

December 2001

UNDERMINING THE LAW

**Addressing the Crisis
in Compliance with
Environmental Mining
Laws in BC**

West Coast Environmental Law
Environmental Mining Council of BC



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**We are going to demand standards be met and
there will be significant penalties if they are not.**

Premier Gordon Campbell

**Open Cabinet Meeting, discussion of
Ministry of Energy and Mines Core
Services Review, October 24, 2001**

ACKNOWLEDGMENTS

This report was written by Karen Campbell, Staff Lawyer, West Coast Environmental Law Association; Lisa Sumi, Research Director, Environmental Mining Council of BC; and Alan Young, Executive Director, Environmental Mining Council of BC. Additional research was conducted by Sandra Thomsen, Environmental Mining Council of BC.

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TABLE OF CONTENTS

Undermining the Law.....	3
Executive Summary.....	3
The Legal Framework	3
Monitoring is Haphazard.....	4
Record Keeping is Poor.....	4
Prosecution is not a Real Threat.....	4
The Public Needs Access to Hold Polluters Accountable.....	5
The Federal Role.....	5
The Provincial Role.....	5
Recommendations.....	6
Top Ten Conclusions & Recommendations	7
1. Introduction.....	9
Why Focus on Deterrence?.....	11
What Do We Mean by Compliance and Enforcement?	12
2. Our Approach to Data Gathering	13
3. Environmental Laws Governing Mining in BC	14
4. Federal Laws Regulating Mining in BC	14
The <i>Fisheries Act</i>	15
Experience with The <i>Fisheries Act</i>	16
The Metal Mining Liquid Effluent Regulations (MMLER)	17
5. Provincial Laws Regulating Mining in BC	19
The <i>Environmental Assessment Act</i>	19
Experience with the <i>Environmental Assessment Act</i>	20
The <i>Mines Act</i>	21
Experience with the <i>Mines Act</i>	23
The <i>Waste Management Act</i>	32
Experience with the <i>Waste Management Act</i>	33
6. Compliance Reporting: Public Accountability for Environmental Outcomes	40
Enforcement: Non-compliance Reporting.....	40
Enforcement: Charges and Penalties Summaries	43
The Economics of Enforcement	46
7. How the Law is Undermined.....	49
Legal Limitations.....	49
How the Legal System Works.....	49
The Role of the Court.....	50
The Private Prosecution Stay Policy – Replacing Citizen Action with Government Inaction .	51
Benefits of Prosecution.....	53
Policy Limitations.....	54
Lack of Resources	54

Evolving Government Policy: Cure or Complacency?	56
MWLAP's Compliance Approach	58
Impeding Compliance through Privatization and Devolution: The Walkerton Syndrome	60
8. Looking Ahead: How to Ensure Compliance in an Era of Limited Enforcement.....	63
The Case for Increased Citizen Participation.....	63
Floodgates: Would We be Awash in Litigation?.....	64
Mechanisms to Improve Enforcement Capacity in a Educed Budget Environment.....	65
9. Conclusion	68
Summary of Conclusions and Recommendations.....	69
Appendix: What are the environmental impacts of mining?	73

LIST OF TABLES

Table 1: MMLER Enforcement Summary for Environment Canada Pacific and Yukon Region	18
Table 2: Discrepancies between MWLAP Investigation Files and the NC Report.....	41
Table 3: Mining Companies Who Appear Repeatedly On The NC Report between 1993 and 2001 .	42
Table 4: Summary of Environmental Infractions For All Industries	43
Table 5: What happens when a violator is ticketed.....	45
Table 6: Costs of Breaking the Law: Industry-Wide Amounts of Tickets and Fines.....	46
Table 7: Reported Environmental Infractions by Mining Companies.....	48

LIST OF GRAPHS

Graph 1: Number of Mining Activity Permits vs. Inspection of these Permits	26
Graph 2: Inspections Conducted at Operating Mines.....	27
Graph 3: MEM Orders and Equipment Shutdowns.....	29
Graph 4: Court Dispositions of Environmental Infractions.....	45

UNDERMINING THE LAW

EXECUTIVE SUMMARY

Over the last two decades, public support for a clean environment has increased. In response, environmental laws have been strengthened to ensure that mining companies and all industries in BC are held accountable for the environmental impacts of their activities. Passing these laws is an important first step to protect our environment. But if laws are not enforced, then they are meaningless. We set out to evaluate the success of the environmental laws governing mining. Is BC's mining industry complying with the standards and law? How effective is government in ensuring that these standards and laws are enforced?

This report takes a close look at the mining industry's record of compliance. It finds that environmental enforcement is generally weak and that our ability to monitor environmental standards is limited and getting worse. If our environmental laws are not enforced, they leave the public with a false sense of security.

The causes for this poor enforcement record are found throughout the regulatory regime, from environmental assessment through to decommissioning and mine reclamation. This report makes recommendations for simple, cost-effective measures that would increase environmental protection and improve environmental quality.

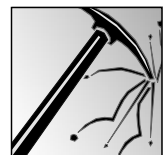
THE LEGAL FRAMEWORK

No single law regulates the environmental impact of mining in BC. The federal *Fisheries Act* and the provincial *Environmental Assessment Act*, *Mines Act*, and *Waste Management Act* all help protect BC's environment from poor mining practices.

