A14/SEM/98-004/06/RSP
DISTRIBUTION: General
ORIGINAL: English

RESPONSE OF THE GOVERNMENT OF CANADA TO A SUBMISSION ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE *NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION* SUBMISSION NO. SEM-98-004 OF JUNE 29, 1998 BY THE *SIERRA CLUB OF BRITISH COLUMBIA*, THE *ENVIRONMENTAL MINING COUNCIL OF BRITISH COLUMBIA* AND THE *TAKU WILDERNESS ASSOCIATION*

September 8, 1999

TABLE OF CONTENTS

EXECUTIVE SUMMARY

In June 1998, the *Sierra Legal Defense Fund* representing three non-governmental organizations (the submitters) made a submission pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (*NAAEC*) asserting that the Government of Canada has failed to enforce subsection 36(3) of the *Fisheries Act* against mining companies in British Columbia.

Canada submits that it is protecting fish and fish habitat through the enforcement of its environmental laws, by implementing a range of enforcement actions, including prosecution where appropriate.

Canada's Position

Canada supports the *NAAEC* process for submissions on enforcement matters, and considers Articles 14 and 15 of the *NAAEC* to be among the most important provisions of the treaty.

Canada submits that it is effectively enforcing its environmental laws including subsection 36(3) of the *Fisheries Act*, and is in full compliance with its obligations under the *NAAEC*. Therefore, Canada submits that, in this instance, the development of a factual record is unwarranted and should proceed no further as:

- the assertions in the Submission concerning the enforcement of the *Fisheries Act* are the subject of pending judicial or administrative proceedings within the meaning of Article 14(3)(a) and Article 45(3)(a) of the *NAAEC*;

- Canada is taking all necessary actions to ensure compliance with the pollution prevention provisions of the *Fisheries Act*;

- Canada objects to the further consideration by the Secretariat of the Submission on the basis of Article 14(1)(e) of the *NAAEC*, in that the submitters did not provide Canada with a reasonable opportunity to respond to the concerns raised;

- the provisions of the *NAAEC* cannot be applied retroactively to assertions of a failure to effectively enforce environmental laws prior to the coming into force of the *NAAEC* on January 1st , 1994;

- private remedies (Article 14(2)(c) of the *NAAEC*) appear not to have been pursued;

- the development of a factual record would not further the objectives of the *NAAEC* given the detailed information provided in this response.

I. Pending judicial and administrative proceedings

Article 14(3)(a) of the *NAAEC* provides that where the matter of a submission is "the subject of a pending judicial or administrative proceeding", then the "Secretariat shall proceed no further" with the consideration of the submission. Article 45(3)(a) of the *NAAEC* provides that for purposes of Article 14(3) of the *NAAEC*, "judicial or administrative proceeding" means "a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law". Such action comprises, among other things, the "process of issuing a license, permit, or authorization" and the "process of issuing an administrative order".
Canada submits that with respect to the assertions made by the submitters with regard to the Britannia Mine located north of Vancouver, the Mount Washington Mine on Vancouver Island, and the Tulsequah Chief Mine in northern BC, Canada has been pursuing judicial and administrative proceedings within the meaning of Article 14(3)(a) and Article 45(3)(a) of the *NAAEC*, in a timely fashion and in accordance with its law, to ensure the enforcement of subsection 36(3) of the *Fisheries Act*. Therefore, Canada respectfully submits that the Secretariat, as required by Article 14(3)(a), proceed no further with its consideration of this Submission.

In support of its submission that the Secretariat proceed no further, Canada wishes to inform the Secretariat that it has pursued, and continues to pursue, various administrative proceedings in all three cases identified in the Submission, and elsewhere, as required.

In the case of Britannia Mine, Canada has been pursuing administrative proceedings through a process involving the issuance of permits by the province of British Columbia for the construction of an effluent treatment plant. The plant will eliminate the discharge of deleterious mine drainage by reducing the concentration of metals and rendering the effluent non-acutely lethal to fish. Canada led the implementation of technical studies and research which culminated in a series of public consultations prior to the drafting of the permits. Canada provided detailed comments[1] on the permit applications on June 23rd , 1999. The draft permits for the treatment plant and landfill operation were posted on the Internet[2] by British Columbia on August 20th , 1999 and were issued on September 8th , 1999 . Treatment plant construction and operation is expected within a year.

In the case of Mount Washington, Canada has collected legal samples of mine drainage from the site and consulted with the Department of Justice Canada (DOJ). On July 30th , 1999, further administrative action was pursued through a letter[3] sent to four companies believed to have an ownership or other interest in the land where the former mining operation existed. The letter advised them of the results of the analyses, indicated that the discharge was acutely lethal to fish and that the deposit was a violation of subsection 36(3) of the *Fisheries Act*. The letter also informed them that Environment Canada (EC) was undertaking inquiries with respect to the responsibilities for the site. Environment Canada will be completing its inquiries and consulting with the DOJ regarding any necessary subsequent enforcement actions.

These actions will be consistent with the working draft of Canada's compliance and enforcement policy[4] for the pollution prevention provisions of the *Fisheries Act* which is currently under development within Environment Canada and the Department of Fisheries and Oceans which Environment Canada's regional enforcement staff are using as a guide to enforcement pending completion and final approval of the policy.

In the case of the Tulsequah Chief Mine, Environment Canada has collected samples of mine drainage from the site, consulted with the Department of Justice Canada, and in June 1998 issued an "administrative order" namely a formal Warning Letter[5] to the company advising that the discharges from the mine site may violate subsection 36(3) of the *Fisheries Act*. This action was pursued in a timely manner and is fully consistent with the working draft of Canada's compliance and enforcement policy[4] for the pollution prevention provisions of the *Fisheries Act*, which Environment Canada's regional enforcement staff are using as a guide to enforcement. Given the works that needed to be implemented, the limited construction season (May- November), and the extreme difficulty of access to the site, the time period given for completion of the works was November 1999. On August 4th , 1999 Canada conducted a further inspection and sampling of the mine site and has reasonable grounds to believe that additional works will be required by the company to alleviate the potential *Fisheries Act* violation. Data and information obtained during the inspection are being reviewed and another inspection is scheduled for November 1999 to verify compliance by this date.

The mandatory language of Article 14(3)(a) of the *NAAEC* reflects clearly the intent of the Parties that the consideration of a Submission shall not proceed further with respect to issues that are the subject of contemporaneous domestic administrative proceedings. The outcome of the foregoing administrative proceedings are expected to resolve the many issues raised in this Submission. It would therefore be contrary to the provisions of Article 14(3)(a) of the *NAAEC* for the Secretariat to proceed further with the consideration of the Submission.

