Commission for Environmental Cooperation - Secretariat

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission I.D.:	SEM-98-004
Submitter(s):	Sierra Club of British Columbia Environmental Mining Council of British Columbia Taku Wilderness Association
Concerned Party:	Canada
Date of Submission:	29 June 1998
Date of this Notification:	11 May 2001

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement"*)* creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the North American Commission for Environmental Cooperation (the "Secretariat") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines based on factors contained in Article 14(2) whether the submission merits requesting a response from the Party named in the submission. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). The Council may then instruct the Secretariat to prepare a factual record for the submission (Article 15(2)).[1]

[1] This is the eighth Secretariat Notification to Council that the Secretariat considers development of a factual record to be warranted for a submission. Regarding the previous seven, the Council has directed the Secretariat to develop a factual record for three (SEM-96-001 Cozumel, SEM-97-001 BC Hydro and SEM-98-007 Metales y Derivados), deferred its decision on one (SEM-97-006 Oldman River II), rejected the fifth (SEM-97-003 Quebec Hog Farms), and is currently considering the sixth (SEM-98-006 Aquanova) and seventh (SEM-99-002 Migratory Birds). The pertinent Council Resolutions (96-08, 98-07, 00-01, 00-02 and 00-03), are available on the CEC home page, www.cec.org.

On 29 June 1998, the Submitters filed this submission, alleging "the systemic failure of the Government of Canada to enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia."[2] On 30 November 1998, the Secretariat determined that the submission met the requirements of Article 14(1), and on 25 June 1999, the Secretariat requested a response from the Party under Article 14(2). The Party submitted its response on 8 September 1999. Canada contends that it is protecting fish and fish habitat by implementing a range of enforcement actions, including prosecution where appropriate, and, therefore, development of a factual record is unwarranted. In accordance with Article 15(1), the Secretariat informs the Council that the Secretariat considers that the submission, in light of the response, warrants developing a factual record, and provides its reasons.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia. Section 36(3), together with section 40(2), make it an offence "to deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter such water."[3]

The Submitters claim that mining frequently causes serious water pollution due to acid mine drainage and heavy metal contamination. According to the submission, acid mine drainage occurs when rocks containing sulphides are exposed to air and water, creating sulphuric acid. The sulphuric acid then dissolves the metals in the surrounding rock. In addition to acid mine drainage, the Submitters claim that processing chemicals and erosion and sedimentation resulting from mining activities also contribute to water pollution from mines.[4] The Submitters contend that the toxic substances that mining generates flow into water systems, causing harm to fish, fish habitat, water quality and human health.[5]

In support of the submission, the Submitters include a report, prepared by the Environmental Mining Council of B.C. (Exhibit 1), which states that acid mine drainage is the mining industry's greatest environmental problem and its greatest liability, especially to waterways.[6] Relying on the 1994 B.C. State of the Environment Report, the Environmental Mining Council report notes that "there were an estimated 240 million tonnes of acid-generating waste rock and 72 million tonnes of acid-generating mine

[2] Submission, at 5.
[3] *Fisheries Act* s. 36(3).
[4] Submission, at 7-8.
[5] Submission, at 5.
[6] Submission, Exhibit 1, at 5.

tailings in the province. Each year, the stockpile of acidic and heavy metal-generating tailings and waste rock from mining in the province grows by 25 million tonnes."[7]

The submission focuses on three mines that the Submitters allege have been leaching toxic, deleterious substances into salmon-bearing waters for over 25 years – the Tulsequah Chief Mine, the Mt. Washington Mine and the Britannia Mine. However, the Submitters assert that there are at least 25 additional mines in British Columbia that are known to be acid-generating and at least 17 other mines identified as potentially acid-generating.[8]

The Submitters claim that violations of section 36(3) are ongoing at each of the three mines highlighted in the submission. According to the Submitters, the Tulsequah Chief Mine, an abandoned copper mine located on the Tulsequah River in northwest British Columbia, has been discharging high levels of zinc, lead and copper into the river since the mine began operating in the 1950s. These toxic substances are having a significant impact on downstream water quality and are acutely toxic to fish.[9] The Britannia Mine, located 50 km north of Vancouver, discharges high levels of minerals, especially copper and zinc, into Britannia Creek and Howe Sound and has been described as "the single worst point source of metal pollution on the North American continent."[10] The Mt. Washington Mine on Vancouver Island, which operated for two years, from 1964 to 1966, has been leaching copper-laced acid mine drainage into nearby streams which flow into the Tsolum River. The Tsolum River's salmon population has been virtually destroyed.[11]

The Submitters claim no charges have ever been laid against the owners or operators of any of the three mines. They state that they were able to find only three prosecutions of mining companies in British Columbia for violations of section 36(3) of the *Fisheries Act*, one in 1983, one in 1984 and one in 1985, despite Canada's knowledge of ongoing violations of the *Fisheries Act*. The Submitters assert:

> 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.[12]

The Submitters attribute Canada's failure to effectively enforce the *Fisheries Act* in part to a severe shortage of staff and resources. They refer to a Memorandum of Understanding between the Department of Fisheries and Oceans and Environment Canada that assigns responsibility for enforcing section 36(3) to Environment Canada. They state that, in

[7] Submission, Exhibit 1, at 7.
[8] Submission, at 8. The Submitters attach a list of these 42 mines as Appendix 1 to the Submission.
[9] Submission, at 10. The Submitters attach a copy of a letter from Environment Canada to the British Columbia Ministry of Environment, Lands and Parks describing the presence of copper, zinc and lead as acutely toxic to fish.
[10] Submission, at 10, citing a mining specialist working with Environment Canada, quoted in the Vancouver Sun, June 13, 1996.
[11] Submission, at 10.
[12] Submission, at 15.

recent years, Environment Canada's budget has shrunk by about 40% and that Environment Canada has only 15 enforcement staff for all of British Columbia and the Yukon. They point to Environment Canada's 1996-97 enforcement statistics which indicate that only 5 prosecutions under section 36(3) were initiated in all of Canada during that time period.[13]

The Submitters cite Canada's efforts to devolve responsibility for enforcing environment laws to the provinces as another factor contributing to Canada's alleged failure to enforce the *Fisheries Act*. They claim this devolution has caused deterioration in transparency and accountability. This and the previous factor, they claim, lead to the conclusion that the examples of the three mines highlighted in the submission demonstrate a persistent, widespread pattern of ineffective enforcement of section 36(3) with respect to mining operations in British Columbia.[14]

The Submitters assert that Canada's alleged failure to enforce section 36(3) of the *Fisheries Act* effectively against the mining industry in British Columbia has contributed to the decline in salmon runs in the province. They cite studies linking the decline, in part, to pollution from mining.[15] They describe the extinction of fish runs as "an irreversible loss" and state that the decline in fisheries has had a significant impact on communities and individuals that depend on fisheries for their livelihood and cultural identity.[16] These communities include First Nations and those involved in the recreational fishing industry.

The Submitters also assert that Canada's alleged failure to enforce the *Fisheries Act* effectively against the mining industry may be creating trade or market distortions because British Columbia "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."[17] They claim that this gives mining companies in British Columbia an unfair competitive advantage over mining companies in other countries, particularly the United States.