The reason these laws exist is to establish a baseline standard for environmental protection. Once they are passed, we count on government, and, to a lesser extent, the courts, to make them work. One of the important functions of environmental laws is to deter polluters from harming the environment. But if they aren't enforced, the benefit of deterrence is lost, making it easier for polluters to continue polluting.

Deterrence is efficient – it means taxpayers don't pay for costly enforcement actions or clean up later on, as companies ensure that their actions won't harm the environment in the first place. At the Britannia Mine, the single largest point source of toxic metals contamination in North America, decades of inadequate regulation and poor enforcement left the public on the hook. Taxpayers must contribute millions of dollars to clean up toxic effluent that has destroyed prime salmon habitat in Howe Sound.

By examining the record of enforcement and compliance we are also able to evaluate how fairly these laws are applied across the mining industry. Laws haphazardly administered distort the market, penalizing corporations that make the effort to comply while rewarding



those that don't. This situation erodes incentives for good practice and does not make bad actors accountable for poor environmental practices.

MONITORING IS HAPHAZARD

Our review uncovered a wide range of problems in enforcement and compliance. Central to these problems is the lack of any coherent approach to enforcement. The BC government has acknowledged that its own enforcement programs are "ad hoc." It recognizes that enforcement activities are often reactive and complaint driven.

Significant reductions to staff and program budgets have also hampered enforcement, contributing to a climate that could reward non-compliance. From 1996 to 2000 the budget for the former Ministry of Environment, Lands and Parks (now Ministry of Water, Land and Air Protection) fell by almost \$40 million, equal to a 20 percent cut. Why put money into meeting environmental laws if you know the laws aren't being rigorously enforced?

Making matters worse, further provincial ministry budgets cuts are expected. There is widespread concern that the currently inadequate enforcement programs will be further eroded making it even more difficult for government officials to fulfill their statutory duties to protect the environment.

RECORD KEEPING IS POOR

There are numerous gaps in the records kept and information available on enforcement. As a result, we could not conduct the comprehensive research we had hoped. However, we did gather enough information to draw conclusions about the state of environmental enforcement in BC.

In terms of information available, there are numerous inconsistencies. For example, while the Ministry of Water, Land and Air Protection publishes a non-compliance report, listing polluters who are not in compliance with the *Waste Management Act*, there is no similar reporting on environmental compliance under the *Mines Act*. As well, our research revealed discrepancies between the number of times problems at mines are noted in regional office investigation files, and whether these mines even appear on the government's Non-Compliance Report.

PROSECUTION IS NOT A REAL THREAT

Because the information specific to mining enforcement is limited, we drew upon records of environmental enforcement more generally in BC. Our research revealed that in situations where charges for breaking the law are laid against a company, a significant number of those charged never appear before a judge, as the charges are stayed. While in some cases there may be a good reason to stay a charge, we fear that if a pattern is established companies will conclude that the risk of legal prosecution is low.

Moreover, when prosecutions are successful, the costs of polluting are minimal. In most cases, lawbreakers are ticketed about \$500, which is little more than the amount of a speeding ticket. Court ordered fines are rarely over \$10,000.

THE PUBLIC NEEDS ACCESS TO HOLD POLLUTERS ACCOUNTABLE

Our report identifies the limited ways that citizens can be involved in ensuring BC's mines are developed and operated in an environmentally sound manner. Without some basic commitments to transparency – such as the ability to find out information about a company's environmental performance – it is impossible for us to identify and reward good companies or penalize those violating our environmental standards.

In addition, there are very limited opportunities for citizens to seek recourse when they are concerned that the environment will be harmed or that a law is being broken. Access to the Environmental Appeal Board is limited for mining-related matters, and complaints to the Forest Practices Board only peripherally deal with environmental harm from mining practices.

Perhaps the most important restriction on citizen involvement is the BC government's policy of staying private prosecutions. Under Canadian law, members of the public can initiate private prosecutions when an environmental violation has occurred. Under current provincial policy, the Crown takes over, and routinely stays (closes down) prosecutions. This means that British Columbians have effectively lost that right. In contrast, Ontario citizens, despite years of cutbacks, still have the right to pursue a private prosecution.

Taken together with cuts to enforcement budgets and staff, these policy limitations makes it difficult to hold polluters accountable for harm to the environment.

THE FEDERAL ROLE

The *Fisheries Act* prohibits activities that harm fish habitat and pollute waters frequented by fish, unless government expressly permits them. Mining operations fall under this Act and its regulations. Our study shows Environment Canada's conclusions about the effectiveness of their compliance record are often based on fewer than ten inspections a year, calling into question the reliability of their results.

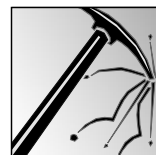
THE PROVINCIAL ROLE

Mining practices in BC are regulated by 3 provincial statutes – The *Environmental Assessment Act* sets out rules for approving mine development; the *Mines Act* regulates the construction, operation and closure of mines and the *Waste Management Act* sets out general environmental protection standards.

Each Act comes with its own set of concerns and operational problems. All suffer from one common issue – a lack of resources and staff to monitor and enforce statutory requirements. The words may be there, but too often they're not backed by action until something goes wrong and habitat and wildlife are damaged and human health is jeopardized.