II. Enforcement actions by Canada

Responsibility for the *Fisheries Act*, enacted to protect fish, fish habitat and water frequented by fish, rests with the Minister of Fisheries and Oceans. Through a 1985 Memorandum of Understanding[6], Environment Canada is responsible for the administration of the pollution prevention provisions of the Act, which prohibit the discharge of deleterious substances into waters frequented by fish. As noted above, Environment Canada and DFO are in the process of developing a compliance and enforcement policy for the *Fisheries Act* . This policy will include many of the features of the CEPA Enforcement and Compliance Policy. While a draft policy has not yet been finalized, Environment Canada's regional enforcement staff throughout Canada are following the general approach laid out in the working versions of this policy under development The working draft outlines a wide range of activities to ensure compliance with the Act, ranging from information distribution, promotion of technology development and transfer, and environmental audits, to inspections, official warnings and prosecutions.

The Submission asserts that Canada has systematically failed to enforce the *Fisheries Act* against mining companies in British Columbia. Canada objects to this assertion and submits that its application of enforcement mechanisms, at both operating and abandoned mine sites in BC, as detailed in this response, demonstrates its active enforcement of the Act. The assertion made by the submitters stems from a limited definition of what constitutes "enforcement". The submitters appear to equate enforcement only with prosecution. Such an approach, unfortunately fails to recognise the broad range of activities undertaken by Canada as enforcement. In fact, Canada's more comprehensive view of enforcement as comprising a much wider system of compliance-seeking actions is consistent with those described in Article 5 of *NAAEC*.

As further evidence that Canada does indeed use a full range of enforcement action**,** there is the case of the Kemess Mine, a mine referenced by the submitters, located about 240 km northwest of Mackenzie, BC. In April 1999, the owner of the Kemess Mine was charged[7] with eleven counts of violating subsection 35(1) and two counts of violating subsection 36(3) of the *Fisheries Act* between July 1997 and March 1999. This matter remains pending before the courts.

III. Reasonable opportunity to respond to the matters raised

Canada objects to the further consideration by the Secretariat of the Submission on the basis of Article 14(1)(e) of the *NAAEC*, in that the submitters wrote to Canada on June 1st , 1998, requested a response within 7 days, and subsequently filed the Submission with the Secretariat on June 29th , 1998, claiming that Canada did not respond. The one week deadline given to Canada by the submitters did not provide Canada with a reasonable opportunity to properly respond and address the concerns in the letter and the matters it raised. If the unreasonable deadline imposed by the submitters is validated by the Secretariat, through the continuation of the factual record process, Canada submits that such continuation goes against both the letter and spirit of the *NAAEC*. The Articles 14 and 15 process is not intended to bypass the domestic process for handling such matters; it would be too easy to raise a matter with an international body a week after having communicated it in writing to the relevant authorities of the Party. Article 14(1)(e) was intended to ensure that a potential submitter would first raise the matter in writing with the authorities of the Parties concerned. This intention is further illustrated by the requirement under Article 14(2)(c), that the Secretariat be guided by whether private remedies available under the Party's law have been pursued.

IV. Prospective application of the *NAAEC*

Canada submits that the *NAAEC* should not be applied retroactively. The focus of the Submission is on the Britannia, Mount Washington and Tulsequah Chief mines, all of which were in operation and closed prior to the entry into force of the *NAAEC*, and so any assertions of failure to enforce environmental laws related to these sites before the *NAAEC* entered into force on January 1st , 1994, should not be

addressed by this process.

Customary international law, as reflected in the *Vienna Convention of the Law of Treaties*, provides that the provisions of a treaty do not bind a party in relation to "any act or fact which took place ... before the entry into force of a treaty", unless a different intention appears from the treaty or is otherwise established. No such different intention appears from the *NAAEC*, or has otherwise been established.

V. Private Remedies

In Canada, interested persons may request that government departments and agencies with enforcement responsibilities investigate alleged violations of environmental laws and regulations. Access to these government departments and agencies, although readily available, appears not to have been pursued by the submitters.

Persons with a legally recognized interest, under the laws of Canada, have appropriate access to administrative, quasi-judicial or judicial proceedings to the enforcement of environmental laws and regulations. Furthermore, private access includes those remedies set out in Article 6(3) of the NAAEC. Persons in Canada may commence civil suits for damages, initiate private prosecutions in the appropriate cases and seek injunctions. These persons have access to the courts administered by provincial governments, to the Federal Court and to the Supreme Court of Canada. Generally, they also have access to administrative tribunals. Canada notes that none of these proceedings appears to have been pursued by the submitters.

VI. Development of a factual record would not significantly further the objectives of the NAAEC

Given that Canada is pursuing administrative proceedings in a timely fashion and in accordance with its law, and given the detailed information provided in this response, the development of a factual record would not, in this instance, significantly further the objectives of the *NAAEC*, and is therefore not warranted. Canada's response clearly illustrates the administrative proceedings undertaken and presently underway to enforce subsection 36(3) of the *Fisheries Act*. The fact that Canada bases its enforcement on a comprehensive range of enforcement actions, as recognized in Article 5 of the *NAAEC*, is clearly evidenced in the materials submitted in support of this response.

1. INTRODUCTION

1.1 Overview of Canada's Position

The *Sierra Club of British Columbia*, the *Environmental Mining Council of British Columbia* and the *Taku Wilderness Association* (the submitters) have submitted, pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (*NAAEC*), that the Government of Canada (Canada) fails to enforce its environmental laws.

Canada supports the Article 14 process. The submission and factual record provisions of the *NAAEC* are among its most important and innovative. Canada views this process as a positive and constructive tool through which the public can help the Parties to the *NAAEC* improve their environmental law enforcement. Canada submits that it is effectively enforcing its environmental laws and is therefore in full compliance with its obligations under the *NAAEC*. Therefore, the further consideration of this Submission is not warranted.

The submitters generally assert a systemic failure to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia (BC) which Canada categorically rejects. In fact, since January 1st , 1994, the period in which the *NAAEC* has been in force, and thus the period for which Canada is accountable under Article 14 of the *NAAEC*, Canada has consistently taken action to address the threat to fish and fish habitat posed by BC mines in general, and the three example mines specifically. These enforcement actions have consistently followed the general approach laid out in the working versions of the Compliance and Enforcement Policy for the *Fisheries Act* which is under development within DFO and DOE. This outlines a range of enforcement responses to suspected violations. At each of the three example mines, there are actions and administrative proceedings which should preclude further consideration by the Secretariat of the Submission.

Therefore Canada respectfully submits that the further consideration of this Submission and the preparation of a factual record are not warranted for the following reasons:

- the assertions concerning the enforcement of the *Fisheries Act* are the subject of pending judicial or administrative proceedings within the meaning of Article 14(3)(a) and Article 45(3)(a) of the *NAAEC*;

- Canada is taking all necessary actions to ensure compliance with the pollution prevention provisions of the *Fisheries Act*;

- Canada objects to the further consideration by the Secretariat of the Submission on the basis of Article 14(1)(e) of the *NAAEC*, in that the submitters did not provide Canada with a reasonable opportunity to respond to the concerns raised;

- the provisions of the *NAAEC* cannot be applied retroactively to assertions of a failure to effectively enforce environmental laws prior to the coming into force of the *NAAEC* on January 1st , 1994;

- private remedies (Article 14(2)(c) of the *NAAEC*) appear not to have been pursued;

- the development of a factual record would not further the objectives of the *NAAEC* given the detailed information provided in this response.

