecutions of mining companies in B.C. by the Government of Canada for violations of s. 36(3) of the *Fisheries Act*. The search yielded three cases dating from 1983, 1984 and 1985. The first case resulted in the conviction of Equity Silver in 1983 and a fine of \$12,000 (*R. v. Equity Silver Mines Ltd.* (1983) 3 F.P.R. (B.C. Prov. Ct.)). The second case resulted in the conviction of Carolin Mines in 1984 and a fine of \$135,000. The third case resulted in the conviction of Westmin Resources in 1985 and a fine of \$80,000.

s. 36(3) of the *Fisheries Act* either may have occurred or may be occurring without any enforcement action being taken.

A major factor contributing to Canada's failure to enforce the *Fisheries Act* against the mining industry in B.C. is dramatic cuts to enforcement staff and resources at Environment Canada. Environment Canada's overall budget has fallen by at least 40% in recent years. Even more disturbing is this year's 72% drop in the operating budget (from \$313,000 to \$87,000) of the enforcement branch of Environment Canada's Pacific Region, a region which covers the broad geographic area of B.C. and the Yukon. There are simply not enough enforcement staff and enforcement resources to uphold the law.

Canada's failure to enforce the *Fisheries Act* against the mining industry in B.C. has contributed to the salmon crisis currently gripping the West Coast. For example, the Mount Washington Mine on Vancouver Island is largely responsible for destroying a salmon fishery on the Tsolum River that would be worth approximately \$2 million annually. Coho salmon runs in the Tsolum River that numbered 15,000 in the 1960s before the mine was operated now number less than one hundred. Steelhead have disappeared completely from the Tsolum River since the 1960s. Across the province of B.C., 142 runs of Pacific salmon have gone extinct during this century, and another 624 runs are at high risk of disappearing. The causes include mining pollution, hydroelectric power development, logging, urbanization and over-fishing.

In addition, Canada's failure to enforce the *Fisheries Act* against the mining industry in B.C. may be creating trade or market distortions. B.C. may be viewed as a "pollution haven", where lax environmental laws and a lack of enforcement enable mining corporations to operate with lower costs in B.C. than in other more stringently regulated jurisdictions such as the United States. This gives mining companies operating in B.C. an unfair competitive advantage (in effect, a subsidy) over mining companies in other jurisdictions, particularly the United States. Mining corporations in B.C. enjoy a further competitive advantage because Canada lacks certain basic environmental laws such as endangered species legislation<sup>2</sup> and laws that place comprehensive limits on the amount of pollution that can be deposited into bodies of water.<sup>3</sup>

The Submitting Parties therefore request that the Commission prepare and publish a thorough factual record documenting Canada's failure to enforce the *Fisheries Act* against the mining industry in British Columbia, with particular emphasis on the Tulsequah Chief, Mount Washington and Britannia mines.

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<sup>2</sup> Unlike the United States with its *U.S. Endangered Species Act*

<sup>3</sup> Unlike the United States with its *Clean Air Act* which sets limits for Total Maximum Daily Loads (TMDLs)

## **II. THE SUBMISSION**

### **A. FACTS**

#### **1. WATER POLLUTION FROM MINING IN BRITISH COLUMBIA**

There are four main ways in which mining causes water pollution: acid mine drainage; heavy metal contamination; pollution from processing chemicals; and erosion or sedimentation.

##### **a) Acid Mine Drainage**

Acid Mine Drainage (AMD) occurs when rocks containing sulphides are exposed, through the mining process, to air and water, creating sulphuric acid. The sulphuric acid, in turn, dissolves the metals in the surrounding rock. Acid Mine Drainage is the single greatest source of environmental damage caused by the mining industry. A copy of a report called “Acid Mine Drainage: Mining and Water Pollution Issues in B.C.” by the Environmental Mining Council of B.C. is attached to this Submission at Tab 1.