III. SUMMARY OF THE RESPONSE

In its response, Canada submits that, both generally and in relation to the three mines described in detail in the submission, "it is protecting fish and fish habitat through the enforcement of its environmental laws, by implementing a range of enforcement actions, including prosecutions where appropriate."[18]

A. Canada's Enforcement Activities Generally

[13] Submission, at 12-13.
[14] Submission, at 11-12.
[15] Submission, at 8-9.
[16] Submission, at 9.
[17] Submission, at 13.
[18] Response, at 3.

Canada points to the high degree of cooperation and coordination in the management of fisheries and environmental issues that Canada asserts is a natural consequence of the Canadian legislative framework. Canada refers to the constitutional division of responsibilities between the federal and provincial government with respect to environmental matters. Canada states that while the mining industry in British Columbia is regulated primarily by the province under various pieces of provincial legislation, the federal government retains responsibility for the habitat and pollution prevention provisions of the *Fisheries Act*. In addition, Canada and British Columbia each has its own environmental assessment laws and they have agreed on a harmonized review mechanism.[19]

Canada asserts that under this legislative framework, compliance promotion and enforcement activities are carried out by both federal and provincial environmental regulatory agencies and that, in practice, the federal and provincial governments cooperate in setting goals, enacting complementary legislation, and achieving compliance in a manner that most effectively avoids gaps, overlaps or conflicts in government enforcement action.[20] Canada reviews section 36(3) of the *Fisheries Act* and refers briefly to the applicable provincial statutes, the *Waste Management Act* and the *Mines Act*.[21] Canada states that, under a 1985 Memorandum of Understanding, Environment Canada is responsible for the administration of section 36(3) on behalf of the Minister of Fisheries and Oceans.

Canada asserts that it is enforcing section 36(3) against mines in British Columbia and other industrial facilities. According to Canada, the Submitters fail to appreciate that, consistent with Article 5 of NAAEC, government enforcement action encompasses actions broader than just prosecutions. Canada claims that its general approach to enforcement and compliance is broad and comprehensive, is consistent with the approach contemplated by Article 5, and recognizes the complexity of the mining industry in British Columbia and of pollution issues related to mining.[22]

Canada describes the range of enforcement and compliance mechanisms at its disposal and states that "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."[23] In particular, Canada refers to its ongoing work on developing a compliance and enforcement policy for the habitat and pollution prevention provisions of the *Fisheries Act*,[24] and attaches to the response the July, 1999 draft of the *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* (the Draft Compliance and Enforcement Policy).[25]

[19] All found in Response, at 9.
[20] Response, at 10.
[21] Response, at 10-11.
[22] All found in Response, at 11.
[23] Response, at 11.
[24] Response, at 13.
[25] Response, Exhibit 4.

Compliance promotion measures addressed in the Draft Compliance and Enforcement Policy include education and information, promotion of technology development, technology transfer, the development of guidelines and codes of practice, and the promotion of environmental audits. Under the draft policy, actions that might be taken in response to suspected violations include site inspections and investigations, warnings, directions by inspectors, ministerial orders and prosecutions. Canada states that although this policy is still being developed, Environment Canada follows the working draft at the regional level in its enforcement of section 36(3).[26]

Canada explains that it prosecutes section 36(3) violations solely in criminal court, as civil proceedings are only available for recovering damages or cleanup costs and not for seeking penalties.[27] It asserts that because criminal prosecutions have more rigorous evidentiary requirements and require proof beyond a reasonable doubt, a prosecution may not always be feasible, particularly in relation to an abandoned mine. The likelihood of success is not as great, there may be no person available to answer to the charges, and the environmental problem may not be resolved if the alleged offender does not have the financial resources to clean up the pollution.[28] Finally, Canada asserts that, despite these limitations, it does prosecute violations of both section 35(1) (habitat protection) and 36(3) of the *Fisheries Act* and points to charges laid in April 1999 under both sections against the owners of Kemess Mine.[29]

With respect to mines specifically, Canada states that Canada and British Columbia "have legislation, regulations, policies and procedures including a range of compliance promotion and other enforcement tools in place to prevent mining operations from harming fish and fish habitat."[30] Canada states:

> 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 . . . 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.[31]

Canada also points to the federal *Fisheries Act Metal Mining Liquid Effluent Regulations* (the *MMLER*) which prescribe certain substances as deleterious under section 36(3) and

[26] Response, at 13.
[27] Response, at 14.
[28] Response, at 14.
[29] Response, at 15. Kemess Mine is included in the list of mines attached to the Submission.
[30] Response, at 15.
[31] Response, at 12.

set permissible levels of deposits from operating mines. Canada states that these regulations do not apply to abandoned mines.

Canada denies the allegation in the submission that there is a pattern of non-enforcement because of staff and resource shortages. It points to a comprehensive review of its enforcement program launched in May 1998, the object of which is to further strengthen the enforcement program, to counteract this allegation.[32] Canada provides no information in its response about the results of that review.

B. Canada's Enforcement Activities in Relation to Specific Mines

Canada submits that actions it has taken in relation to the Britannia, Tulsequah Chief and Mt. Washington mines constitute pending judicial or administrative proceedings within the meaning of Articles 14(3)(a) and 45(3)(a) of NAAEC. Canada states that the actions were pursued in a timely manner, are consistent with the Draft Compliance and Enforcement Policy, and are expected to resolve the many issues raised in the submission.[33]

Aside from noting the enforcement action taken against owners of the Kemess Mine, Canada does not include information about any of the mines listed in Appendix 1 of the submission because in Canada's view the Submitters did not include specific assertions about those mines.[34] Canada adds, however, that it regularly reviews and evaluates monitoring data from over 80 operating and abandoned mines in British Columbia, including those listed in Appendix 1, to ensure compliance with the *Fisheries Act*.

1. Britannia Mine

Canada acknowledges that Britannia Mine is a source of pollution to the marine environment and has been at least since the mine ceased operation in 1974. Canada describes the history of actions taken by Canada and British Columbia in response to the problems at Brittania Mine, including a series of studies conducted between 1996 and 1998 by Environment Canada and the British Columbia Ministry of the Environment, Lands and Parks (MELP) to ascertain the feasibility of a treatment plant to treat the acutely lethal effluent. The two jurisdictions also carry out a joint program of effluent and stream monitoring which began in 1995.[35]

Canada reports that the studies, monitoring and other field research culminated in an application by the mine owner to MELP for a permit to construct a treatment plant to be

[32] Response, at 16.
[33] Response, at 5.
[34] Response, at 16.
[35] All found in Response, at 17-18.

funded by tipping fees for non-hazardous industrial wastes in a landfill which will help seal the old mine workings and decrease drainage flows.[36] Canada asserts that it reviewed and commented on the permit applications and accepted the plans in principle, subject to various conditions. According to Canada, British Columbia issued the permits on September 8, 1999, with treatment plant construction and operation expected within a year of that date.[37]

Canada claims that the treatment plant will significantly reduce the pollution caused by the mine and allow recovery of fish habitat[38] and that Canada's participation to date constitutes "administrative proceedings" within the meaning of Article 14(3)(a) and Article 45(3)(a).[39] Canada also asserts that the provincial permitting process in which Canada participated constitutes a "pending judicial or administrative proceeding" and that the Secretariat therefore should proceed no further.[40]

2. Mt. Washington Mine

Canada acknowledges the pollution problems at Mt. Washington Mine, commenting that the environmental damage caused by toxic levels of copper released from the mine into the drainage basin of the Tsolum River on Vancouver Island has been apparent since 1985.[41] The mine closed in 1967. Canada states that since 1985 it has been an active participant in studies and research to find a solution to the problem, including participation on a technical committee and, later, on a community-based task force that addressed environmental problems in the area.[42] The task force issued its final report in 1999.