1. The *Environmental Assessment Act*

Our review found that the ability to ensure that the conditions of BC's environmental assessment process are followed through when a mine project is being approved is weakened at each stage of the process. Terms and conditions recommended by the government's



review committee are not always included in the approval documents. Furthermore, the terms and conditions that do appear in the approval documents are not necessarily reflected in specific pollution permits. Without these safeguards, a company's agreement to ensure environmental protection, made during the approval process, cannot be enforced.

This assumes that there is enforcement. But, as of this time last year, no enforcement was undertaken relating to any of the existing 37 environmental assessment approvals.

2. The *Mines Act*

BC's *Mines Act* sets few specific standards for environmental protection and those it does set are vague. Because of this, the standards are difficult to enforce. Officials with the Ministry of Mines have vast discretion in exercising their duties, and there is no independent appeal process to provide accountability for their decisions, such as the Environmental Appeal Board.

Mine reclamation bonding provisions present a particular challenge. Taxpayers are on the hook for millions of dollars in reclamation costs that should be borne by the mining industry. Our report shows corporate bonding is woefully inadequate. Current estimates put BC mine reclamation liabilities at \$400 million, but the total available in reclamation bonds is well under half that, only \$172 million.

3. The *Waste Management Act*

The *Waste Management Act* is BC's primary environmental law. All mines require a waste management permit that set standards for when, where, and how much a company can discharge. The *Act* gives the Ministry of Water, Land and Air Protection significant powers of enforcement. But this report shows that the Ministry's ability to enforce the law has declined dramatically: overworked inspectors now scrape by with few resources, and little ability to follow through once a problem has been identified. In some cases, it appears that the government finds it easier to increase pollution permit levels so that companies otherwise violating the law, will suddenly be in compliance rather than attempting to enforce the law.

RECOMMENDATIONS

This Report makes 24 recommendations in the following areas:

- to improve reporting and information;
- to improve public accountability;
- to set strict and clear environmental criteria for permits and amendments;
- to improve enforcement by reviewing penalties, fines, and administrative deterrents; and
- to ensure that it is the polluter, not the public, who pays the price for poor environmental compliance.

TOP TEN CONCLUSIONS & RECOMMENDATIONS

CONCLUSION

RECOMMENDATION

Funding & Resources

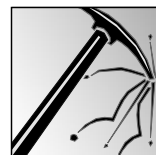
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| <p>1. Funding is inadequate and declining. There are too few staff and resources to monitor and enforce compliance with environmental laws.</p> | <p>1. Restore funding for compliance activities including monitoring and enforcement; early investment in deterrence means there will be no need for enforcement action later on.</p> |
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Public Accountability

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| <p>2. Government policies prevent the public from playing a role in enforcement.</p> | <p>2. The provincial government should end the policy of automatically staying private prosecutions.</p> |
| <p>3. The lack of meaningful appeal rights under the <i>Mines Act</i> permits too much discretion with little public accountability.</p> | <p>3. Amend the <i>Mines Act</i> to establish a right of appeal to the Environmental Appeal Board for decisions related to environmental matters.</p> |

Setting Standards

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| <p>4. Recommendations made through the environmental assessment process are not incorporated into enforceable permits.</p> | <p>4. All requirements of an EA project approval certificate should be mandatorily transposed into related permits and approvals.</p> |
| <p>5. Amendments to increase pollution limits are made to pollution permits because it is easier to raise limits than enforce the law.</p> | <p>5. Establish strict, transparent, science-based criteria to determine under what circumstances amendments increasing permitted emission levels will be considered acceptable.</p> |
| <p>6. Mine exploration site inspections have declined and exploration Notices of Work are not bound by performance standards related to standards set in recent land use plans.</p> | <p>6. The Ministry of Energy and Mines should develop performance standards for exploration Notices of Work based upon land use plans to ensure the integrity of the land use planning process is respected.</p> |



CONCLUSION (continued)**RECOMMENDATION (continued)**

Penalties and Deterrence

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| <p>7. Insignificant tickets and limited persecutions mean the threat of enforcement action is not a deterrent.</p> <p>8. Court ordered fines are not a deterrent because amounts are negligible.</p> | <p>7. Develop an administrative monetary penalty regime that would allow conservation officers to ensure that fines appropriate to the infraction are effectively levied.</p> <p>8. Government sentencing guidelines should be publicly reviewed and strengthened with minimum mandatory penalties.</p> |
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Reporting and Information

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| <p>9. The Ministry of Energy and Mines does not provide annual public reporting on monitoring and compliance. Poor government record keeping and data collection means officials and the public have no accurate idea of the real state of compliance and enforcement.</p> <p>10. Discrepancies and inconsistencies in compliance reporting make it difficult to determine what action has been taken with what consequences.</p> | <p>9. Implement compliance reporting regime with particular emphasis on <i>Mines Act</i> compliance.</p> <p>10. Develop standardized criteria for compliance reporting and action.</p> |
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1. INTRODUCTION

The past 20 years have seen a proliferation of new Canadian environmental laws. This reflects the fact that governments, industry and the public recognize the importance of appropriate safeguards for environmental protection in our society. These laws are a critical element of the social license that allows industry to operate. Pollution permits granted to companies are another facet of this arrangement between companies and the public. They are meant to deliver environmental protection, ensure human health, and sustain the cornerstones of our natural wealth – air, water and land.

