

Secretariat of the Commission for Environmental Cooperation

Overall Plan to Develop a Factual Record

Submission ID.: SEM-98-004

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

Party: Canada

Date of this plan: 14 December 2001

Background

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

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

¹ Submission, at 5.

failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

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

Overall Scope of the Fact Finding:

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

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

In its response, Canada describes its general approach to enforcing and assuring compliance with section 36(3) at acid-generating mines in B.C. and claims that this approach is effective both generally and in the specific case of Britannia. With respect to Britannia, Canada asserts that it has worked together with the B.C. government to study the acid mine drainage problem and that

these efforts have resulted in a proposal to build an effluent treatment plant and landfill at the mine which are expected to reduce the concentration of metals in the mine effluent and render it non-acutely lethal to fish.

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

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

Overall Plan:

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

- Through public notices or direct requests for information, the Secretariat will invite the Submitters; JPAC; community members; the regulated community; and local, provincial and federal government officials to submit information relevant to the scope of fact finding outlined above. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested non-governmental organizations or persons or the JPAC to provide relevant information to the Secretariat (section 15.2 of the *Guidelines*). **[January 2002]**
- The Secretariat will request information relevant to the factual record from federal, provincial and local government authorities of Canada, as appropriate, and will consider any information furnished by a Party (Articles 15(4) and 21(1)(a) of the NAAEC). **[January 2002]** Information will be requested relevant to the facts regarding:
 - (i) alleged violations of section 36(3) of the *Fisheries Act* in connection with the Britannia Mine;
 - (ii) Canada's enforcement of section 36(3) of the *Fisheries Act* in connection with the Britannia Mine; and
 - (iii) whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in the context of the Britannia Mine.

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

Additional information

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

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