Canada states that in June 1999 it collected and analyzed samples of the mine drainage from the mine site and found that the samples were acutely lethal to fish. Canada further states it sent a letter on July 30, 1999 to four companies that have ownership or other interests in the Mt. Washington Mine property advising them of the pollution problem and that the deposit of the acutely lethal discharge violates section 36(3) of the *Fisheries Act*.[43]

Canada submits that these latter activities, carried out after its earlier participation in the studies, research and task force, are proper and timely administrative proceedings.[44] Canada also asserts that these latter activities, which it claims are consistent with the Draft Compliance and Enforcement Policy, constitute "pending judicial or administrative proceedings" that require the Secretariat to proceed no further.[45]

---

[36] Response, at 18-19.
[37] Response, at 4. Canada attaches its comments and the draft permits to the Response as Exhibits 1 and 2.
[38] Response, at 20.
[39] Response, at 17.
[40] Response, at 4.
[41] Response, at 20.
[42] Response, at 21.
[43] All found in Response, at 22.
[44] Response, at 20.
[45] Response, at 4-5.

3. Tulsequah Chief Mine

Canada acknowledges that water draining from the Tulsequah Chief mine contains substances that are acutely lethal to fish. Canada states that the owner of Tulsequah Chief mine, which ceased operating in 1957, applied to the province in 1994 for permission to develop the mine. This application triggered a harmonized federal provincial environmental assessment process in which Canada participated. The environmental assessment was completed in 1998 and it was determined that the most beneficial site remediation results would be accomplished by allowing the company to pursue its development plans.[46]

Canada states that at the end of the environmental assessment process, it advised British Columbia that, subject to the successful implementation of certain conditions, the project was not likely to cause significant environmental effects. British Columbia issued a project approval certificate for the mine development in March 1998, one of the conditions of which was construction of a temporary water treatment plant.[47]

Canada states that it conducted an inspection of the mine site in June 1998 to determine the status of any works undertaken by the owner and obtain drainage samples. Canada found violations of section 36(3) and wrote a warning letter to the owner referring to the letter as "the minimum enforcement response". The letter warned of further inspections and possible further enforcement action.[48]

Canada and the mine owner subsequently held meetings to discuss the compliance issue and review the company's technical control options. The owner then produced a plan to treat the mine effluent and, as of May 1999, had taken an interim step to reduce the potential mine drainage impacts on the Tulsequah River.[49]

Canada submits that the warning letter constitutes an "administrative order" and that the warning letter, together with subsequent inspections of the mine site, constitute "pending judicial or administrative proceedings" that require the Secretariat to proceed no further.[50]

C. Other Issues Raised in the Response

Canada submits that the Secretariat should proceed no further with development of a factual record for the following additional reasons:

- Canada claims that the Submitters did not provide Canada with a reasonable opportunity to respond to the concerns raised in the submission as contemplated by Article 14(1)(e). The Submitters wrote to Canada on June 1, 1998, requesting a

[46] All found in Response, at 23.
[47] All found in Response, at 23-24.
[48] Response, at 24. The letter is attached to the Response as Exhibit 5.
[49] Response, at 24.
[50] Response, at 6.

response within 7 days, and subsequently filed the submission with the Secretariat on June 29, 1998, claiming Canada did not respond. Canada asserts that continuing the factual record process in these circumstances would go against both the letter and spirit of NAAEC by bypassing domestic processes for handling environmental matters.[51]

- Noting that the provisions of NAAEC cannot be applied retroactively to assertions of a failure to effectively enforce environmental laws prior to the coming into force of NAAEC on January 1, 1994, Canada submits that any assertions of failure to enforce environmental laws in relation to the three mines before NAAEC came into force on January 1, 1994 should not be addressed in the factual record process.[52]

- Canada notes that the Submitters appear not to have pursued private remedies as contemplated under Article 14(2)(c) of NAAEC. Specifically, Canada states that the Submitters appear not to have requested government departments and agencies to investigate the alleged violations of the *Fisheries Act*, although access to the government departments and agencies is readily available. In addition, Canada notes that the Submitters do not appear to have pursued civil suits for damages, initiated private prosecutions, sought injunctions in relation to the alleged violations or pursued administrative remedies either provincially or federally even though they have access to the courts and, generally, to administrative tribunals.[53]

- Canada asserts that the development of a factual record would not further the objectives of NAAEC given the detailed information provided in the response and that Canada is pursuing administrative proceedings in a timely fashion and in accordance with its law.[54]

IV. ANALYSIS

A. Introduction

We are now at the Article 15(1) stage of the factual record process. Previously, the Secretariat determined that the submission met the criteria in Article 14(1) and, on the basis of the factors in Article 14(2), requested a response from Canada. As the Secretariat has noted in previous Article 14(1) determinations, the requirements contained in Article 14 are not intended to place an undue burden on submitters or present an insurmountable screening device.[55]

---

[51] Response, at 6.
[52] Response, at 6-7.
[53] Response, at 7.
[54] Response, at 7.
[55] See, for example, SEM-97-005 (Biodiversity), Article 14(1) Determination (26 May 1998) and SEM-98-003 (Great Lakes), Article 14(1) and (2) Determination (8 September 1999). Although the Secretariat is not bound by the principle of *stare decisis*, references to previous determinations help to ensure consistency in the Secretariat's decisionmaking. See, SEM-97-001 (BC Hydro), Article 15(1) Notification (27 April 1998).

The revised *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines")[56] require the Secretariat to provide in its notifications concerning Articles 14(1) and 14(2) an explanation of how the submission meets, or fails to meet, the Article 14(1) criteria and of the factors that guided the Secretariat in determining that the submission merits a response. Because the Article 14(1) and 14(2) determinations in relation to this submission predate the revised Guidelines, these explanations are included in this notification.

1. Article 14(1)

As indicated above, the Secretariat found on November 30, 1998 that the submission met the criteria for continued review included in Article 14(1).

First, the submission satisfies the criteria in the first sentence of Article 14(1). The submission asserts that Canada, a Party, is failing to effectively enforce its environmental law. Section 36(3) of the *Fisheries Act* qualifies as environmental law for the purposes of NAAEC. The submission emphasizes the extent to which Canada has allegedly failed to effectively enforce section 36(3) rather than the effectiveness of section 36(3). The submission also meets the temporal requirements inherent in Article 14(1). The Submitters assert that, even for those mines that allegedly have been violating section 36(3) for many years, the violations are continuing and have been ongoing since January 1, 1994.