Passing these laws is an important first step to protect our environment. But if laws are not enforced, they are meaningless. To some extent, the passing of each act and regulation brings with it an element of complacency; a sense that we, as a society, have solved a problem by establishing a standard through law or policy. However, setting these standards is simply not enough. While most environmental legislation contains a variety of mechanisms to enable monitoring and enforcement by government, and, to a lesser extent, the public, these tools are underutilized. Without regular monitoring and consistent enforcement of standards there is no guarantee:

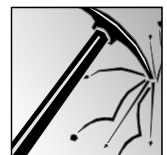
- that our agreed upon level of environmental protection is happening,
- that those companies who fail to meet the standards are identified and disciplined where necessary, and
- that companies who invest in environmental protection are rewarded and not undercut by “free riders” who harm the public and environment without cost.

To those concerned about the health of our communities and ecosystems, any failure to enforce environmental laws is serious. Our laws are developed on the assumption that companies will comply and that government will enforce. But when government budgets are substantially decreased, and such emphasis is placed on the freedom of corporations to make profits on their own terms, meaningful enforcement of environmental legislation is often seriously reduced. This sends a signal to potential polluters that they are not likely to be held accountable for their polluting activities. The incentive to “do the right thing” is limited when there is little threat that violations will appear on the business accounts through financial penalties, production stoppages, long term liabilities or other disincentives.

Meaningful enforcement not only ensures that illegal polluters get caught, but it ensures that otherwise good corporate actors remain committed to obeying the law. Failure to enforce our environmental laws is a real problem, documented across our country.¹ There are

¹ Some examples of reports documenting problems with enforcement include:

- Friends of the Earth, *Primary Environmental Care: An Assessment of Environment Canada’s Delivery*, February 2001. This report concludes that it is “beyond belief that the current level of enforcement provides any motivation for (the regulated community) to comply with pollution laws” and that “Canadians are being short changed in the primary environmental care they expect and deserve from their federally elected representatives” (Vol. I, Pt. 4);



numerous examples of inadequate or declining enforcement and BC is no exception. With this in mind, we set out to investigate mining industry compliance with environmental regulation in BC. Our goal is to increase awareness of the risks and liabilities (both environmental and economic) resulting from weaknesses in the system, and to stimulate discussion of alternatives and solutions to ensure that proper environmental protection is achieved.

MICHAEL PORTER: Are Regulations “Bad for Business?”

The Harvard Business School on the Economics Benefits of Regulation...

The conflict between environmental protection and economic competitiveness is a false dichotomy based on a narrow view of the sources of prosperity and a static view of competition. Strict environmental regulations do not inevitably hinder competitive advantage against foreign rivals; indeed they often enhance it. Tough standards trigger innovation and upgrading.... I have found that nations with the most rigorous requirements often lead in exports of affected products. Properly constructed regulatory standards that aim at outcomes and not methods, will encourage companies to re-engineer their technology. The result in many cases is a process that not only pollutes less, but lowers costs or improves quality. Processes will be modified to decrease use of scarce or toxic resources and to recycle wasted by-products.²

Part 1 of this report sets the context for this study; part 2 briefly explains our approach to data gathering; parts 3 to 6 review the enforcement provisions of our federal and provincial environmental mining laws and how they are applied in BC; part 7 reviews recent compliance and enforcement patterns with respect to hard rock and coal mining, as well as environmental enforcement patterns in BC generally; part 8 discusses some of the legal and policy limitations that effectively “undermine” the law; and finally, part 9 contains our conclusions and recommendations to encourage better environmental protection in BC.

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- Martin Mittelstaedt, “Ontario Pollution Fines Plunge,” *Globe and Mail*, Jan 10, 1997, at A6, noting that in the first 10 months of 1996, environmental prosecutions dropped by 21 per cent and fines dropped by 57 per cent;
 - *Committee Report of Nova Scotia’s Environment Act Legislative Review Process 2000*, which identifies “lack of support for use of broad inspection powers by staff, as well as public frustration with this approach” as a key issue in the implementation of Nova Scotia’s environmental legislation; p. 3;
 - House of Commons Standing Committee on Environment and Development, *Enforcing Canada’s Pollution Laws: The Public Interest Must Come First!*, 3rd Report, Ottawa, May, 1998 – the recommendations and themes in this Standing Committee report are based on extensive federal and provincial budget cutbacks.

² Michael Porter, Harvard Business School, leader of Harvard Competition and Strategy Group; excerpted from “Green Competitiveness” *Scientific American*, April 1991.

WHY FOCUS ON DETERRENCE?

The threat of penalty or consequence is a signal to corporations that poor environmental performance and breaches of established environmental standards and regulations is not acceptable. Weak enforcement translates into weak environmental policy and weak environmental protection. Even our most progressive environmental laws are useless if they are not enforced. A firm belief in the practical effect of deterrence underlies this report.

Deterrence assumes that actual or threatened punishment reduces or prevents violations of the law. Legal theory on sanctioning criminal conduct points to two types of deterrence: *specific deterrence* is designed to deter a violator from violating a specific law in the same or similar circumstance again; *general deterrence* is designed to deter society at large from violating the law, using the specific circumstance as an example. A federal Department of Justice report notes that “a belief in the effectiveness of deterrence lies at the very core of sanctioning strategies applied to polluting behaviour in Canada,” and that this view has been expressed in our laws, judicial statements, political speeches, and the confessions of polluters themselves.³

Canada’s *Criminal Code* contains sentencing principles, which enshrine deterrence as a key factor in sentencing criminals in order to contribute to “respect for the law and the maintenance of a just, peaceful and safe society.”⁴ These principles are applied routinely by judges in the adjudication of regulatory offences.