Sulphuric acid is transported from mine sites into neighbouring aquatic systems through rainwater, snowmelt, surface drainage and groundwater flows. Not surprisingly, Acid Mine Drainage can have dramatic impacts on water quality and can destroy fish and fish habitat. Acid Mine Drainage is often 20 to 300 times more acidic than acid rain. In some circumstances, a naturally occurring bacteria which thrives in acidic environments may kick in (*Thiobacillus ferrooxidans*), accelerating the oxidation and acidification processes, leaching even more trace metals from the waste rocks, exposed ore and tailings.

##### **b) Heavy metal contamination**

Heavy metal contamination occurs when metals, (such as arsenic, lead, copper and zinc), contained in excavated rock or exposed in underground mines come in contact with water. The heavy metals are leached out and carried into the water system. Heavy metal leaching is accelerated in the low pH conditions created by Acid Mine Drainage.

##### **c) Pollution from processing chemicals**

Pollution from processing chemicals occurs when substances like cyanide (used to separate minerals from ore) spill, leak or leach from mine sites into nearby water systems.

##### **d) Erosion and sedimentation**

Erosion and sedimentation result from mining activities that disturb soil and rock, such as road construction, open pit mining and waste impoundment. Erosion and sedimentation in rivers, lakes and streams can harm fish, fish habitat and water quality.

e) The magnitude of the problem

Mining exposes enormous volumes of potentially acid generating rock to air and water. According to Environment Canada, the mining industry in Canada generates 650 million tonnes of waste rock and tailings every year.<sup>4</sup> Waste rock from mining will continue to generate acid for as long as it is exposed to air and water—until the sulphides are leached out. This process can take hundreds or even thousands of years. For example, the Equity Silver Mine in northern B.C. is expected to continue generating acid mine drainage for between 500 and 150,000 years.<sup>5</sup>

There are 25 mines in British Columbia that are currently acid generating, while at least 17 other mines have been identified as potentially acid generating (see Appendix 1). According to the Government of British Columbia, by 1994 there were approximately 240 million tonnes of acid-generating waste rock and 72 million tonnes of acid-generating mine tailings in B.C. Each year the volume of acid generating waste rock and tailings in B.C. grows by 25 million tonnes.<sup>6</sup> A copy of a report called “Digging Up Trouble: The Legacy of Mining in British Columbia” by the Sierra Legal Defence Fund, (Vancouver, May 1998) is attached to this Submission at Tab 2.

## 2. THE DECLINE IN SALMON RUNS IN B.C.

An alarming number of anadromous fish stocks in B.C. have either gone extinct, or are in a state of serious decline. A recent study by the American Fisheries Society concluded that 142 salmon runs in B.C. and the Yukon have been extirpated, and 624 are at high risk of becoming extirpated.<sup>7</sup> The study identified logging, urbanization and hydropower development as the primary factors contributing to most of the 142 documented population extinctions. The study also mentions mining as one of the threats facing B.C. salmon populations, stating that “mine effluents have contributed to stock depressions at several locations in British Columbia, including the Tsolum River on eastern Vancouver Island and the Coquihalla River on the lower Fraser System.”<sup>8</sup> A copy of a 1996 study by Slaney, Hyatt et al. in *American Fisheries Society*, (Vol. 21, No. 10) called “Status of Anadromous Salmon and Trout in British Columbia and Yukon” is attached to this Submission at Tab 3.

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<sup>4</sup> Government of Canada, *The State of Canada's Environment*, (Ottawa: Ministry of Supply and Services, 1991)

<sup>5</sup> B. Wilkes, “Prediction of Environmental Impacts as a Silver/Gold Mine Follow-up” (The Banff Centre, October 1985)

<sup>6</sup> Government of British Columbia, “B.C. State of the Environment Report”, (Victoria, 1994)

<sup>7</sup> Slaney, Hyatt et al. “Status of Anadromous Salmon and Trout in British Columbia and Yukon” in *American Fisheries Society*, Vol. 21, No. 10

<sup>8</sup> Slaney, Hyatt et al. See previous footnote



The extinction of fish runs is an irreversible loss. Each run possesses unique genetic information that determines the timing of its spawning runs, and that also dictates the run's return to its original spawning bed. That genetic information is lost when a run becomes extinct.