Like other submissions the Secretariat has considered, the submission alleges a failure to enforce effectively both in specific cases and more broadly. Although the submission focuses on three mines, it alleges a widespread failure by Canada to enforce section 36(3) of the *Fisheries Act* effectively against mines in British Columbia generally, resulting in ongoing and widespread harm to an important public resource. The Secretariat has previously found, after considerable analysis, that none of the criteria in Articles 14(1) and 14(2) reflects an intent, either direct or indirect, to limit the citizen submission process either to submissions alleging failures to enforce effectively in regard to particularized incidents or to submissions that focus on alleged failures to effectively enforce that are broad in scope.[57] The Secretariat concluded that allowing either type of submission would

[56] In June 1999, the Council adopted revised Guidelines, which are available on the CEC web page, www.cec.org under Citizen Submissions. The Secretariat has previously noted that the revised Guidelines provide further support for a relatively low burden on submitters with respect to Article 14, in that the revised Guidelines require submitters to address at least 13 criteria in 15 pages. See, SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999).

[57] For a detailed discussion of the rationale for this conclusion, see, SEM-99-002 (Migratory Birds), Article 15(1) Notification (December 15, 2000). See also, SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999) ("Submissions . . . which focus on the effectiveness of enforcement in the context of asserted widespread violations . . . are inherently more likely to warrant scrutiny by the Commission than allegations of failures to enforce concerning single violations. This is so even though it may be appropriate for the Commission to address the latter, depending on the circumstances.").

promote the objects and purposes of the NAAEC. Further, the Council has instructed the Secretariat to prepare factual records with respect to both particularized allegations of ineffective enforcement[58] and allegations of a widespread, systemic failure to enforce effectively.[59] With respect to this submission, the Secretariat affirms that approach and concludes that both the alleged failure to enforce section 36(3) with respect to the three particular mines and the alleged failure to enforce section 36(3) against mining operations in British Columbia generally are within the scope of Article 14.

The submission also meets the criteria in Articles 14(1)(a)-(f). First, the submission is in English, one of the languages designated by Canada (Article 14(1)(a)). Second, the submission clearly identifies the organizations making the submission, on its cover page and at page 5 (Article 14(1)(b)). Third, the submission appears to be aimed at promoting enforcement rather than harassing industry (Article 14(1)(d)). The Submitters are organizations committed to environmental protection, not competitors of the entities that are the subject of the concerns raised in the submission. Fourth, the submission indicates that the matter was communicated in writing to Canada and that Canada did not respond prior to the filing of the submission (Article 14(1)(e)).[60] Fifth, the Submitters are organizations that have been established in Canada (Article 14(1)(f)).

The Submitters also provided sufficient information under Article 14(1)(c)[61] to allow the Secretariat to review the submission, as to both the alleged failure to enforce section 36(3) effectively with regard to the three specific mines discussed at length in the submission and the alleged widespread failure to enforce section 36(3) effectively. The submission explains in detail the persistent and ongoing problems with controlling acid mine drainage at the Britannia, Tulsequah Chief and Mt. Washington mines and attaches several government reports, reports of non-governmental organizations and other documents that allow the Secretariat to review the issues raised in the submission regarding the three mines.

The submission and its attachments also include information supporting the Submitters' allegation of a widespread failure to enforce section 36(3) effectively. The Submitters include three studies that present information regarding the overall decline of and ongoing threats to fisheries in British Columbia, including the manner in which acid mine drainage and heavy metal contamination result from mining operations and cause harm to fish and fish habitat.[62] As well, the studies outline the significant technical challenges in controlling acid mine drainage effectively, including examples both in British Columbia

[58] SEM-96-001 (Cozumel) and SEM-98-007 (Metales y Derivados).
[59] SEM-97-001 (BC Hydro).
[60] Letter of June 1, 1998 from counsel for the Submitters to the Minister of Fisheries and Oceans, attached to the Submission at Exhibit 8 requesting information about enforcement actions being taken against polluting mines in British Columbia and advising of the possibility of a submission under NAAEC if Canada did not respond by June 8, 1998.
[61] Failure to meet this criterion can be a basis for terminating a submission. See SEM-00-003 (Jamaica Bay), Article 14(1) Determination (12 April 2000).
[62] Submission, Exhibits 1, 2 and 3.

and elsewhere of failed attempts to control acid mine drainage.[63] The Submitters also provide some information regarding the forty-two mines in British Columbia, in addition to the three highlighted in the submission, that are known to be or potentially are acid-generating.[64] Finally, the Submitters provide information regarding the overall use of prosecutions to enforce section 36(3)[65] and regarding recent reductions in the staff and resources available to Environment Canada to enforce section 36(3).[66]

Taken together, this information, along with the information regarding the three mines highlighted in the submission, is sufficient to allow the Secretariat to review the alleged widespread failure to enforce section 36(3) effectively. Many submitters are non-government environmental organizations with limited financial and human resources for monitoring compliance with environmental laws and gathering evidence of specific breaches. These constraints provide additional support for concluding that the Submitters have submitted sufficient information regarding the alleged widespread failure to enforce section 36(3) effectively to meet the threshold requirements of Article 14.

2. Article 14(2)

The Secretariat also determined on 25 June 1999 that the submission merited a response from Canada. In deciding whether a submission merits a response, the Secretariat considers the four factors enumerated in Article 14(2). Article 14(2) lists these four factors as follows:

> In deciding whether to request a response, the Secretariat shall be guided by whether:
>
> (a) the submission alleges harm to the person or organization making the submission;
>
> (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
>
> (c) private remedies available under the Party's law have been pursued; and
>
> (d) the submission is drawn exclusively from mass media reports.

[63] See, e.g., Submission, Exhibit 1, at 11, 15-16.
[64] See also Submission, Exhibit 1, at 13 and generally, and Exhibit 2.
[65] Submission, at 14-15, and Exhibit 7, at 7.
[66] Submission, at 11 (and cited references).

The submission alleges harm to the Submitters within the meaning of Article 14(2)(a).[67] The Submitters refer to their common interest in protecting British Columbia's threatened wild salmon population and to the importance of salmon to the province as a whole. The Submitters state that they each have a strong concern about Canada's failure to enforce the *Fisheries Act* against mining operations and about the resulting industrial pollution and its effect on fish, fish habitat, and water generally. They allege that the failure to enforce fisheries legislation against the mining industry has contributed to the decline of anadromous fish stocks and to destruction of fish habitat and valuable fisheries and has had a significant effect on communities and individuals who depend on fisheries for livelihood and cultural identity.[68]

Second, the submission raises matters whose further study in the factual record process would advance the goals of NAAEC. At the very least, further study of the matters raised in the submission would help "foster the protection and improvement of the environment . . . for present and future generations;"[69] "enhance compliance with, and enforcement of, environmental laws and regulations;"[70] and "promote pollution prevention policies and practices."[71] Further, as the Secretariat has noted in connection with other submissions, allegations of widespread patterns of ineffectual enforcement, such as those contained in this submission, "are particularly strong candidates for Article 14 consideration."[72]

Third, the Secretariat considered the extent to which the Submitters pursued private remedies under the Party's law. The Submitters assert that they have urged Canada to enforce section 36(3) but that Canada has failed to respond.[73] They also state that environmental groups, First Nations, local communities and others have made extensive efforts to have the law enforced so as to prevent contamination of fisheries from mines in British Columbia.[74] The Submitters acknowledge the right of Canadian citizens to initiate private prosecutions under the *Fisheries Act* but claim that this is not an effective remedy. They point to several private prosecutions of alleged *Fisheries Act* violations commenced by the Sierra Legal Defence Fund which were taken over and terminated by the provincial Attorney General.[75] Given the widespread nature of the alleged failure to enforce section 36(3) effectively, the burden on the Submitters of pursuing remedies with regard to all of the mines involved and the Submitters' experience with futile private prosecutions,

---

[67] The Secretariat considered the issue of harm in "Recommendations of the Secretariat to Council for the development of a Factual Record" in relation to Submission SEM-96-001 (Cozumel). After noting the importance and public nature of the marine resource in question, the Secretariat stated:

> While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources brings the submitters within the spirit and intent of Article 14.