2. ENVIRONMENTAL REGULATION OF MINING: LEGAL CONTEXT

2.1 Federal and Provincial Responsibilities

The high degree of cooperation and coordination in the management of fisheries and environmental issues in Canada is a natural consequence of the underlying legislative framework. The responsibilities of the federal and provincial governments are set out in the *Constitution Act, 1867*. Subsection 91(12) gives the federal government exclusive legislative authority for "Sea Coast and Inland Fisheries". Under subsection 92, provinces have exclusive jurisdiction over matters dealing with "property and civil rights" and the "management of public lands", and "generally all matters of a merely local or private nature in the Province". This division of responsibilities results in shared legislative jurisdiction with respect to laws in relation to environmental matters. In BC, anadromous and marine fish species are managed by Canada, while BC exercises responsibility for managing freshwater species. The habitat decision-making powers under the *Fisheries Act* remain the exclusive authority of Canada.

The BC mining industry is governed primarily by provincial laws, regulations and associated permitting mechanisms which address issues such as environmental assessments of new mine proposals, mine safety, mining operations, mine reclamation and bonding, environmental monitoring and effluent discharges. However, because mining operations are often situated near waterbodies, and discharge effluents into waters frequented by fish, they must also comply with the habitat and pollution prevention provisions of the federal *Fisheries Act*.

Provincial and federal environmental assessment laws apply to most new mine proposals in BC which results in comprehensive reviews of new mine developments. Harmonized review mechanisms between BC and Canada ensure that mine proposals are effectively and thoroughly reviewed and any necessary conditions are imposed to protect the environment both during the life of a mine and after mining operations cease. Importantly, most of the legislative, regulatory and policy tools available for federal and provincial environmental protection and regulatory authorities today were non-existent when the three abandoned mines addressed in the Submission began operation. Today's environmental assessment and environmental protection regimes preclude similar problems from occurring at BC metal

mines currently in production or proposed for development.

Compliance promotion and enforcement activities related to protection of fisheries resources are carried out by both provincial and federal environmental regulatory agencies. Federal compliance activity stems from the federal constitutional responsibility for fisheries and is expressed through the *Fisheries Act*. Collectively these compliance activities are identified as "government enforcement action" under Article 5 of the *NAAEC*. In practice, the federal and provincial governments cooperate in setting environmental goals, enacting complementary legislation, and achieving compliance in the most effective manner. This high level of federal-provincial coordination is desirable to avoid gaps, overlaps or conflicts in government enforcement action.

2.2 The *Fisheries Act*

The *Fisheries Act* was first enacted by the federal government in 1868 and applies to the whole of Canada, including private property in every province and territory. Subsequent amendments to this Act have enhanced the ability of the federal government to protect fish, fish habitat and water frequented by fish. Subsection 36(3) of the Act prohibits the deposit of a deleterious substance in water frequented by fish. Subsections 35(1) and 35(2) of the Act provide that no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat in the absence of an authorization by the Minister of Fisheries and Oceans or under Regulations made by the Governor in Council under the *Fisheries Act.*

In the absence of specific regulations, the pollution prevention provisions (subsection 36(3)) of the Act applies. Penalties for contravening of subsection 36(3) of the Act are provided for in subsection 40(2). Upon summary conviction, a person is liable to a fine not exceeding $300,000 for a first offence and, for repeat offences, a fine not exceeding $300,000 or up to six months imprisonment, or both. A person who is found guilty of an indictable offence is liable to a fine not exceeding 1 million dollars for a first offence and, for a subsequent offence, to a fine not exceeding 1 million dollars, or to imprisonment not exceeding three years, or to both. Although the Minister responsible for the *Fisheries Act* is the Minister of Fisheries and Oceans, through a 1985 Memorandum of Understanding,[6] Environment Canada is responsible for the administration of subsection 36(3) on behalf of the Minister of Fisheries and Oceans.

Penalties for contravening subsection 35(1) are provided for in subsection 40(1). The penalties are identical to those for violations of subsection 36(3).

2.3 Provincial Statutes

Environmental quality in British Columbia is also protected through the application of provincial laws and regulations. In BC, the *Waste Management Act*, administered by the Ministry of Environment Lands

and Parks (MELP), is used to control effluent discharges from industrial facilities including mines, through the issuance of permits and application of regulatory standards. The *Waste Management Act Contaminated Sites Regulations* can be applied to abandoned mines to facilitate remediation under specified conditions. In addition, mining operations are governed by the provincial *Mines Act* which controls the safety and methods used to extract mineral resources and has provisions for the approval of reclamation plans and implementation of financial bonds to ensure their completion. The range of BC's enforcement and compliance measures are described in the document entitled "Ensuring Effective Enforcement."[8] It recognises a broad range of activities undertaken by BC as enforcement, consistent with those described in Article 5 of *NAAEC*, which are broader than a limited definition of what constitutes "enforcement" (namely prosecution) which appears to be used by the submitters.

3. *FISHERIES ACT*: ENFORCEMENT AND COMPLIANCE

Canada is enforcing the pollution prevention provisions (i.e., subsection 36(3)) of the *Fisheries Act* against BC mines and other industrial facilities in general. Article 5 of the *NAAEC* recognizes that government enforcement action encompasses actions broader than just prosecution and provides an illustrative list of appropriate government enforcement actions. This includes, among other things, appointing and training inspectors, conducting inspections, reviewing data and monitoring compliance, issuing warning letters and inspector's directions, and using licenses, permits or authorizations. The Submission fails to appreciate the comprehensive approach recognized in Article 5 of the *NAAEC* and followed by Canada. Rather, the Submission appears to be based on a more limited view of enforcement, which equates enforcement directly with judicial prosecution and sanctions.

The enforcement methods utilized by Canada and BC recognize both the integrated and complex nature of the mining industry in BC and the related pollution issues. Canada has determined, based on experience and as recognized by Article 5 of *NAAEC*, that there are many different mechanisms that can be employed to bring about compliance with environmental laws and regulations. These include provision of research and technical assistance and working arrangements with Provincial agencies and, where appropriate and necessary, legal and judicial prosecution and sanctions. 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. This approach to government enforcement action is entirely consistent with Article 5 of the *NAAEC*. However, Canada does not hesitate to utilize the full power of its laws to protect fish and fish habitat through the use of prosecution where the exercise of these powers is determined by Canada to be the appropriate response.

3.1 Enforcement and Compliance - General Approach

The submitters have asserted, pursuant to Article 14 of the *NAAEC*, a systemic failure of Canada to enforce subsection 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia . In their Submission, the submitters have relied on what appears to be a very limited definition of enforcement that does not fully reflect the provisions of Article 5 of the *NAAEC*. The central thesis of the Submission in respect to enforcement appears to equate enforcement only with legal and judicial prosecution and sanctions. This perspective on the issue of enforcement is evident from the statements made with respect to each of the three abandoned mines in question. The final paragraph in each of sections 3(a), (b) and (c) of the Submission begins with "No *Fisheries Act* charges have ever been laid against the owners or operators….". The submitters rely solely on references to judicial prosecution and sanctions to advance their assertions that Canada has failed to effectively enforce subsection 36(3) of the *Fisheries Act* and do not consider alternate enforcement actions used by Canada to achieve compliance.