The decline in the fisheries has had a significant impact on communities and individuals that depend on fisheries for their livelihoods and cultural identities. First Nations, who enjoy a constitutionally protected aboriginal right to fish, have faced the severe decline, or loss, of a traditional livelihood. Fisheries dependent communities up and down the coast have also faced the severe decline, or loss, of their livelihood. The harmful alteration of fish habitat has reduced recreational fishing opportunities, and threatens the livelihoods of people working in the recreational fishing industry. Clearly, the preservation and enhancement of fish populations and habitat should be a top priority for the Government of Canada.

The salmon crisis in British Columbia reached new depths in the spring of 1998 when the Government of Canada announced a ban on fishing for coho salmon. This ban has had a devastating impact on coastal communities and has resulted in a federal aid package worth over \$400 million. Pollution from mines has contributed to the decline of the coho salmon. Again, a prominent example is the Tsolum River on Vancouver Island, polluted since 1966 by the Mount Washington Mine. According to the B.C. Ministry of Environment,

“After 1966, the coho escapement has declined steadily from 15,000 to a low of 14 in 1987. The coho are particularly vulnerable to toxicity caused by acid mine drainage as they reside in the system for up to 14 months after hatching.”<sup>9</sup>

### 3. SPECIFIC EXAMPLES OF ONGOING FISHERIES ACT VIOLATIONS WHERE NO ENFORCEMENT ACTION HAS BEEN TAKEN BY THE GOVERNMENT OF CANADA FOR DECADES

#### a) Tulsequah Chief Mine

The Tulsequah Chief Mine is an abandoned copper mine located on the Tulsequah River, a major tributary of the Taku River, in northwest B.C. The Taku River flows out of B.C. and through Alaska before emptying into the Pacific Ocean. Operated by Cominco for six years in the 1950s, the Tulsequah Chief Mine is now the subject of a proposal by Redfern Resources to reopen the mine for another eight years.

The Taku River watershed covers 18,000 square kilometres of roadless wilderness. The area is the traditional territory of the Taku River Tlingit and Tahltan First Nations. The Taku River

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<sup>9</sup> “Water Quality Assessment and Objectives for the Tsolum River Basin”, B.C. Ministry of Environment, Land and Parks, April 1995, pp. 11-12

supports millions of sockeye, coho and chinook salmon, as well as Aboriginal, Canadian and American fisheries.

Acid Mine Drainage has flowed into the Tulsequah River ever since the mine began operating in the 1950s. According to provincial government documents, this Acid Mine Drainage has “extremely high” concentrations of toxic metals, is having “a significant impact on downstream water quality” and is “acutely toxic” to fish. Environment Canada has confirmed that copper, zinc and lead levels are far higher than legal limits and that the Acid Mine Drainage from the Tulsequah Chief mine site is “acutely toxic to fish”.<sup>10</sup> A copy of a letter from M.D. Nassichuk, Manager, Pollution Abatement Division, Environment Canada to the B.C. Ministry of Environment, October 20, 1995 is attached to this Submission at Tab 4.

No *Fisheries Act* charges have ever been laid against the owners or operators of the Tulsequah Chief Mine despite the longstanding and ongoing pollution caused by the deposit of deleterious substances in fish-bearing waters.

#### b) Britannia Mine

Located 50 km north of Vancouver, the Britannia Mine was once the largest copper producing mine in the entire British Empire, operating from 1905 to 1974. 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. According to the Government of Canada, millions of litres of contaminated water flow into Britannia Creek and Howe Sound every day, containing elevated levels of copper, zinc, cadmium, iron and aluminum. The daily discharge of copper and zinc is estimated at up to one tonne. A mining specialist working with Environment Canada recently described the Britannia Mine as “the single worst point source of metal pollution on the North American continent”.<sup>11</sup>

Britannia Creek was once productive salmon habitat. It is now virtually devoid of life. Similarly, 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. Salmon returning to spawn in the Squamish and Cheakamus River systems are jeopardized because they must travel past this toxic area of Howe Sound.