The threat of enforcement must be real; otherwise our environmental laws will be flouted. The possibility that enforcement measures, including prosecution will occur as a result of a polluter violating the law is vital if we are to deter the regulated community from breaking environmental laws.⁵ The potential threat of a significant fine, and the adverse publicity generated by a prosecution serves important deterrent effects.

What Motivates Compliance?

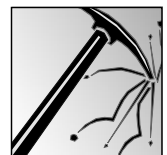
Surveys of business leaders have confirmed the importance of strong laws and regulations in achieving environmental protection. In one survey, over 90 percent of businesses stated that their primary motivation for establishing environmental management systems was compliance with regulations. Approximately 70 percent cited potential directors liability – a factor also related to environmental laws. Only 25 percent claimed to have been motivated by voluntary programs.⁶

³ See *From Sawdust to Toxic Blobs: A Consideration of Sanctioning Strategies to Combat Pollution in Canada*, Department of Justice Canada, 1988, p. 23.

⁴ *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.

⁵ Steven D. Shermer, “The Efficiency of Private Participation in Regulating and Enforcing the Federal Pollution Control Laws: A Model for Citizen Involvement” (1999), 14 *J. Env’tl Law and Litigation*, p. 474.

⁶ Canadian Environmental Management Survey 1996. KPMG Management Consultants (Toronto KPMG, 1996).



WHAT DO WE MEAN BY COMPLIANCE AND ENFORCEMENT?

The level of compliance is a measure of the extent to which a company acts in accordance with the law. Compliance is achieved in a number of different ways, and governments routinely establish compliance programs that may include preventative education, warnings to offenders of specific problems and ultimately the imposition of penalties and sanctions.

A key part of an effective compliance program is a meaningful threat of enforcement, whereby polluters are held to account for violations of the law, penalized through prosecution, and, if necessary, fined. In this sense, enforcement is at the end of the compliance continuum. There are also other, more preventative mechanisms to ensure compliance. Careful permitting, inspections, and monitoring programs, if properly conducted, all act as preventative measures that minimize the need for rigorous enforcement to address violations of environmental laws.

A 1991 BC Environment discussion paper identifies 6 measures that government uses to ensure compliance:

- written and verbal communication;
- consultation;
- monitoring;
- inspection;
- data review; and
- enforcement.

This discussion paper also identifies 4 different types of enforcement activities:

- investigations of alleged violations;
- imposition of corrective measures;
- administrative responses (such as warnings and orders); and
- prosecution.⁷

All of these elements, working together, are important parts of a compliance regime that rewards good players and ensures that bad actors are dealt with fairly.

⁷ BC Environment, *Ensuring Effective Enforcement*, Victoria, 1991.

2. OUR APPROACH TO DATA GATHERING

We conducted visits to some key regional offices, reviewed centralized records kept in Victoria, and interviewed Ministry of Water, Land and Air Protection (MWLAP)⁸ and Ministry of Energy and Mines (MEM) staff involved in writing, inspecting and monitoring mining related permits. We also reviewed files on various mining projects to get a general idea of the type of information gathered by staff, the number of inspections conducted and how non-compliance issues are dealt with. We also were interested in how things may have changed over time.

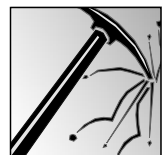
By MWLAP's own admission, its ability to keep records on enforcement is weak. A recent provincial discussion paper on compliance states:

To date there has been no systematic process that examines the effectiveness of many statutes and regulations against the ministry's primary objectives or the relative significance of regulations to environmental outcomes. The rate of compliance in the regulated community is not well reported or understood. ... *As a result, achieving compliance has been primarily an ad hoc process involving sporadic public education and participation, largely unsubstantiated dependence on voluntary compliance, site and client specific negotiations, some monitoring and inspection and reactive enforcement initiated by public complaints.*⁹ (Emphasis added)

Recognizing that records and data are not consistently maintained, we attempted to compile available data on patterns of success or failure in enforcement over the past 5 years. While mining enforcement is the focus of this report, a number of the conclusions are based upon information about environmental enforcement in BC more generally. We note where the information is mining-specific and where it deals with environmental enforcement overall. Virtually all the information in parts 3, 4 and 5 is mining specific; the material in the remainder of the report is drawn from environmental enforcement information more generally.

⁸ Most of the research for this report was conducted with Ministry of Environment, Lands and Parks (MELP) officials prior to June 2001, when the former MWLAP was divided. We have substituted MWLAP throughout, on the assumption that all regulatory responsibilities formerly conducted by MWLAP are now being conducted by MWLAP.

⁹ See *Compliance Approach: A Discussion Paper from the Compliance Working Group*, MWLAP, March 2000, pages 2-3."



3. ENVIRONMENTAL LAWS GOVERNING MINING IN BC

Environmental regulation of mining in BC is found in various federal and provincial statutes. We will not provide a full overview of the environmental regulation of mining in BC; this has been done elsewhere.¹⁰ Rather, we have focused on the elements of the law that provide for enforcement to ensure that the goals of the legislation are being achieved in practice. This review of enforcement focuses principally on provincial legislation, as that is primarily how mining in BC is regulated.¹¹ We also comment on the role of federal law with regard to mining first, as thereafter, most of the report is dedicated to provincial mining laws.