As noted above, Canada takes a more comprehensive view of enforcement, and further submits that the concept of enforcement in the Submission reflects a partial view of a much wider system of compliance-seeking actions which collectively constitute the proper enforcement of environmental laws in a modern and complex society. Further, it is just such a wide-ranging system of compliance mechanisms and activities that is envisaged under Article 5 of the *NAAEC*.

Canada has available all the elements, as described by Article 5, with respect to judicial, quasi-judicial or administrative enforcement proceedings under its law to sanction or remedy violations of the *Fisheries Act*. The goal of compliance with the *Fisheries Act* (and its associated Regulations) is to protect fish and fish habitat in BC's marine, freshwater and estuarine ecosystems. Canada states without reservation that Canada and BC have a strong commitment to work collectively to conserve and protect fisheries, and specifically waters frequented by fish, in British Columbia.

Clearly then, there is a difference between Canada's enforcement of its *Fisheries Act* which relies on the full range of measures provided for under Article 5 of the *NAAEC*, and a restricted view that enforcement equals prosecution. In the case of mining operations, extensive monitoring, research and other 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. A range of different activities has been directed toward solving the unique discharge problems at each of the three abandoned mines referenced in the Submission. Canada's actions with each of these three abandoned mines (Section 4.2 below) 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.

3.2 The Range of Compliance Promotion Actions

Canada approaches potential violations of the *Fisheries Act* in a systematic and predictable way. The Department of Fisheries and Oceans and Environment Canada have, for some time been engaged in the development of a compliance and enforcement policy for the habitat protection and pollution prevention provisions of the *Fisheries Act.* This initiative, which is under development and has yet to be formally adopted for use by DFO and EC is modelled after Canada's "Enforcement and Compliance Policy" for the *Canadian Environmental Protection Act*. This policy will outline in detail the inspection and investigation activities that enforcement personnel from Environment Canada and DFO will undertake, and how enforcement personnel will respond to suspected violations. Various measures to promote compliance will be addressed such as education and information, promotion of technology development, technology transfer, the development of guidelines and Codes of Practice, and the promotion of environmental audits. A range of actions in response to suspected violations will be described such as warnings, directions by Inspectors and prosecutions. This policy is expected to be finalized and published in 1999. While this policy is still under development, within Environment Canada working drafts are currently followed at the regional level to guide enforcement of the pollution prevention provision of the *Fisheries Act*.

If a violation of the *Act* is suspected, information on the site or incident is collected and examined. This examination includes, not just the *prima facie* evidence (usually results of sample analysis), but also includes a detailed review of all factors contributing to the alleged offence, including the reasonable care (due diligence) undertaken by the alleged offender to prevent the commission of the offence. Violations of subsection 35(1) and 36(3) of the *Fisheries Act* are strict liability offences, and therefore the defence of due diligence is a critical consideration. These facts are assembled and reviewed and a decision made as to what enforcement action, if any, is required.

If the alleged offence meets certain criteria, a court brief is prepared by the investigator and a recommendation for laying of charges is forwarded to the Department of Justice Canada. If the case meets the Department of Justice criteria for approval for laying charges (i.e. a prosecution is in the public interest and there is a reasonable likelihood of conviction), charges will be laid by the investigator.

Depending upon the circumstances, alternative actions may be selected; these actions include, for example, the issuance of a Warning Letter. A Warning Letter describes the subsection of the Act or regulations alleged to have been violated, a description of the alleged offence**,** the description of the statutory penalty, a statement that if the warning is not heeded, enforcement personnel will take further action, and a statement that the warning will become part of the compliance history of the responsible individual or corporation. In some situations (e.g., abnormal deposit of a deleterious substance from a spill, leak or explosion), directions may be issued by an Inspector. The Minister of Fisheries and Oceans may require plans and specifications where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat or the deposit of a deleterious substance in water frequented by fish. If the Minister is not

satisfied with these plans and specifications, the Minister or his designate may require modifications or additions to the work or undertaking, or may restrict the operation of the work or undertaking.

3.3 Criminal Prosecutions and Mines

If a prosecution is deemed to be the appropriate response to non-compliance with subsection 36(3) of the *Fisheries Act*, the accused party (corporation or individual) is tried in a criminal court. There are no civil proceedings available to punish violators of subsection 36(3) although there are opportunities for using the civil courts to recover damages or cleanup costs. The evidentiary requirements of a criminal case are more rigorous than those of a civil case. To obtain a criminal conviction the Crown must prove, beyond a reasonable doubt, all elements of the charges before the Court. The evidence will usually be highly technical and will usually be put before the Court through one or more expert witnesses. This evidence is subject to challenge from defence experts and, even though the case may appear to the Crown to be strong, the Court may not find the Crown has met the strict standard of proof "beyond a reasonable doubt". 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.

The *Fisheries Act* provides for court orders which include specific remedial measures and high fines. If the Court finds the accused guilty, the sentence will take into consideration the following sentencing provisions: protection of the public and general and specific deterrence. In imposing a sentence, the court will take into account sentencing criteria such as the level of environmental damage, compliance history, and the ability to pay or carry out an order of the Court. It is very unlikely that a Court would issue an order that was beyond the means and the ability of the convicted party to pay or implement.

Where an alleged violation of subsection 36(3) of the Act has occurred in relation to discharges from an abandoned mine, a criminal prosecution may not always be feasible. The Crown will not approve the laying of charges unless there is a reasonable likelihood of a conviction, and it is in the public interest to prosecute. In a prosecution, the Crown must prove all of the elements of an offence beyond a reasonable doubt. If the investigative agency is unable to gather sufficient evidence to satisfy a Crown prosecutor of a reasonable likelihood of a conviction, the prosecutor will not approve the laying of charges.

In the case of an abandoned mine, if the company is bankrupt and the board of directors of the company are dissolved, a prosecution may not be feasible if no person is available to answer to the charges for alleged offences which occurred when the company was not bankrupt and when the directors and managers were operating the company. Even if the Crown prosecuted, financial limitations on the part of current owners would likely prevent the court, upon a finding of guilt, to order a cleanup as part of the sentence. In such an instance, the environmental problem will not be resolved.

It should be emphasized that Canada's approach to the enforcement of the *Fisheries Act* can and does result in prosecutions under both subsection 35(1) and 36(3) of the *Fisheries Act*. For example, in April 1999, the owner of the Kemess Mine, a mine referenced by the submitters, was charged[7] with eleven counts of violating subsection 35(1) and two counts of violating subsection 36(3) of the Act between July 1997 and March 1999. This matter remains pending before the courts.