Elevated copper and zinc levels have been found in crabs, mussels, oysters and shrimp up to 18 km away, along with significantly reduced numbers of these species. Copper levels in surface

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<sup>10</sup> Letter from M.D. Nassichuk, Manager, Pollution Abatement Division, Environment Canada to the B.C. Ministry of Environment, October 20, 1995

<sup>11</sup> Vancouver Sun, June 13, 1996, p. A1

waters at Britannia Bay are six times the “never to exceed level” established by the United States Environmental Protection Agency.<sup>12</sup>

No *Fisheries Act* charges have ever been laid against the owners or operators of the Britannia Mine despite the longstanding and ongoing pollution caused by the deposit of deleterious substances in fish-bearing waters.

### c) Mount Washington Mine

At the Mount Washington Mine on Vancouver Island, open pits of acid generating ore, along with waste rock and tailings, are exposed to the elements. The sulphides in the ore and the waste rock continually react with the air and water to form acutely toxic sulphuric acid that in turn leaches out heavy metals such as copper from the ore and rock.

Ironically, this small, open-pit copper mine operated for only two years, from 1964-66. The mill continued for another year, until 1967, before closing. In that short time span, the mine excavated over 940,000 tonnes of waste rock and 360,000 tonnes of ore while the mill produced 340,000 tonnes of tailings.

Sadly, both the waste rock piles and the mill tailings lie at the headwaters of the Tsolum River. The copper-laced Acid Mine Drainage from Mount Washington Mine leaches into Pyrrhotite Creek which flows into Murex Creek which then joins the Tsolum River. The Tsolum River used to be the home of healthy runs of coho salmon, pink salmon, chum salmon and steelhead. Surveys conducted in the 1950s counted hundreds of thousands of salmon spawning each year in the Tsolum River system.

The toxic impacts of copper in the Tsolum River have virtually destroyed the salmon populations, eliminating a \$2 million per year salmon-based economy. The B.C. Ministry of Environment’s watershed assessment of the Tsolum River concludes: “the fisheries resource is believed to have declined by 90 per cent predominantly because of Acid Mine Drainage from Mount Washington.”<sup>13</sup> In the spring of 1982, 2,500,000 pink salmon fry were released into the Tsolum River from a pilot hatchery. These fish were expected to return in the fall of 1984. Not a single salmon came back. It is estimated that to restore the Tsolum River to a point where salmon could return would require a 96% reduction in copper discharges from the mine.<sup>14</sup> A copy of a provincial government report called “Water Quality Assessment and Objectives for

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<sup>12</sup> Stephen, Robertson and Kirsten, Inc. “Evaluation of ARD from Britannia Mine and Options for Long Term Remediation of the Impact on Howe Sound” (November, 1991)

<sup>13</sup> J. Deniseger, J.P. Collin and A.R. Chapman. “Tsolum River Watershed Water Quality Assessment and Objectives” B.C. Ministry of Environment, Land and Parks (April 1995)

<sup>14</sup> AGRA Earth and Environmental Limited, “Opportunities Relating to the Remediation of Acid Mine Drainage at Mount Washington and the Restoration of the Tsolum River Watershed” (July 1996)

the Tsolum River Basin”, (B.C. Ministry of Environment, Land and Parks, 1995) is attached to this Submission at Tab 5. A second report on “Opportunities Relating to the Remediation of Acid Mine Drainage at Mount Washington and the Restoration of the Tsolum River Watershed” is attached to this Submission at Tab 6.

The impacts of copper on salmon are well documented and include acute toxicity, difficulties migrating to and from the ocean, disorientation and stress. In copper contaminated streams, juvenile salmon have difficulty migrating into salt water. Returning salmon become disoriented or refuse to enter copper tainted streams. There is no question that copper is a “deleterious substance” for purposes of s. 36(3) of the *Fisheries Act*.

No *Fisheries Act* charges have ever been laid against the owners or operators of the Mount Washington Mine despite the longstanding and ongoing pollution caused by the deposit of deleterious substances in fish-bearing waters.