[68] Submission, at 9.
[69] Article 1(a).
[70] Article 1(g).
[71] Article 1(j).
[72] SEM-99-002 (Migratory Birds), Article 14(1) and (2) Determination (23 December 1999).
[73] Submission, at 18.
[74] Submission, at 15.
[75] Submission, at 18.

"reasonable actions have been taken"[76] to pursue specific private remedies with respect to the violations alleged in the submission.

Finally, the submission relies on a number of government reports and reports by non-governmental organizations.[77] Therefore, the submission is not drawn exclusively from mass media reports.

B. Whether the Matter is Subject to Pending Administrative or Judicial Proceedings

As noted above, Canada submits that the assertions in the submission concerning the enforcement of the *Fisheries Act* in relation to Britannia, Mt. Washington and Tulsequah Chief Mines are the subject of pending judicial or administrative proceedings within the meaning of Article 14(3)(a) and Article 45(3)(a). Because Article 14(3)(a) provides that the Secretariat "shall proceed no further" where the matter alleged in the submission is the subject of "a pending judicial or administrative proceeding," the Secretariat considers whether any pending judicial or administrative proceedings preclude or limit development of a factual record before considering other factors relevant to whether a factual record is warranted.

A "judicial or administrative proceeding" is defined in Article 45(3) as

> (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
>
> (b) an international dispute resolution proceeding to which the Party is party.

In order to fall within the definition of "judicial or administrative proceeding" in Article 45(3)(a), a proceeding must be "specifically delineated in Article 45(3)(a), pursued by a Party in a timely manner, and in accordance with a Party's law."[78] Further, such a proceeding must concern the same subject matter as the allegations raised in the submission. Finally, "this initial threshold consideration should be construed narrowly so as to give full effect to the object and purpose of the NAAEC, and more particularly, to Article 14(3)."[79]

---

[76] Guideline 7.5(b).
[77] The Submission relies on reports such as "Acid Mine Drainage: Mining and Water Pollution Issues in B.C.", by the Environmental Mining Council of B.C. (Exhibit 1) and "Water Quality Assessment and Objectives for the Tsolum River Basin," by B.C. Ministry of Environment (Exhibit 5).
[78] SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).
[79] SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).

Applying these principles in considering whether Article 14(3)(a) precludes further consideration of a submission, the Secretariat has stated previously that

> [o]nly proceedings which are designed to culminate in a specific decision, ruling or agreement within a definable period of time should be considered as falling within Article 14(3)(a). Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, should not be sufficient to trigger the automatic termination clause. If such a proceeding were included within the definition, a Party could effectively shield non-enforcement of its environmental laws from scrutiny simply by commissioning studies or holding consultations.[80]

Bearing these parameters in mind, none of the actions Canada has taken in relation to the three mines falls within the definition of "judicial or administrative proceedings" under Articles 14(3) and 45(3). With respect to Britannia Mine, neither Canada's historic participation in studies and other efforts intended to address the pollution problem, nor its participation in the provincial permitting process, meets the definition. Issuing certain permits clearly falls within the definition of "judicial or administrative proceeding." However, according to Canada, the provincial permits for the treatment plant and landfill operations associated with Britannia Mine were issued on September 8, 1999. Therefore, even assuming that a proceeding for issuing a provincial permit under British Columbia's *Waste Management Act* would constitute an administrative proceeding respecting the alleged failure to enforce the *Fisheries Act* effectively,[81] the provincial permits are no longer the subject of pending proceedings.

Similarly, Canada's collection of samples of mine drainage, its participation on the Tsolum River Task Force, and its letter of July 30, 1999 to the four companies believed to have an interest in the land on which Mt. Washington Mine is located[82] do not fall within the kinds of actions described in Article 45(3)(a). They are not proceedings of any kind against any person to enforce the *Fisheries Act*. Further, they are not designed to reach a compliance agreement or to culminate in a specific decision or ruling within a specified time. Last, the response makes clear that at the time of the response, the June 30, 1999 letter had been sent, the Task Force had issued its final report and its funding had been terminated and Canada had not determined what future enforcement or other action, if any, it would pursue. Canada's actions in relation to Mt. Washington Mine have not proceeded to the point where they can be seen as an integral step in any of the actions specified in Article 45(3)(a).

[80] SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).

[81] Because the provincial permit proceedings are no longer pending, it is not necessary to address this question. Notably, however, while a violation of some of the conditions in the provincial permits might, as a factual matter, also result in a violation of section 36(3), there is no indication that the permits are *Fisheries Act* authorizations.

[82] Response, Exhibit 3.

With respect to Tulsequah Chief Mine, Canada points to the inspections, testing and subsequent warning letter[83] to the mine owner as pending judicial or administrative proceedings within the meaning of Articles 14(3) and 45(3). Construing the Article 45(3) definition narrowly, inspections and testing do not fall within any of the actions described in Article 45(3), because by themselves they are not designed to culminate in a specific ruling, decision or agreement. Rather, they are information-gathering steps that might, but do not necessarily, lead to further enforcement action within a specified timeframe.

Nor does the warning letter to the owner of the Tulsequah Chief Mine fall within the Article 45(3) definition. Canada asserts that the warning letter is an "administrative order". However, applying the principles set out above, an "administrative order" in the context of Article 45(3) must at the very least contain a directive with immediate legal effect that compels or enjoins an activity so as to promote compliance with the law. An administrative order, unlike the warning letter, is a ruling from which legal rights and obligations flow.[84] Indeed, the Draft Compliance and Enforcement Policy provides for the issuance of ministerial orders as a distinct, and more consequential, alternative to warning letters. Warning letters as contemplated in the Draft Compliance and Enforcement Policy[85] may be a legitimate enforcement measure, and they may lay the groundwork for further action. However, given the indefinite nature of any future action that may follow, the warning letter attached to the response is not an administrative order issued under the *Fisheries Act* within the meaning of Article 45(3).

Only in relation to Kemess Mine has Canada shown that there is a pending judicial or administrative proceeding within the meaning of Article 45(3)(a). By laying charges against the mine owner, Canada is seeking sanctions in a judicial forum. If a factual record is developed as a result of the submission, the Secretariat will be precluded from considering whether Canada is failing to effectively enforce the provisions of the *Fisheries Act* in relation to Kemess Mine as long as the charges and prosecution are pending. However, Article 14(3)(a) would not preclude the Secretariat from looking at certain matters relating to Kemess Mine as they pertain to the allegation of a widespread failure to enforce section 36(3) effectively against mining operations. For example, the Secretariat may want to examine the circumstances leading to charges against the owners of Kemess Mine in order to provide information about why charges are laid in some circumstances and not others.