4. CANADA'S RESPONSE TO SPECIFIC ISSUES IN THE SUBMISSION

Canada is protecting fish and fish habitat through the enforcement of its environmental laws in BC, by implementing a range of enforcement actions, including prosecution where appropriate. The main thesis of the Submission is that Canada is not enforcing its environmental laws against the mining industry in BC, as indicated by a lack of prosecutions. As the submission focuses on three example mines, Canada will respond using the same three mines identified by the submitters.

4.1 Response to the General Facts of the Submission

The Submission identifies the potential of mining activities and abandoned mine sites to cause harm to fish and fish habitat, through acid mine drainage (AMD), heavy metal contamination, contamination from processing chemicals, and erosion and sedimentation. However, Canada and BC 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. Historically, AMD and heavy metal contamination were problems caused by what are now considered unacceptable mine development planning and mining practices which left sulphide rich minerals in rocks, seams, pits, tunnels and other substrates exposed to air and water. This resulted in the generation of acid that was able to dissolve metals from these substrates. New mine development proposals are reviewed under federal and provincial environmental assessment and protection legislation and procedures to ensure that the potential for AMD generation is assessed and avoided through best management practices.

The federal *Fisheries Act Metal Mining Liquid Effluent Regulations (MMLER),* have been developed pursuant to subsection 36(5) of the *Fisheries Act*. Where a mine, as defined in the *MMLER,* is in operation, the Regulations apply. The Regulations prescribe the following substances as deleterious: arsenic, copper, lead, nickel, zinc, total suspended matter and radium 226. Effluent containing these substances is authorized to be deposited provided that it meets certain parameters and conditions of authorization that are set out in these Regulations. Failure to do so results in an automatic suspension of the authorization to deposit and is a violation of subsection 36(3) of the *Fisheries Act.* The *MMLER* are under active review and scheduled to be amended this year. Proposed revisions would expand the kinds of mines that will be covered by the Regulations, include a requirement that

mine effluents be non-acutely lethal to fish, and that mines conduct environmental effects monitoring (EEM) programs. The *MMLER* do not apply to abandoned mines. In such cases, the deposit of any of the aforementioned substances, in concentrations which are deleterious, is a violation of subsection 36(3) of the *Fisheries Act*.

There are many factors threatening the sustainability of the Pacific salmon resource, including: ocean climatic conditions, fishing industry overcapacity and degradation of salmon habitat. Habitat loss, due to urban development, agriculture, resource extraction (e.g., forestry, mining), and hydroelectric development, has long been recognized as a major factor contributing to declines in salmon in British Columbia.

Canada categorically denies the assertion in the Submission that there is a pattern of non-enforcement of Canada's environmental laws because of staff and resource shortages. In fact, Environment Canada launched a comprehensive review of its enforcement program in May 1998. The objective of this exercise, involving the development of an action plan, is to further strengthen the enforcement program and increase its reach and impact.

In the absence of specific assertions regarding other mines in BC, we are unable to respond to the general assertions raised in the Submission. Of the 42 mineral properties listed in the Appendix I of the Submission, some have been producing mines, and others merely proposed developments. In Canada's view, the list is used to imply that each site may cause water pollution in ways similar to the three abandoned mines cited as examples in the Submission. Canada regularly reviews and evaluates monitoring data and fisheries resource information from over 80 operating and abandoned BC mines (including those listed in the Submission), to ensure compliance with the *Fisheries Act*, protection of fisheries resources, and to prioritize mines for inspection and, if necessary, investigation.

4.2 Responses to Assertions Made About the Three Abandoned Mine Sites

The following sections clearly outline the history of each abandoned mine and demonstrate the "administrative proceedings" (Article 14(3) of the *NAAEC*) and compliance and enforcement actions which are being pursued by Canada in a timely fashion and in accordance with its law to ensure the elimination of the deleterious discharges. Canada contends that these contemporaneous proceedings negate the need to develop a factual record in this matter.

4.2.1 The Britannia Mine (North of Vancouver)

In response to the assertions concerning the Britannia Mine made by the submitters under subsection 3(b) of their Submission, Canada informs the Secretariat that it has, since 1994 and earlier, carried on

"administrative proceedings" within the meaning of Article 14(3)(a) and Article 45(3)(a) of the *NAAEC* with a view to solving the pollution problem at that site by encouraging the construction of an effluent treatment plant. Draft permits and draft remediation orders were posted on August 20th , 1999 and a decision by the Government of British Columbia on the permits for the treatment plant to end the pollution was made on September 8th, 1999, allowing construction to be completed within a year. This will reduce the metal concentrations and render the effluent non-acutely lethal to fish.

Canada submits this action would not have occurred without the administrative proceedings described below. Canada states categorically, that the enforcement action and prosecutions contemplated by the submitting parties would not have compelled actions necessary to end the pollution at the Britannia Mine. A fine or order resulting from a successful prosecution has limited benefit if it can not be collected or implemented because the responsible party does not have sufficient financial resources. The difficulties associated with obtaining a successful prosecution were previously outlined in Section 3.3 above.

4.2.1.1 Historical overview of pollution at the Britannia Mine

Copper and zinc ores were discovered at the Britannia Mine site over one hundred years ago. They outcrop at an elevation of 1325 meters (4350 feet), on a mountain adjacent to Howe Sound, a fjord-like inlet near Vancouver. Development work started in 1905 with tunnels driven into the mountain near its summit, then at successively lower elevations. Over time, development of the mine was continued through its full vertical extent of almost 1800 meters. The tunnel functions as a drain for very heavy precipitation and snow melt at the mountain summit to enter the mine workings. Peak flows of up to 600 litres per second have been recorded during spring runoff.

Broken ore at the mine summit and within underground openings contains copper and zinc minerals. Oxidation of iron sulphide forms weak acids which cause the copper and zinc to enter solution. Water draining from the mine at its lowest level contains toxic concentrations of these and other heavy metals, and is a source of pollution to the marine environment. The environmental problem at Britannia arises because the mine's workings cannot be sealed, and because the heavy metal pollution requires treatment in perpetuity, much like a city's sewage treatment plant. This has presented an intractable problem since the mine ceased operation in 1974.

The last operator of the mine was Anaconda Canada Ltd. It acquired the mine and its extensive land holdings in 1963, and operated the mine until its closure in November 1974. In 1977, the property was transferred to Copper Beach Estates Ltd, the present owner. Although some land holdings were subsequently sold to other owners, Copper Beach Estates Ltd continues to own those parts of the mine workings which cause the pollution.

4.2.1.2 Administrative Proceedings

On January 29th , 1981, the British Columbia Ministry of Environment, Lands and Parks issued an order (AE-2194) to Copper Beach Estates Ltd following their purchase of the property from Anaconda. This required the Copper Beach Estates Ltd to carry out drainage flow diversions within the mine workings so that all contaminated flows were discharged, without treatment, into Howe Sound through a submerged outfall. Between 1983 and 1990, EC and MELP focused on sources of pollution entering Britannia Creek and Howe Sound from another mine tunnel, following the failure of an internal flow diversion. Environment Canada and the province of British Columbia cooperated in commissioning, in 1990, a comprehensive study of Britannia Mine environmental problems.