#### 4. INADEQUATE STAFF AND RESOURCES TO ENFORCE THE LAW

There is a Memorandum of Understanding between the Department of Fisheries and Oceans and Environment Canada that assigns responsibility for enforcement of s. 36(3) of the *Fisheries Act* to Environment Canada. As well, there are six regulations associated with s. 36 of the *Fisheries Act* that must be enforced. Environment Canada is also responsible for enforcing the *Canadian Environmental Protection Act*, which currently includes 26 different regulations. The *Fisheries Act* and the *Canadian Environmental Protection Act* are the main environmental laws that require enforcement by the Government of Canada.

Part of the reason why the Government of Canada is failing to enforce the *Fisheries Act* against the mining industry in B.C. is that there is a severe shortage of staff and resources to enforce the law. Government resources are being diverted away from environmental enforcement activity. In recent years, the budget of Environment Canada has shrunk by approximately 40%.

For example, in the Pacific Region, which covers all of British Columbia and the Yukon, Environment Canada has only 15 enforcement staff (three of whom are managerial staff). For the entire country of Canada, there are only 60 enforcement staff, 11 of whom are managerial staff. The operating budget for the enforcement branch of the Pacific Region of Environment Canada for the 1997-98 period fell 72% from the previous year (from \$313,000 to \$87,000).<sup>15</sup>

The astonishingly low enforcement statistics for Environment Canada reflect the dramatic shortage of staff and resources. In the entire country in 1996-97, Environment Canada initiated only 5 prosecutions under the *Canadian Environmental Protection Act* and 5 prosecutions under s. 36(3) of the *Fisheries Act*. A copy of the Report of the Standing Committee on

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<sup>15</sup> Report of the Standing Committee on Environment and Sustainable Development called “Enforcing Canada’s Pollution Laws: The Public Interest Must Come First” (May 1998)

Environment and Sustainable Development called “Enforcing Canada’s Pollution Laws: The Public Interest Must Come First” (May 1998) is attached to this Submission at Tab 7.

Another factor contributing to the failure of the Government of Canada to enforce the *Fisheries Act* involves efforts to devolve responsibility for enforcing environmental laws to the provinces. This process, euphemistically referred to as “harmonization”, has caused deterioration in transparency and accountability. In a recent court case, the federal Minister of Fisheries and Oceans was sued for failing to produce annual reports on enforcement activities as required by law. The Minister responded by admitting that the federal government did not have the required information on enforcement, and was having difficulty obtaining this information from various provincial governments (see *United Fishermen and Allied Workers Union v. Minister of Fisheries and Oceans*, Federal Court of Canada, Trial Division, 1998).

The myriad problems faced by Environment Canada lead inexorably to the conclusion that the examples highlighted in this Submission (the Tulsequah Chief, Britannia and Mount Washington mines) demonstrate a persistent, systemic pattern of non-enforcement of Canada’s environmental laws.

## **B. MARKET DISTORTIONS CAUSED BY CANADA’S LACK OF ENFORCEMENT OF ENVIRONMENTAL LAWS AND CANADA’S LACK OF CERTAIN BASIC ENVIRONMENTAL LAWS**

Canada’s failure to enforce the *Fisheries Act* against the mining industry in B.C. may be creating market or trade distortions. B.C. may be viewed as a “pollution haven”, where lax environmental laws and a lack of enforcement enable mining corporations to operate with lower costs than other more stringently regulated jurisdictions such as the United States. Reduced operating costs associated with lower environmental standards give mining companies operating in B.C. an unfair competitive advantage over mining companies in other jurisdictions, particularly the United States. This assertion is indirectly supported by the fact that Canada has consistently ranked in the top three destinations of mineral exploration investment in the world for the last twenty-five years.<sup>16</sup>

Unlike their American counterparts, mining companies operating in B.C. are free from the environmental constraints of legislation such as the U.S. *Endangered Species Act* and the U.S. *Clean Water Act*. Neither Canada nor British Columbia has legislation to protect endangered species from industrial threats like mining, unlike the United States. Neither Canada nor British Columbia has legislation that sets comprehensive limits to the amount of pollution that can be dumped into bodies of water, unlike the United States.