---

[83] Response, Exhibit 5.

[84] The following definitions support this interpretation of "administrative order." *Black's Law Dictionary*, 7th ed., defines "administrative order" as

> 1. An order issued by a government agency after an adjudicatory hearing. 2. An agency regulation that interprets or applies a statutory provision.

The *Dictionary of Canadian Law* (Dukelow, 1991) includes the following definition of "order" taken from the *Court of Appeal Act* (BC):

> (a) A judgment and a decree, and (b) an opinion, advice, direction, determination, decision or declaration that is specifically authorized or required under an enactment to be given or made.

[85] Response, Exhibit 4.

In sum, Article 14(3)(a) does not preclude the Secretariat from proceeding further, except with respect to whether Canada is effectively enforcing section 36(3) in regard to the Kemess Mine. Under Article 15(1), the Secretariat's next step is to consider whether the submission, in light of the Party's response, warrants developing a factual record.[86]

C. Why Preparation of a Factual Record is Warranted

The Secretariat is of the view that development of a factual record is warranted regarding the matters raised in the submission. Section 36(3), the key provision at issue, is the central pollution prevention provision in the *Fisheries Act.* As described in detail above, the Submitters allege a pattern of ineffective enforcement of section 36(3) in relation to mines operating in British Columbia.

Throughout the response, Canada disputes this allegation. First, Canada describes measures it has undertaken to promote compliance with and enforce section 36(3) of the *Fisheries Act* in relation to the three mines that the Submitters use to illustrate this alleged pattern of ineffective enforcement. Canada's response also includes numerous claims about the overall effectiveness of its enforcement activities in connection with mining operations in British Columbia, but provides few specific details to support those claims in relation to the mines listed in the Appendix. The centerpiece of Canada's assertions regarding its approach to enforcement of section 36(3) is the Draft Compliance and Enforcement Policy. As explained below, a factual record would afford an opportunity to develop additional information concerning both the effectiveness of the actions Canada has taken with respect to the three highlighted mines and the actual application of the various measures Canada claims it employs generally in the enforcement of section 36(3) in relation to mines in British Columbia.

1. The Britannia, Mt. Washington and Tulsequah Chief Mines

The Secretariat first considers whether development of a factual record is warranted in relation to the Britannia, Mt. Washington and Tulsequah Chief mines, taking into account the details that Canada has provided regarding concrete compliance and enforcement action it has taken in relation to the mines. Clearly, Canada acknowledges and has made attempts to address the longstanding issues related to acid mine drainage at these mines. Significantly, however, Canada provides no information indicating that the actions it or British Columbia has taken to address the serious and persistent water pollution problems at any of the mines have ensured, or will in the future ensure, compliance with section 36(3). In short, it appears undisputed that at least as of the date of Canada's response, acid mine drainage from each of the three mines -- one of which has been described as the

[86] On 18 April 2000, the Submitters filed a reply to the Party's response. There is, however, no provision in the NAAEC for consideration of such a reply from a submitter at this stage of the citizen submission process. If the Council directs preparation of a factual record for this submission, the Secretariat may consider additional information from the Submitters in its development of the factual record. See Article 15(4).

single worst point source of metal pollution in North America[87] -- was continuing to enter and affect fish habitat and *Fisheries Act* violations were ongoing. Accordingly, the Secretariat has determined that development of a factual record is warranted to examine in greater detail the effectiveness of the enforcement approach taken in relation to each mine, whether those approaches serve as models for effective enforcement with respect to mines in British Columbia generally, and whether and how Canada's approach prevents *Fisheries Act* violations at the mines in the long term.

The Secretariat considers preparation of a factual record to be appropriate with respect to all three mines despite the effluent treatment works planned or underway at the Britannia and Tulsequah Chief mines. With respect to Britannia Mine, development of a factual record would provide an opportunity to examine the progress in implementing the treatment plant and landfill, their effectiveness as a solution to acid mine drainage from the mine and the steps Canada has taken to ensure long-term compliance with section 36(3) at the mine. As to the Tulsequah Chief mine, Canada explains that inspection and sampling it conducted in August 1999 indicated treatment works beyond those initially anticipated were likely necessary to address *Fisheries Act* violations. A factual record is warranted to examine in more detail whether those additional works have been required and implemented, whether they have been effective in controlling the violations, and what steps Canada has taken to ensure that violations of section 36(3) do not persist at the mine.

The Tulsequah Chief mine also raises questions regarding Canada's assertion that current environmental assessment and environmental protection regimes preclude problems similar to those at older mines such as the Britannia, Mt. Washington and Tulsequah Chief mines from occurring at newer mines in production or proposed for development in British Columbia.[88] In particular, Canada points to the harmonized environmental assessment process between British Columbia and Canada, as well as other licensing and permitting processes. Canada reports that between 1994 and 1998, Canada and British Columbia conducted a comprehensive environmental review of a new Tulsequah mining project and concluded that the development of the project improved the ability to properly rehabilitate the site for long-term closure. In March 1998, following Canada's determination that the project was not likely to cause significant environmental impacts if certain conditions were met, British Columbia issued a project approval certificate. One condition of approval was construction of a temporary water treatment plant, scheduled to be in place by September-October 1998, followed by full effluent treatment, scheduled to be in place by November 1999. However, in spite of the environmental assessment and the conditions placed on the project approval by the province, Canada issued a warning letter to the mine owner[89] on September 28, 1998 and concluded in August 1999 that additional works were likely necessary to control *Fisheries Act* violations. A factual record is warranted to examine the extent to which section 36(3) is enforced effectively

[87] Submission, at 9.
[88] Response, at 9-10.
[89] Response, Exhibit 5.

through application of the environmental assessment process at the Tulsequah Chief mine and other mines.[90]

2. The Alleged Widespread Failure to Enforce Section 36(3) Effectively

The submission asserts a widespread failure by Canada to enforce section 36(3) to protect fish and fish habitat from the environmental impacts of mining operations in British Columbia. While it focuses most heavily on the Britannia, Mt. Washington and Tulsequah Chief Mines, those mines are clearly intended to illustrate a more widespread concern. The submission also lists 25 "known acid generating mines" and 17 "potentially acid generating mines" in Appendix 1. The submission provides no specific details of alleged violations in relation to these additional mines and Canada provides no specific information in this regard except as to the Kemess Mine. Canada maintains that, in the absence of specific assertions regarding the other mines in British Columbia, it is unable to respond to the Submitters' claims about those other mines. However, the allegations regarding widespread ineffective enforcement of section 36(3) against the mines listed in the Appendix must be viewed in light of all of the information presented in the submission.