Given the complex nature of the site and the specific technical and engineering information needed to solve the problems of heavy metal contamination and acutely lethal effluent at Britannia, a series of studies, initiated by Environment Canada and supported by MELP, were conducted between 1996 and 1998, to ascertain the feasibility of a treatment plant.

The first examination of methods and costs for treating drainage from the mine was the 1991 report by Steffen, Robertson and Kirsten (BC) Ltd. This study, jointly funded by BC and Canada, estimated a treatment plant would cost $3.4 million to construct and $900,000 annually to operate. Subsequently, a technical committee of provincial and federal officials agreed in 1992 that better definition of mine flows and contaminants would allow a more accurate estimation of treatment plant costs. The province partially funded research into environmental effects in Howe Sound, and provincial staff carried out a two-year, comprehensive field program on the mine site which was completed and published in 1995. Also in 1992, EC personnel began field work and monitoring at the mine site which has continued to the present day.

In February 1995, agreement was reached between EC and MELP on a joint program of effluent and stream monitoring. This field work began in late 1995, and has continued to the current date. These important studies provided the basis for the design of a treatment plant currently planned for the site. Later in 1995, EC began investigations of treatment methods for the Britannia drainage and commissioned a bench-scale study of methods for neutralizing the mine's drainage. At the same time, DFO began planning for a multi-year study of the Howe Sound ecosystem to determine the effects of the pollution on nearshore marine habitat and fishery resources.

In 1996, EC commissioned further studies on treatment methods, and environmental effects. In the same year, DFO began its intensive field research program. The effluent and stream monitoring program initiated in 1995 provided confidence in the characterization of the chemistry of the drainage and flow rates essential for effective treatment plant design. One study carried out examined supplies and properties of pulp mill ash as a treatment plant reagent. A second included operation of a pilot plant that continuously tested lime and ash as reagents. A third, EC-initiated study designed a pipeline to collect contaminated mine flows. Encouraging results for this work led EC and MELP to jointly fund

conceptual designs for the necessary treatment plant. This work[11] was completed in 1998 by H.A. Simons Ltd, a large engineering firm specializing in process design.

On March 15th , 1999, the owner applied to MELP for approval to construct a treatment plant. Canada has reviewed and accepted the plans in principle, subject to various conditions. It is expected that plant operating costs will be met by tipping fees for metals-contaminated soil and other non-hazardous industrial wastes in a landfill which will help to seal the old mine workings and decrease drainage flows. The treatment plant is expected to reduce heavy metals concentrations and eliminate the acute lethality of the effluent, and allow the recovery of the intertidal and near shore habitat in Howe Sound for juvenile salmonids and other species.

4.2.1.3 Status of Administrative Proceedings

EC and DFO completed their review of permit applications by the owner for construction of the treatment plant and operation of the landfill, and provided detailed comments[1] to BC in June 1999. The Province of BC posted the draft Permits and draft Remediation Orders on the Internet (http://www.elp.gov.bc.ca/epd/cpr/permit/lmrper/lmrper99.html) on August 20th , 1999. The status of the permit reviews is indicated by this web page as follows:

> Two draft permits for the Britannia mine site are being requested by Copper Beach Estates Ltd. and are part of an overall reclamation proposal which also requires permitting under the BC *Mines Act* under the jurisdiction of the BC Ministry of Energy and Mines. The BC Ministry of Environment, Lands and Parks (BCMELP) intends to make a decision regarding the issuance of a landfill permit (PR-5938) and an effluent treatment plant discharge permit (PE-12840) by August 30, 1999[1], and at the same time issue a remediation order (OE-16097) to require Copper Beach Estates Ltd to conduct the necessary studies and to construct and operate a treatment plant for the Acid Rock Drainage (ARD), by specified dates.
>
> A technical rationale, draft remediation order, draft effluent permit, and draft landfill permit, have been prepared by BCMELP and have been posted to the Pollution Prevention and Remediation Website (http://www.env.gov.bc.ca/epd/epdnew/epdnew.html) to allow further public review. Due to the substantial public consultation already conducted and the further substantial public consultation anticipated, BCMELP will only post the documents for a limited time until August 30, 1999, before making a final decision regarding the order and permits.

[1] The draft permits for the treatment plant and landfill operation were issued on September 8, 1999.

The treatment plant is expected to commence operation about a year after the construction permits have been issued. The treatment plant will significantly reduce the concentration of dissolved heavy metals and eliminate the acute toxicity and allow recovery of the nearshore habitat for juvenile salmonids and other species at this location.

4.2.2 The Mount Washington Mine (Vancouver Island)

In response to the facts concerning the Mt Washington Mine asserted by the submitters under section 3(b) of their Submission, Canada asserts that it has, since 1994 and earlier, carried on "administrative proceedings" within the meaning of Article 14(3)(a) and Article 45(3)(a) of the *NAAEC*. Environment Canada has initiated an investigation of the problem, conducted an inspection of the site, collected and analyzed samples of the mine drainage, and sent a letter[3] to four companies that have ownership or other interests in the property advising them of the pollution problem. Canada has also been an active participant in a community-based Task Force that is addressing environmental problems in the area.

Canada submits that this action, made subsequent to other actions described below, is a proper and timely administrative proceeding. Canada will pursue further enforcement action with the interested parties in a timely and appropriate manner.

4.2.2.1 Historical overview of pollution at the Mt Washington Mine

This small, abandoned, open pit copper mine site is located at 1350 meters elevation (4400 feet) on Mt. Washington, on Vancouver Island near Courtenay, BC. The Mt. Washington Mine site is on the Esquimalt and Nanaimo Railway Land Grant which gave ownership of the base metal rights to the railway company while the province retained ownership of the precious metals (gold and silver). The mine operator (which subsequently went bankrupt) leased the base metal rights from the railway and the precious metal rights from the province. Presently, the surface rights and subsurface rights in the mine area are owned by different companies.

The mine operated for two years and closed in 1967. The exposed rock releases acutely lethal concentrations of copper into the drainage basin of the Tsolum River. The environmental damage caused by toxic levels of copper released from the mine was not apparent until identified by MELP staff in 1985, almost twenty years after mining ended.

4.2.2.2 Administrative Proceedings

In 1985, the pollution in the Tsolum River was traced to the abandoned Mt. Washington Mine site[12] . Beginning in 1987, federal and provincial agencies formed a technical committee to begin work on a solution. This group retained consultants to advise on treatment options and BC provided $1.5 million dollars funding for remedial work and monitoring. During 1988 to 1992 various remediation techniques were used at the site including addition of a till cover, diversion of ground and surface waters, and covering "hot spots" with asphalt and concrete-impregnated textiles, and *in situ* neutralization with calcium hydroxide and calcium carbonate. Unfortunately, actions undertaken did not reduce copper releases from the site.