The absence of certain basic environmental laws, combined with lax enforcement of existing laws, creates an indirect subsidy for mining companies in B.C. Given the pressures of global

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<sup>16</sup> Mineral Yearbook 1995, Natural Resources Canada, (Ottawa, 1996)

competition, there is a danger that low environmental standards in B.C. may contribute to a “race for the bottom” as other jurisdictions relax their environmental protection regimes to attract or retain investment.

### C. THE FAILURE TO ENFORCE THE FISHERIES ACT

Section 36(3) of the *Fisheries Act* states:

“Subject 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.”

In other words, it is illegal to put toxic substances into water where fish live.

Section 36(4) states that no person contravenes 36(3) if that person deposits or permits the deposit of a deleterious substance that is authorized by regulations made under the *Act*.

Section 40(2) makes a contravention of s. 36(3) a summary conviction or indictable offence. The penalties available for violating s. 36(3) range up to fines of \$1 million and three years in jail. Section 78.1 of the *Fisheries Act* states that where a contravention of the *Act* is ongoing, each day constitutes a separate offence.

The *Fisheries Act* is the single most important law in Canada for protecting fish and fish habitat. It is the critical law that holds individuals and corporations responsible for harming fish and fish habitat. The fines and jail terms described earlier are the only deterrents available to prevent such damage.

As the facts described earlier indicate, mining operations in British Columbia have caused and are continuing to cause significant harm to fish and fish habitat because of historical and ongoing Acid Mine Drainage and heavy metal pollution problems. Both the Department of Fisheries and Oceans and Environment Canada, the two federal departments responsible for enforcing environmental laws, are aware of these facts and have been aware of these facts for considerable periods of time. Yet neither Environment Canada nor the Department of Fisheries and Oceans have enforced the *Fisheries Act* against mining companies in B.C. for at least a decade.

The Submitting Parties have searched legal databases for prosecutions of mining companies in B.C. for violations of s. 36(3) of the *Fisheries Act* by the Government of Canada. The search yielded three cases dating from 1983, 1984 and 1985. The first case resulted in the conviction of Equity Silver in 1983 and a fine of \$12,000 (*R. v. Equity Silver Mines Ltd.* (1983) 3 F.P.R. (B.C. Prov. Ct.)). The second case resulted in the conviction of Carolin Mines in 1984 and a

fine of \$135,000. The third case resulted in the conviction of Westmin Resources in 1985 and a fine of \$80,000.

Given the clear and compelling evidence of chronic ongoing violations of s. 36(3) of the *Fisheries Act* and the clear evidence of declining salmon populations in B.C., the facts reveal a consistent failure by the Government of Canada to effectively enforce the law against mining companies in B.C.

#### **D. EFFORTS TO HAVE THE FEDERAL GOVERNMENT ENFORCE THE LAW**

Several prominent abandoned mines in B.C. have been violating the *Fisheries Act* for decades. The Britannia Mine has been leaching acid mine drainage into Britannia Creek and Howe Sound for many decades, dating back to the first half of the century. The Tulsequah Chief Mine has been leaching acid mine drainage into the Tulsequah River since 1958 and possibly longer. The Mount Washington Mine has been leaching acid mine drainage into the Tsolum River since 1966. The Government of Canada has known about these ongoing violations but chosen not to enforce the law.

Environmental groups, First Nations, local communities and others have made extensive efforts to have the law enforced and ultimately to have these polluting mines cleaned up. These efforts have clearly failed.

Counsel for the Submitting Parties wrote to the federal Minister of Fisheries and Oceans on June 1, 1998 requesting an explanation for the Government of Canada's failure to enforce the *Fisheries Act* against the mining industry in B.C. The letter specifically refers to the three case studies highlighted in this Submission (the Tulsequah Chief, Mount Washington and Britannia mines). A copy of this correspondence was also sent to the federal Minister of Environment. No response has been received. A copy of the June 1, 1998 letter is attached to this Submission at Tab 8.

#### **E. THE CONCERNS OF THE SUBMITTING PARTIES**

This Submission is made by the Sierra Legal Defence Fund on behalf of the Sierra Club of British Columbia, the Environmental Mining Council of British Columbia and the Taku Wilderness Association.