4. FEDERAL LAWS REGULATING MINING IN BC

The importance of using federal legislation for environmental protection cannot be overestimated, yet federal environmental legislation is not the primary source of environmental regulation in BC. Traditionally, the public looks to the federal government to ensure consistently strong environmental protection across Canada, as it is often less subject to industry pressure than provincial governments, who are in direct competition for regional investment dollars and responsible for regional development strategies. This situation is not unique to Canada. Indeed, much of the federal environmental legislation in the US was enacted in response to a perception that “individual states could not be relied upon to further these goals and that federal legislative intervention was necessary for their effective execution.”¹²

Serious concerns about federal enforcement capacity have been identified by officials since at least 1999. Environment Canada’s National Enforcement Program Business Case, prepared in September 1999, reveals that there are significant shortfalls in enforcement of federal pollution and wildlife laws, and recommends dramatic increases in funding and staffing levels for federal enforcement. Some of the recommendations are:

- That 357 enforcement field officers would be needed to adequately enforce federal responsibility for pollution and wildlife laws. In 1999, there were just 95

¹⁰ For an overview of the legislative requirements, see for example *Mining’s Many Faces: Environmental Mining Law and Policy in Canada*, CIELAP, www.cielap.org, (Toronto, 2000). See also Part 1 of *Digging up Trouble: The Legacy of Mining in British Columbia*, SLDF, www.sierralegal.org (Vancouver, 1998). See also Joseph Castrilli, “Environmental Regulation of the Mining industry in Canada: An Update of Legal and Regulatory Requirements,” available on the Gordon Foundation website: www.gordonfn.org.

¹¹ While federal legislation can also be enforced in its own right, there are a number of administrative mechanisms, such as the Canada/BC EA Cooperation Agreement, and a Memorandum of Understanding regarding the *Fisheries Act* which permits the provincial government employees to enforce the *Fisheries Act*.

¹² Shermer, “The Efficiency of Private Participation,” p. 461.

officers. Even with recent hirings, federal field officers number only 150, well under half those required.

- That, in order to meet expectations for enforcement of federal pollution and wildlife laws a \$41 million budget would be necessary. In September 1999, the budget was \$17 million and is now at \$24 million.¹³

THE **FISHERIES ACT**

Damage to fish and fish habitat is one of the most effective triggers for federal response to pollution concerns in BC. There are a greater number of *Fisheries Act* convictions in BC than anywhere else in Canada. Application of the *Fisheries Act* is one of the strongest tools to encourage the mining industry to conduct its activities responsibly.

An intergovernmental agreement divides responsibility for *Fisheries Act* enforcement between the Department of Fisheries and Oceans (DFO) and Environment Canada. Environment Canada assumes responsibility for *Fisheries Act* enforcement with respect to pollution, and DFO has primary responsibility for ensuring that habitat provisions of the *Fisheries Act* are enforced. An agreement between the federal and provincial government means that provincial Environment officers can enforce this *Act* as well.

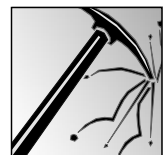
The *Act's* enforcement provisions are tremendously influential in ensuring environmental protection in Canada. Two key sections prohibit activities that may harm fish or fish habitat. Section 35 of the *Fisheries Act* prohibits a person from carrying on any activity that results in the "harmful alteration, disruption, or destruction of fish habitat," unless authorized by regulation. Section 36(3) of the *Act* prohibits the deposit of a deleterious substance in water frequented by fish, unless authorized by regulation. As with the provincial legislation, the *Fisheries Act* establishes some fairly broad powers for inspectors to enter, search and inspect property to determine whether a breach of these sections has occurred, and specifies fines and penalties for breaches of these two key provisions.¹⁴

Fisheries Act Regulations contain a unique incentive for private citizens who choose to enforce the law themselves. The *Act* allows private citizens to lay charges. If the charges are proven and the violator is guilty, the citizen is entitled to 50 per cent of any fine levied. Similarly, if a charge is laid by a provincial government employee, then 50 per cent of the fine is payable to the provincial government.¹⁵

¹³ According to an Environment Canada official, the enforcement budget is scheduled to rise to \$26 million in 2005, where it will be stabilized. All of this is taken from "Staff crunch puts wildlife at risk," *The Ottawa Citizen*, 25 Feb 2001, p. A3.

¹⁴ *Fisheries Act*, R.S.C. 1985, c. F-14, ss. 38 and 40.

¹⁵ SOR/93-53, Fishery (General) Regulations, ss. 60 – 62.



EXPERIENCE WITH THE *FISHERIES ACT*

According to the most recent report available from DFO, there is no clear downward trend in convictions under the *Fisheries Act* in BC, although the statistics are somewhat erratic. In 1994/95, there were 62 convictions for violations of sections 35(1) and 36(3); in 1995/96, there were 35 convictions; in 1996/97, there were 49 convictions; and in 1997/98, there were 48 convictions.¹⁶

Also noteworthy is DFO's stated preference for encouraging preventative action to protect habitat and avoid losses of fisheries resources through voluntary measures, although it is prepared to use enforcement action when voluntary compliance fails.¹⁷ We discuss the implications of voluntary approaches below.