Late in 1995, Comox Valley environmental groups were invited to join a federal-provincial technical group led by the provincial Ministry of Energy and Mines. MELP and EC subsequently funded an overview study of the problem and the resulting report provided impetus to actions that followed. In 1996, EC re-installed a flow monitoring station near the mine site, and contracted with Golder Associates Ltd to study passive methods of treatment appropriate to that site. This Golder research was supplemented by a parallel study of a pipeline to deliver contaminated flows to a treatment plant at a lower elevation in the Tsolum River valley. On January 9th , 1997, while EC's work was underway, Canada and British Columbia signed the "Pacific Salmon Revitalization Strategy". Under this program, the Department of Fisheries and Oceans (DFO) provided core funding to the Tsolum River Task Force which was founded in 1997 to, amongst other goals, identify factors which were limiting salmon production in the Tsolum River. Over the following two years, the Task Force formed six working groups, completed the "State of the Tsolum Report" and carried out extensive water quality monitoring, fish habitat restoration and salmon enhancement in the watershed.

EC's other actions during 1997 included suggesting that Canadian Pacific Railway (CPR) join the Task Force; they have been active participants since this time. EC also retained a specialist to advise on wetland treatment options. In May 1998, the Task Force retained Levelton Engineering Ltd to conduct an overview engineering study of reclamation alternatives[13] whilst CPR retained its own consultants to assess aspects of the pollution problem. In September 1998, EC and MELP met with CPR and discussed its future involvement in the site remediation. CPR committed to funding the provision of a detailed contour map and an evaluation of local till source material; both studies have since been completed and provide useful information for the next remediation stages. In February 1999, CPR committed to continuing its work with the Task Force and has continued to be an active member of the Acid Mine Drainage Working Group. Funding for the Task Force ended on March 31st , 1999, and the group issued its final report, "State of the Tsolum River" which summarized the extensive works conducted by the Task Force between 1997-1999.

4.2.2.3 Status of Administrative Proceedings:

In June 1999, EC Inspection staff collected water samples at the mine site for chemical analysis and bioassay testing. The results of the analyses indicated that the samples were acutely lethal to fish and contained elevated levels of copper. On July 30th , 1999 further administrative action was pursued through a letter[3] sent to four companies believed to have an ownership or other interest in the land where the former mining operation existed. The letter advised them of the results of the analyses, indicated that the discharge was acutely lethal to fish and that the deposit is a violation of subsection 36(3) of the *Fisheries Act*. The letter also informed them that EC was undertaking inquiries with respect to the responsibilities for the site. EC will be completing its inquiries and consulting with the Department of Justice Canada (DOJ) regarding any necessary enforcement actions.. On August 12th and 13th , 1999, Canada and BC, CPR, Better Resources Ltd and other members of the Tsolum River Task Force, participated in the Mt Washington Acid Mine Drainage Workshop. The Mt Washington Mine Remediation Draft Action Plan was reviewed to prioritize the work necessary to remediate the situation at the mine site.

4.2.3 The Tulsequah Chief Mine (Taku River Valley near the BC-Alaska border)

In response to the facts concerning the Tulsequah Chief Mine asserted by the complainants under Subsection 3(b) in parts of their Submission, Canada asserts that it has, since 1994 and earlier, carried on "administrative proceedings" within the meaning of Article 14(3)(a) and Article 45(3)(a) of the *NAAEC*, which have resulted in the present actions; in June 1998, Canada issued an "administrative order", namely a formal Warning Letter[5], to the company advising that the discharges from the mine site may violate subsection 36(3) of the *Fisheries Act*. Canada considers this action to be an "administrative proceeding" as defined in Article 45(3)(a) of the *NAAEC*. This action was pursued in a timely manner and is fully consistent with the working draft of the compliance and enforcement policy for the pollution prevention provisions of the *Fisheries Act*. Given the works that needed to be implemented, the limited construction season (May-November), and the extreme difficulty of access to the site, the time period given for completion of the works was November 1999. On August 4th , 1999 Canada conducted a further inspection and sampling of the mine site and has reasonable grounds to believe that additional works will be required by the company to alleviate the potential *Fisheries Act* violation. Data and information obtained during the inspection are being reviewed and another inspection is scheduled for November 1999 to verify compliance by this date.

Canada submits that its actions at the Tulsequah Chief Mine site clearly demonstrate that it is pursuing the necessary actions to enforce subsection 36(3) of the *Fisheries Act* against mines in BC. Canada's actions will continue to focus on ending any suspected violation of the Act.

4.2.3.1 Historical overview of pollution at the Tulsequah Chief Mine

This abandoned mine is situated on the east bank of the Tulsequah River, approximately 14 kilometres above its confluence with the Taku River, in northwestern British Columbia. Mine development work started in the 1930's and production was started in 1951; the mine was operated by Cominco Ltd until mining ended in 1957. The pollution problem at Tulsequah Chief is caused by contamination of mine waters which flow into the Tulsequah River. Broken ore and waste rock piled near and within underground openings contain copper and zinc minerals. Oxidation of iron sulphide forms weak acids which dissolve copper and zinc. Water draining from the mine at its lowest levels contains elevated concentrations of these and other heavy metals and is acutely lethal to fish.

4.2.3.2 Administrative Proceedings

Recent exploration programs on the Tulsequah property began in 1987 and continued through 1994. During this time Redfern became the sole owner of the property. In 1994, Redfern announced its intention to develop the Tulsequah Chief property and submitted an application for a mine development certificate under the BC Mine Development Assessment Process.

In 1995, the *BC Environmental Assessment Act* was proclaimed replacing the *Mine Development Assessment Act* and process; the review of the project proposal was carried out under a new process pursuant to the new Act. The project also triggered a review under the *Canadian Environmental Assessment Act (CEAA)* and DFO became a Responsible Authority under the Act. To streamline the review of the project and avoid duplication, federal and provincial agencies harmonized their review in accordance with the Canada-British Columbia Agreement for Environmental Assessment Cooperation.

In August 1995, EC inspected the Tulsequah Chief Mine site, and collected drainage samples which were analyzed and shown to be acutely lethal to fish. Environment Canada advised BC that mitigation of the old mine's drainage should be a condition of any approval of new mine development.

Between 1994 and 1998, a comprehensive environmental review of the Tulsequah project was conducted by Canada and BC, and included notification, information exchange and consultation among stakeholders. In March 1998, DFO, with input from EC, completed its *CEAA* screening of the project and advised BC that, subject to the successful implementation of several conditions, the project was not likely to cause significant environmental effects.

Due to the nature of the remediation required at this site, it was determined that the most beneficial results would be accomplished by allowing the company to pursue its development plans. If the mine is certified and developed, the ability to properly rehabilitate the site for long-term closure is expected to

be significantly improved. If development does not occur, a previously designed closure plan or an updated and improved version would be implemented. Consequently, on March 19th , 1998, BC issued a project approval certificate to Redfern. As one of many conditions of that approval, a temporary water treatment plant was to have been constructed by September-October 1998 with full effluent treatment in place by November 1999 to deal with the ongoing drainage problem.