The Submitting Parties share a common interest in protecting British Columbia's threatened wild salmon populations. Salmon are of unrivaled importance to B.C. culturally, economically, recreationally and as an indicator of ecosystem health.

Each of the Submitting Parties has a strong concern about the Government of Canada's failure to enforce the *Fisheries Act* against mining operations, ongoing or abandoned, that are polluting fish habitat. The Submitting Parties share a common conviction that industrial pollution should be reduced and eliminated rather than tolerated or mitigated. Major sources of pollution like the Tulsequah Chief Mine, Britannia Mine and Mount Washington Mine should be cleaned up as effectively and efficiently as possible. Proper enforcement of the law is essential in deterring pollution and should accelerate the long overdue process of cleaning up.

The *Fisheries Act* provisions that prohibit the deposit of deleterious substances into water frequented by fish are also relevant to human health concerns shared by the Submitting Parties. Clean water is a basic component of good health, and all water ecosystems are interconnected. As well, many people in B.C., and aboriginal people in particular, depend on fish for part of their diet. Proper enforcement of the *Fisheries Act* would therefore have indirect benefits for human health in addition to the direct benefits for fish and fish habitat.

## **F. THE ISSUES RAISED IN THIS SUBMISSION MERIT THE PREPARATION OF A FULL FACTUAL RECORD**

### **1. This Submission is within the jurisdiction of the NACEC**

The Submitting Parties are all "non-governmental organizations" as defined by Article 45(1) of the NAAEC. All of the Submitting Parties are located in Canada.

Section 36(3) of the *Fisheries Act* is an "environmental law" within the meaning of Articles 14 and 45(2)(a) of the NAAEC. The primary purpose of s. 36(3) is to protect fish and fish habitat. The Commission for Environmental Cooperation has already confirmed that the *Fisheries Act* is an "environmental law" in SEM-97-001 (B.C. Aboriginal Fisheries Commission et al.).

The purpose of the Submitting Parties in making this Submission is to promote the enforcement of environmental laws, not to harass particular mining companies or the mining industry. It is well known that diligent enforcement of environmental laws results in improved protection for the environment. In this case, enforcing the law would benefit wild salmon, aquatic ecosystems and human health. Diligent enforcement of environmental laws also forces industry to be more efficient.

This Submission provides clear and compelling evidence that the Government of Canada has abdicated its responsibility to enforce s. 36(3) of the *Fisheries Act*. The Government of



Canada's failure to enforce the law against mining companies in B.C. is systemic and is not the result of a "reasonable exercise of ... discretion in ... prosecutorial, regulatory or compliance matters" or of "*bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities" (Article 45(1) of NAAEC). The Government of Canada cannot credibly argue that there are higher enforcement priorities than:

- the worst point source of heavy metal pollution in Canada (Britannia);
- a polluting mine that is leaching acid mine drainage into an important international salmon river (Tulsequah Chief); or
- a mine that has virtually destroyed the entire salmon population of the Tsolum River (Mount Washington).

Pollution from all three of these mines continues to have negative impacts on salmon, salmon habitat and aquatic ecosystems. The fact that these three mines 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.

Both the Government of Canada and the Government of British Columbia have recognized that salmon populations in British Columbia are in a state of crisis because of habitat destruction and degradation. Section 36(3) is a crucial legal mechanism in protecting fish and fish habitat, yet it has not been utilized for at least ten years against a mining company in B.C. for problems associated with Acid Mine Drainage.

The Submitting Parties are not aware of any "judicial or administrative proceeding" currently underway with respect to any of the matters raised in this Submission.

The Submitting Parties and their Counsel have communicated in writing to the Government of Canada regarding the lack of *Fisheries Act* enforcement against mining companies in B.C. The Government of Canada has failed to respond.

## 2. This Submission merits a request that the Government of Canada respond

The Submitting Parties assert that this Submission meets the criteria identified in Article 14(2) of the NAAEC to guide the CEC's decision regarding requesting a response from the Government of Canada.