The non-enforcement of *Fisheries Act* provisions at three closed mine sites in BC (the Britannia Mine near Squamish, the Mt. Washington Mine on Vancouver Island, and the Tulsequah Chief Mine in northern BC) is the subject of a complaint by conservation groups to the North American Commission on Environmental Cooperation (CEC). Acidic and metals laden effluent continues draining into salmon-bearing waterways at these mine sites without legal recourse as it has for decades. In 1998, several environmental groups petitioned the CEC to investigate the government's failure to address persistent violations of the *Fisheries Act*, and actively enforce the legislation. In May of this year, the Commission agreed there are legitimate concerns about environmental enforcement. It will conduct a full investigation, with a factual record. The preparation of a factual record is the most significant measure available to the public under the NAFTA environmental side agreement.

Incentives for Citizen Participation

The unique provisions of the *Fisheries Act* regulations permitting one half of a fine to be paid to complainants are underutilized. To date, we identify only two instances where complainants were awarded half of the fine – both in Ontario. In 2000, a citizen was awarded \$150,000 (1/2 of a \$300,000 fine) for the private prosecution she brought against the City of Hamilton for toxic leachate discharging into a fish-bearing creek. In 1999, another citizen was awarded \$60,000 (1/2 of a \$120,000 fine) for the illegal release of toxic effluent from a waste dump in Kingston.¹⁸ In both of these cases, the citizen incentive provisions were successfully utilized to support the efforts and cover the expenses of private citizens working to protect the environment.

At this time, there is a fundamental obstacle to the application of these sections in BC, given the BC government's policy of "staying" private prosecutions, which is examined below.

¹⁶ The DFO Annual Report contains statistics for the first three periods; 1997/98 convictions are reported at www.ncr.dfo.ca/habitat.annrep97/english/chap6_e.htm. This latter report indicates that the conviction statistics includes all convictions reported by DFO, Environment Canada and MWLAP.

¹⁷ DFO, Annual Report 1996-1997, *Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act*, Ottawa, 1998, p. 4.

¹⁸ See Sierra Legal Defence Fund newsletters, October 2000, and May 1999 respectively, available on their website at www.sierralegal.org.

THE METAL MINING LIQUID EFFLUENT REGULATIONS (MMLER)

The MMLER, established under the *Fisheries Act*, apply to base metal, uranium and iron ore mines that were opened, expanded or reopened after 1977. The intent of the MMLER is to control discharges of liquid effluents containing deleterious substances from metal mines in order to provide minimum standards for the protection of fish and other aquatic life. Among other things, the MMLER require that active mining operations send a report to the federal Minister of the Environment within 30 days of the end of each month, containing monitoring results for the concentrations of regulated deleterious substances.¹⁹

Recently proposed amendments to the MMLER (known as the Metal Mining Effluent Regulation or MMER) may make them moderately more stringent. Some changes include requiring their application to all mines in operation prior to 1977 including gold mines which were excluded under the old regulations; lowering some effluent emission limits; and requiring all mines to conduct comprehensive environmental effects monitoring (EEM) programs.²⁰

There are, however, a number of criticisms of the MMER. Allowable limits for arsenic, copper, lead, nickel, and zinc remain the same as in the old regulation, and key pollutants, such as cadmium and mercury, are still not on the list of regulated contaminants. And where the limits for parameters were made more stringent, some believe the limits do not go far enough to protect aquatic resources. Indeed, the limits for many of the MMER parameters are not as strict as what is currently being applied in other countries. Other criticisms of the proposed MMER include the fact that there is no requirement to fix site-specific problems that are discovered through EEM reporting. And from an enforcement perspective, there would be no requirement to provide monitoring, inspection, prosecution data, and EEM results to the public in a comprehensive way.²¹

Practice Under the MMLER

It is difficult to evaluate the success of enforcement of the MMLER. One study noted that the MMLER has been controversial since its inception. That's because when it was first promulgated in 1977 it did not apply to any metal mines then operating in Canada. Further, one of the first proposed mines to be subject to the regulations obtained a special exemption from the requirements.²²

The Final Reports of the National Inspection Plans (NIPs) outline the MMLER inspection priorities as designated by Environment Canada's Office of Enforcement every year. They summarize how the inspection priorities were met, and can be used as an indication of how effectively Environment Canada's enforcement officers are meeting their objectives. The results, based on the last three years data are as follows:

¹⁹ See *1998 Annual Compliance Report for Metal Mining Liquid Effluent Regulations in British Columbia*, Environment Canada, Pacific and Yukon Region, Regional Program Report 99-19.

²⁰ See Environment Canada's press release, July 2001, at www.ec.gc.ca/press/2001/010731_b_e.htm.

²¹ News Release Backgrounder issued by the Canadian Environmental Defence Fund, MiningWatch Canada and the Environmental Mining Council of BC. September 26, 2001.

²² Castrilli, p. 36. The proposed amendments would remove the exemption for this mine, based in BC. It is the Alice Arm Tailings Deposit Regulations, SOR/79-345, under the *Fisheries Act*.