The Submitters support with three studies their assertion that there are or may be a number of mines polluting fish habitat in addition to the three discussed in detail in the body of the submission.[91] Together, these studies present information regarding the overall decline of and ongoing threats to fisheries in British Columbia, including threats due to acid mine drainage. The studies also discuss the manner in which acid mine drainage and heavy metal contamination result from mining operations and cause harm to fish and fish habitat. As well, the studies outline the significant technical challenges in controlling acid mine drainage effectively, including examples both in British Columbia and elsewhere of failed attempts to control acid mine drainage.[92] These studies support the conclusion that acid mine drainage and heavy metal contamination are a predictable result of mining in the absence of -- and sometimes despite -- preventive and containment measures.[93]

The Submitters also provide information on several of the forty-two mines listed in the Appendix.[94] The attachments to the submission describe impacts acid mine drainage from

[90] The Kemess Mine provides another example. According to materials attached to the submission, the Kemess Mine project was approved in 1996 after undergoing the harmonized environmental assessment process. Submission, Exhibit 2, at 48. As of the date of Canada's response, British Columbia was pursuing charges against owners of the mine under sections 35(1), 36(3), 40(1) and 40(2) of the *Fisheries Act*. Response, Exhibit 7. Although these pending proceedings preclude a factual record regarding effectiveness of *Fisheries Act* enforcement at the mine, the mere fact that these violations occurred despite application of the harmonized environmental assessment process raises questions as to the limits on the ability of the process to prevent *Fisheries Act* violations.

[91] Submission, Exhibits 1, 2 and 3.

[92] See, for example, Submission, Exhibit 1, at 11, 15-16

[93] See, for example, Submission, Exhibit 1, at 1-5, Exhibit 2, at 10-11.

[94] Submission, Exhibits 1 and 2.

some of these mines has had on associated fisheries historically and recount attempts, with varying degrees of success, to control acid mine drainage from some of the mines so as to prevent contamination that might threaten fisheries.[95] For at least two of the mines, the attachments note ongoing surface or ground water pollution concerns related to the mines.[96]

The Submitters also provide information indicating that Canada initiated only 5 prosecutions Canada-wide under section 36(3) in 1996-97[97] and state they were able to find only three cases (dating from the 1980's) in which mining companies have been prosecuted for violations of section 36(3).[98] They maintain that enforcement mechanisms other than prosecution have been "complete and utter failures" given that the three mines described in the submission have been allowed to continue to pollute fish habitat.[99] Finally, they provide information regarding recent reductions in the staff and resources available to Environment Canada to enforce section 36(3).[100]

Taken together, this information, along with the detailed information regarding the ongoing *Fisheries Act* violations at the Britannia, Tulsequah Chief and Mt. Washington mines, raises central questions regarding the effectiveness of Canada's enforcement efforts with respect to mines in British Columbia generally. Notably, the additional forty-two mines that the Submitters identify have in common a crucial characteristic relevant to their potential to violate section 36(3), namely their known or potential capacity to generate acid mine drainage. The information presented in the submission, especially in view of the experience at the three highlighted mines, raises important questions regarding the extent to which these mines are contaminating or threaten to contaminate fisheries and Canada's efforts to address problems associated with those mines through enforcement of section 36(3).

Canada's response does not adequately answer these questions. Canada does not deny the Submitters' assertion that water pollution caused by mining has a deleterious environmental impact. As well, Canada notes that "mining operations are often situated near water bodies, and discharge effluents into waters frequented by fish."[101] However, Canada states that "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."[102] Canada contends that whereas the submission appears to equate enforcement only with prosecutions, "Canada's actions with each of these three abandoned mines and other mines clearly demonstrate a comprehensive and productive strategy aimed at eliminating the discharge of deleterious

[95] See Submission, Exhibit 1, at 11, 14, 19-20; Exhibit 2, at 3-4, 32-42.
[96] Submission, Exhibit 2, at 41 (citing elevated copper and zinc levels in water bodies located near the Myra Falls mine) and at 37 (citing ongoing groundwater contamination at the Sullivan mine).
[97] Submission, Exhibit 7, at 7.
[98] Submission, at 14-15.
[99] Submission, at 17.
[100] Submission, at 11 (and cited references).
[101] Response, at 9.
[102] Response, at 15.

substances and thereby achieving compliance with the Act."[103] Canada adds that pollution problems associated with older mines are being addressed in new mines under federal and provincial environmental assessment and protection legislation and procedures.[104]

As the Secretariat has previously indicated, varied principles and approaches are encompassed in the term "effective enforcement," and under certain circumstances, enforcement measures other than prosecution may be more effective in securing compliance with a Party's environmental law.[105] Nonetheless, the response fails to make a sufficient connection between the full range of enforcement tools available to Canada and whether the tools are being used effectively to enforce section 36(3) of the *Fisheries Act* with respect to mines in British Columbia.

The response does provide a detailed and helpful description of the tools available to the federal government and British Columbia for addressing violations of section 36(3). Central to this description is the Draft Compliance and Enforcement Policy.[106] The purpose and scope of the Draft Compliance and Enforcement Policy is described in the following terms:

> This Compliance and Enforcement Policy lays out general principles for application of the habitat protection and pollution prevention provisions of the Act and explains the role of regulatory officials in promoting, monitoring and enforcing the legislation. It is a national policy which applies to all those who exercise regulatory authority, from ministers to enforcement personnel.[107]

Thus, the Draft Compliance and Enforcement Policy provides a template for what Canada asserts constitutes effective enforcement of section 36(3) of the *Fisheries Act.* It includes eight sections containing the framework and the specifics of the policy, listed under the following headings:

- What are enforcement and compliance?
- Guiding principles
- Jurisdiction and responsibilities
- Measures to promote compliance
- Inspection and investigation
- Responses to violation
- Penalties and Court Orders upon conviction
- Civil suit by the Crown to recover costs.

[103] Response, at 12.
[104] Response, at 15
[105] SEM-97-001 (BC Hydro), Article 15(1) Recommendation (27 April 1998).
[106] Canada also attaches to its response a document describing British Columbia's overall approach to and policies regarding environmental enforcement and compliance assurance. Response, Exhibit 8.
[107] Response, Exhibit 4, at 1.

The Draft Compliance and Enforcement Policy defines compliance as the state of conformity with the law and instructs regulatory officials to secure compliance through two types of activities, compliance promotion and enforcement. It lists the following measures for promoting compliance:

- communication and publication of information;
- public education;
- consultation with parties affected by these provisions of the *Fisheries Act*; and
- technical assistance.

It defines enforcement as compelling adherence to the law through the exercise or application of powers granted under the legislation and states that enforcement is to be carried out through the following measures:

- inspections to monitor or verify compliance;
- investigations of violations;
- issuance of warnings, directions by inspectors, authorizations, and Ministerial orders, without resorting to court action; and
- court actions, such as injunctions, prosecution, court orders upon conviction, and civil suits for recovery of costs.[108]

What the response lacks is a detailed explanation regarding the actual implementation and effectiveness of this policy and related federal and provincial measures with respect to mining operations in British Columbia. While the Draft Enforcement and Compliance Policy provides a helpful framework for assessing Canada's statement that it is systematically enforcing the pollution prevention provisions of the *Fisheries Act* against British Columbia's mines, the draft policy alone does not show the extent to which it has been implemented in practice or that its implementation has been effective.

Canada asserts that it regularly reviews and evaluates monitoring data and fisheries resource information for mines in British Columbia to ensure compliance, protect fisheries resources and select mines for inspection.[109] Canada states that the extensive monitoring, research and other data gathering activities it has conducted for over 15 years have resulted in a better understanding of the acid rock generation problems associated with mining.[110] However, Canada provides few specific details to show how it has used this information in enforcing section 36(3), through application of the Draft Enforcement and Compliance Policy or otherwise, in relation to mining operations in British Columbia. Since Canada claims that the federal and provincial governments have consistently taken action to address the threat to fish and fish habitat posed by British Columbia mines in general, additional specific information should be available for development in a factual record.