This submission raises issues that advance the objectives set forth in Article 1 of the NAAEC, in that:

- its purpose is to foster the protection of the environment for the well-being of present and future generations (1(a));
- it promotes sustainable development based on cooperation and mutually supportive environmental and economic policies (1(b));
- it promotes cooperation between governments, regulatory agencies and industry groups in Canada and the U.S. to protect and conserve shared fisheries (1(c));

- it identifies and seeks to avoid trade distortion caused by the differential enforcement of environmental laws (1(e));
- it seeks to enhance compliance with, and enforcement of, environmental laws (1(g));
- and
- it seeks to promote pollution prevention policies and practices (1(j)).

The Submitting Parties have pursued all available “private remedies” (Article 14(2)). The Government of Canada has been urged to enforce the law by the Submitting Parties. The Government of Canada has failed to respond to these requests.

Canadian citizens possess the common law right to initiate private prosecutions under the *Fisheries Act* and other regulatory legislation in situations where the government (either federal or provincial) is refusing to enforce the law. The Sierra Legal Defence Fund, acting on behalf of various clients, has commenced several private prosecutions for alleged *Fisheries Act* offences in British Columbia. In each case, the provincial Attorney General took over and terminated the proceedings without pursuing the prosecution.

Therefore the common law right of concerned citizens to bring private prosecutions cannot be a credible justification for the Government of Canada’s failure to enforce its own environmental laws. It is the Government of Canada that has the obligation and the resources to adequately identify and prosecute *Fisheries Act* offences.

This Submission is not based exclusively or even primarily on “mass media” reports. A substantial amount of evidence has been gathered from a variety of sources including the federal and provincial governments (documents obtained through access to information requests), non-governmental organizations, independent experts and regulatory agencies.

## **G. CONCLUSION**

The Submitting Parties seek to have the Government of Canada enforce s. 36(3) of the *Fisheries Act* in order to ensure the protection of salmon, other aquatic species, habitat and water quality. At present, the Government of Canada is granting the British Columbia mining industry a *de facto* exemption from the application of the *Fisheries Act*. For more than a decade there have been no prosecutions of mining companies in B.C. for violating s. 36(3) despite the Government of Canada’s knowledge that major violations were (and are) ongoing at the Tulsequah Chief, Britannia and Mount Washington mines. The demonstrable result of the Government of Canada’s failure to enforce the law is ongoing damage to fish and fish habitat from Acid Mine Drainage and heavy metal pollution.

In addition to environmental damage, the failure to enforce the law provides mining companies operating in British Columbia with a form of indirect subsidy, creating an unfair trade advantage through lower costs incurred for environmental protection and restoration. Thus in every

respect, this is exactly the kind of systemic failure to enforce environmental laws that the NAAEC was designed to address.

## **APPENDIX 1**

### **KNOWN AND POTENTIALLY ACID GENERATING MINES**<sup>17</sup>

#### **Known Acid Generating Mines**

1. Tulsequah Chief
2. Britannia
3. Mount Washington
4. Big Bull
5. Equity
6. Eskay Creek
7. Samatosum
8. Gibraltar
9. Myra Falls
10. QR Gold
11. Sullivan
12. Anyox
13. Baker
14. Bell
15. Duthie
16. Giant Nickel
17. Goldstream
18. Gran Isle
19. Island Copper
20. Johnny Mountain
21. Kitsault
22. Premier
23. Saint Eugene
24. Silver Butte
25. Silver Standard

#### **Potentially Acid Generating Mines**

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<sup>17</sup> B.C. Ministry of Employment and Investment Acid Rock Drainage Policy, June 1997; Draft Guidelines for Metal Leaching and ARD at Mine Sites in B.C. (B.C. Ministry of Employment and Investment—Reclamation Section); “B.C. Minfile”, B.C. Ministry of Employment and Investment, Geological Survey Branch

1. Fish Lake (Prosperity)
2. South Kemess
3. Telkwa Coal
4. Huckleberry
5. Red Chris

**Potentially Acid Generating Mines, continued**

6. Elk
7. Quinsam
8. Snip
9. Boss
10. Scottie Gold
11. Cirque
12. Harmony Gold
13. Kutcho Creek
14. Lexington
15. Lumby Muscovite
16. Mount Milligan
17. Red Mountain