On June 17th , 1998, Canada's Inspection staff conducted another inspection of the mine site to determine the status of any works the company had undertaken and to obtain drainage samples for analysis. On October 7th , 1998, EC wrote to the company advising that the company's operation must comply with the *Fisheries Act* with respect to all discharges from the site. Accompanying the October 7th letter was a September 28th , 1998 Warning Letter[5] to Redfern signed by an EC Inspector. This letter advised the company of the June 17th , 1998 inspection results and stated that an Inspector would be conducting a further inspection for the purpose of verifying compliance with the *Fisheries Act*.

Between October 1998 and March 1999, EC and Redfern Resources held meetings to discuss the compliance issue, and later, to review the technical control options the company could implement. Subsequently, on March 18th , 1999, the company provided EC with a report on its work plans for the summer of 1999. These plans indicated that Redfern intended to collect and treat the mine effluent by allowing it to drain through trenches packed with limestone prior to infiltration into the Tulsequah River which was expected to result in some neutralization and improved dilution of the mine effluent. A passive treatment system was constructed by Redfern in May 1999, as an interim step to reduce the potential mine drainage impacts on the Tulsequah River.

4.2.3.3 Status of Administrative Proceedings

On August 4th , 1999 Canada conducted a further inspection and sampling of the mine site and has reasonable grounds to believe that additional works will be required by the company to alleviate the potential *Fisheries Act* violation. Data and information obtained during the inspection are being reviewed and another inspection is scheduled for November 1999 to verify compliance by this date.

5. CONCLUSIONS

Canada supports the Article 14 process. The submissions and factual record provisions of the *NAAEC* are among its most important and innovative. Canada views this process as a positive and constructive tool through which the public can help the Parties to the NAFTA improve their environmental enforcement. However, Canada submits that, in this instance, development of a factual record is not warranted for the following reasons:

- The assertions concerning enforcement of the *Fisheries Act* are the subject of pending judicial or administrative proceedings within the meaning of Article 14(3)(a)and Article 45(3)(a) of the *NAAEC*;

- Canada is taking all necessary actions to ensure the enforcement of the pollution prevention provisions of the *Fisheries Act*;

- Canada objects to the further consideration by the Secretariat of the Submission on the basis of Article 14(1)(e) of the *NAAEC*, in that the Sierra Legal Defense Fund did not provide Canada with a reasonable opportunity to respond to the concerns raised;

- The provisions of the *NAAEC* cannot be applied retroactively to assertions of a failure to effectively enforce environmental laws prior to the coming into force of the *NAAEC* on January 1st, 1994;

- Private remedies (Article 14(2)(c) of the *NAAEC*) appear to not to have been pursued; and

- The development of a factual record would not further the objectives of the *NAAEC* given the detailed information provided in this response.

It would be contrary to Article 14(3)(a) of the *NAAEC* for the Secretariat to proceed further on this matter, as the Submission raises issues in relation to three specific abandoned mines in BC which are the subject of pending judicial or administrative proceedings.

Canada has effectively enforced and continues to effectively enforce the *Fisheries Act* and more specifically its subsection 36(3) and is taking all necessary actions to ensure the enforcement of the pollution provisions of the *Fisheries Act*.

The one week deadline given to Canada by the submitters did not provide Canada with a reasonable opportunity to respond to the concerns raised in the Submission prior to the filing of the Submission with the Secretariat. This unreasonable deadline was inappropriately validated by the Secretariat given the continuation of its consideration of the Submission. Canada submits that the continuation of the process would be against the intent of the provisions of the *NAAEC* and more specifically its Article 14(1)(e).

Canada submits that the *NAAEC* should not be applied retroactively. The three specific abandoned mines referred to by the submitters were build and in operation prior to the entry into force of the *NAAEC*, and so any assertions of failure to effectively enforce environmental laws related to those sites before January 1st, 1994 should not be addressed by the Secretariat.

Canada notes that private remedies appear not to have been pursued by the submitters. In Canada, interested persons may request that government departments and agencies with enforcement responsibilities investigate alleged violations of environmental laws and regulations. Access to these government departments and agencies is readily available. In addition, persons with a legally recognized interest, under the laws of Canada, have appropriate access to administrative, quasi-judicial or judicial proceedings to the enforcement of environmental laws and regulations.

Canada is effectively enforcing its environmental laws through the pursuit of administrative proceedings in a timely fashion and in accordance with its law and its Enforcement and Compliance Policy to ensure compliance by the BC mines industry with the pollution provisions of the *Fisheries Act*. Given the detailed information provided in this response, the development of a factual record would not, in this instance, significantly further the objectives of the *NAAEC*, and is therefore not warranted. Canada's response clearly illustrates the administrative proceedings undertaken and presently underway to enforce subsection 36(3) of the *Fisheries Act*.

6. END NOTES/ATTACHMENTS

1. Britannia Mine: June 23rd , 1999 letters from Environment Canada to the British Columbia Ministry of Environment Lands and Parks.

2. Britannia Mine: British Columbia's Draft Remediation Order OE-16097, Draft Effluent Discharge Permit PE-12840, and Draft Refuse Discharge Permit PR-15938, http://www.elp.gov.bc.ca/epd/cpr/permit/lmrper/lmrper99.html.

3. Mt. Washington Mine: July 30th , 1999 letter from Environment Canada to Canadian Pacific Limited, Canadian Pacific Railway, TimberWest Forest 1 Limited, and Better Resources Limited.

4. Working draft of the "*Fisheries Act* Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy" under development within Environment Canada and the Department of Fisheries and Oceans and used as a general guideline for enforcement activities related to the pollution prevention provisions of the *Fisheries Act* in Environment Canada regional enforcement offices.

5. Tulsequah Chief Mine: September 28th , 1998 Warning Letter from Environment Canada to Redfern Resources Ltd.

6. DFO-EC Memorandum of Understanding *Fisheries Act* subsection 36(3).

7. Kemess Mine: Information pertaining to *Fisheries Act* violations.

8. *British Columbia's Environment, Planning for the Future: Ensuring Effective Enforcement*. British Columbia Ministry of Environment Lands and Parks, Victoria, 25 pp. Undated.

9. *Canadian Environmental Protection Act:* Enforcement and Compliance Policy. Environment Canada. ISBN 0-662-16218-8. 58 pp. May 1988.

10. Britannia Mine: *Treatment of Acid Drainage at the Anaconda-Britannia Mine, Britannia Beach, BC*, H.A. Simons Ltd, March 1998.

11. Mt. Washington Mine: *A Preliminary Assessment of Acid mine Drainage from an Abandoned Copper mine on Mt Washington*, Kangasniemi, B.J, and Lloyd J. Erickson; British Columbia Ministry of Environment, Lands and Parks, July 1985.

12. Mt. Washington Mine: *Mount Washington Copper mine data review and*

recommendations on Mitigative Measures, Wendling, Dr Gilles and Dr Sue Baldwin; Levelton Engineering Ltd, July 1998.