[108] Response, Exhibit 4, at 3.
[109] Response, at 16.
[110] Response, at 12.

Canada's response also indicates that the *MMLER* apply where a mine, as defined in those regulations, is in operation, and that as of the date of the response, revisions to *MMLER* were under consideration.[111] However, Canada does not provide information about whether the *MMLER* are being applied to any of the mines listed in the Appendix to the submission or the extent to which the *MMLER* are applied and enforced so as to ensure compliance with section 36(3).

Finally, while Canada "categorically denies the assertion in the submission that there is a pattern of non-enforcement due to staff and resource shortages,"[112] it provides no detailed information regarding whether and to what extent reductions in enforcement resources have had an impact on implementation of the Draft Enforcement and Compliance Policy and on the overall effectiveness of the enforcement of section 36(3) with respect to mines in British Columbia. Canada provides no details about the current level of enforcement staff and resources, how the allocation of those resources has changed over time, and whether there is any correlation between the level of enforcement staff and resources and the degree of the impact on fisheries from mining activities. Canada also offers no information about the progress or results of Environment Canada's 1998 review of its enforcement program, and how those results relate to the allegations raised in the submission.

In sum, a factual record is warranted to develop information regarding enforcement of section 36(3), through application of the Draft Compliance and Enforcement Policy or otherwise, at mines other than the three mines highlighted in the submission, except in regard to the effectiveness of the enforcement of section 36(3) at the Kemess Mine. In particular, a factual record is warranted for the following purposes:

- To develop information regarding the extent to which the mines listed in Appendix 1 discharge deleterious substances to fish-bearing waters, including information on whether any such discharges are authorized under the *Fisheries Act* and on whether the mines are violating section 36(3);

- To develop information regarding the extent to which the harmonized environmental assessment process or other federal or provincial compliance-promoting measures have been effective in preventing or addressing violations of section 36(3) at those mines;

- To develop information regarding the nature, extent and frequency of compliance monitoring for those mines;

- To examine the findings of compliance monitoring activities at those mines, including the frequency and seriousness of non-compliance with section 36(3) and, where applicable, the *MMLER*;

[111] Response, at 15.
[112] Response, at 16.

- To develop information regarding investigations, prosecutions or other enforcement action taken by the federal government or British Columbia in response to findings of non-compliance with section 36(3) of the *Fisheries Act* or the *MMLER* at those mines, including action taken when non-compliance persists;

- To examine the results and effectiveness of the enforcement or other action taken by Canada as a result of findings of non-compliance with section 36(3) at those mines; and

- To examine the results of Environment Canada's 1998 review of its enforcement program and other information relevant to whether reductions in enforcement resources have had an impact on the effectiveness of Canada's enforcement of section 36(3) with respect to mines in British Columbia.

A factual record would also provide an opportunity to examine the results of the "extensive monitoring, research and other data gathering activities" that Canada indicates has led to a better understanding of problems associated with acid mine drainage in British Columbia.[113] As well, the materials attached to the submission indicate that efforts to control acid mine drainage at some of the mines in the Appendix have, at least for the time being, had some success. Therefore, a factual record would also potentially provide an opportunity to present information regarding preventive or remedial measures that so far have been successful in controlling acid mine drainage.

3. Private Remedies

Under Article 14(3)(b)(ii), a Party may submit information regarding whether private remedies in connection with the matters raised in a submission are available to the submitter and whether they have been pursued. In its response, Canada asserts that interested persons may request government agencies to investigate alleged violations of environmental legislation and the Submitters appear not to have taken this step.[114] Canada also asserts that the Submitters do not appear to have pursued other administrative, quasi-judicial or judicial proceedings available to them, including civil actions for damages, private prosecutions and injunctions. Finally, Canada asserts that the one week that the Submitters gave the Party to respond regarding matters raised in the submission was not a reasonable opportunity and that proceeding further would encourage submitters to bypass domestic processes. While nothing in the NAAEC compels termination of a submission if a submitter fails to pursue private remedies or to allow a certain amount of time for a Party to respond to matters raised in the submission, in Canada's view, these are additional reasons why a factual record is not warranted here.

As noted above, the Submitters have described prior efforts they have made to pursue private remedies, in particular private prosecutions. In their view, those efforts were not

[113] Response, at 12.
[114] Response, at 7.

satisfactory. Further, the Submitters do not have access to the same range of enforcement options as Canada or to the same range of monitoring and compliance information for pursuing private remedies. Canada acknowledges that, aside from the possibility of seeking damages or recovery of cleanup costs, there are no civil proceedings available for enforcing section 36(3) and enforcement is solely in the criminal courts.[115] Moreover, Canada identifies no potential avenue for the Submitters to seek redress of the alleged widespread failure to enforce section 36(3) effectively other than seeking remedies against individual mines. Given the number of mines of potential concern to the Submitters, the burden of seeking private remedies to address the alleged widespread pattern of ineffective enforcement would be significant.

Additionally, the response indicates that the pollution problems caused by the Britannia, Mt. Washington and Tulsequah Chief mines are long-standing and have each been the subject of a public process to attempt to deal with the problems. Both the submission and the response indicate that citizens, as well as government agencies, have been aware of and concerned for years about the extent of the pollution caused by the three mines highlighted in the submission. Further, the two reports attached to the submission[116] that discuss more generally the environmental problems caused by mines in British Columbia were publicly released, demonstrating the efforts the Submitters have made to bring these issues to the attention of Canada and the general public.

For these reasons, the short period of time that the Submitters gave Canada to respond to their June 1, 1998 letter prior to filing the Submission is not a compelling reason to preclude preparation of a factual record. Further, the Secretariat is satisfied with the Submitters' explanation of why they did not pursue a private prosecution or other specific remedies in relation to any of the mines.

IV. RECOMMENDATION

For the reasons stated above, the Secretariat considers that the submission, in light of the Party's response, warrants development of a factual record. Using three mines as examples, the submission raises central questions regarding the Party's efforts to control and prevent acid mine drainage so as to enforce compliance with section 36(3) of the *Fisheries Act* in relation to mining operations in British Columbia. The response reflects an appreciation for the importance of the environmental laws and natural resources at issue in this submission. However, while the response asserts that Canada is protecting fish and fish habitat through the effective use of different enforcement and compliance tools with respect to mining operations in British Columbia, it leaves open questions regarding the Submitters' assertions. The Secretariat concludes that the lack of information concerning Canada's actual use of various enforcement and compliance tools and their effectiveness in achieving and maintaining compliance with section 36(3) at the three highlighted mines as well as other mines known to be or to have the potential to be

[115] Response, at 14.
[116] Submission, Exhibits 1 and 2.

acid-generating supports developing additional information through the factual record process. Accordingly, in accordance with Article 15(1), and for the reasons set forth in this document, the Secretariat informs that Council of its determination that the purposes of the NAAEC would be well served by developing in a factual record regarding the Submission.

Respectfully submitted on this 11th day of May, 2001.

(original signed)
Geoffrey Garver
Director, Submissions on Enforcement Matters Unit

cc: Janine Ferretti, Executive Director, CEC