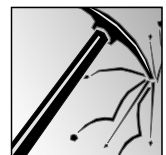


Table 1: MMLER Enforcement Summary for Environment Canada Pacific and Yukon Region

	1997-98	1998-99	1999-2000
Priority of Regulation	Medium	Medium	Doesn't say
Number of inspections planned	14	9	6
Number of inspections conducted	9	1	1
Environment Canada's Reason for discrepancy	Only 9 MMLER mines in operation	The number of inspections completed reflected actual demand and resources were diverted to other priorities	Shift of priority to conduct non-MMLER mining inspections as a result of unplanned referrals by regional program staff

In the last two reported years, the number of inspections conducted was significantly less than what was anticipated in the Plan. The reasons indicate that resource constraints are preventing Environment Canada enforcement staff from meeting their designated enforcement objectives. While the reasons for the discrepancy are provided, concerns remain about priority setting in enforcement programs. How is "actual demand" for inspections determined? What are the unplanned referrals that result in mining inspections not being conducted?

In addition to the NIP, we also reviewed the 1998 Annual Compliance Report for the MMLER in BC, which contains somewhat different information than the NIP. According to this report, the 1998 NIP called for inspection of 7 mines (3 regulated under the MMLER), and only 5 mines were inspected (1 of these was regulated under the MMLER).²³

Not only is the information in this report inconsistent with that presented in the NIP, but in our view, the 1998 Annual Compliance Report, which is the most recent report available on the Environment Canada website, contains conclusions about compliance that are based on too little data. For example, this report concludes that effluent samples for 1994, 1996 and 1997 indicate 100 percent compliance for water quality parameters, yet in 1995, the compliance rate was 0 percent. This 1995 conclusion about annual compliance is based on 2 samples from 1 mine. Similarly, the 1994 and 1997 information is based upon 6 samples and 8 samples respectively at 1 mine; the 1996 compliance statistic is based upon 12 samples from 5 inspections, and does not indicate the number of mines inspected). While the report rightfully indicates that compliance is estimated by using information from all mines inspected during the period,²⁴ sector wide compliance statements and trend data based upon inspections conducted at one or two mines is of extremely limited value.²⁵

²³ See www.pyr.ec.gc.ca/ep/enforcement/98mine.htm, at page 6.

²⁴ 1998 MMLER Report, p. 7.

²⁵ 1998 MMLER Report, p. 7.

5. PROVINCIAL LAWS REGULATING MINING IN BC

Mining practices in BC are regulated primarily by 3 provincial statutes – initial approval of mine development is regulated by the *Environmental Assessment Act*; construction, operation and mine closure are regulated under the *Mines Act*; and general environmental protection obligations are set out under the *Waste Management Act*.

THE ***ENVIRONMENTAL ASSESSMENT ACT***

The *Environmental Assessment Act* (EA Act) requires that significant mine projects in BC undergo an environmental assessment (EA) review.²⁶ Proponents, or mine developers, are required to submit an application to the provincial Environmental Assessment Office (EAO).²⁷ When the review process is completed, and if the government ministers responsible are satisfied that the project meets the requirements of the EA Act, proponents are granted a project approval certificate. These certificates contain all the terms and conditions under which a project can be developed. By law, proponents are required to adhere to all the terms and conditions in a certificate, and are liable for failure to meet the conditions specified in the certificate.

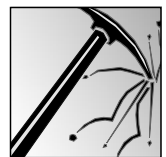
In order to ensure that enforcement can occur, the Act prohibits a proponent from developing a reviewable project without an approval and for failing to comply with a project approval certificate. Penalties for these prohibited activities include fines of up to \$100,000, and the possibility of imprisonment of company officials for up to 6 months.²⁸ The Act authorizes regulatory agency enforcement staff to inspect any works or activities at a project site under review, and enables the Minister of Sustainable Resource Management to issue an order to halt construction until the proponent obtains a project approval certificate. The Minister can also require compliance by applying to the Supreme Court for an order requiring the proponent to comply with the requirements of the Act. Finally, the Act gives the Minister the authority to suspend or alter a certificate for specific reasons, where justified.²⁹

²⁶ While the Canadian Environmental Assessment Act (CEAA), S.C. 1992, c. 37, applies to mining activities as well, virtually all federal EAs of mining activities in BC have been harmonized under the Canada-British Columbia Agreement for Environmental Assessment Cooperation (see the *Guide to the BC EA Process*, BC Environmental Assessment Office, Victoria, January 2001, pp. 59-61). Thus this report will not review practice under CEAA separately from that of provincial practice. From an enforcement perspective, it is noteworthy that CEAA is silent on offences or penalties for violations of the Act or Regulations. Thus, there is little or no incentive for proponents to ensure that the requirements of the Act are followed through completely, as they cannot be made to account for a breach of the requirements under the Act. A court challenge is the only means by which those concerned about application of CEAA can seek a remedy.

²⁷ Part 2 of the EA Reviewable Projects Regulation, B.C. Reg. 276/95, sets out the thresholds for EAs of mining projects.

²⁸ *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, ss. 76 and 78.

²⁹ See Part 6 of the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, which addresses “Sanctions.”



The project approval certificate sets out the broad terms and conditions that must be adhered to by the proponent throughout the construction and operation of the project. Other regulatory authorities responsible for issuing more detailed permits under the different legislation such as the *Mines Act*, *Waste Management Act* or *Forest Practices Code* are expected to incorporate the conditions of the certificate into the related statutory approvals that must be obtained. These other regulatory agencies, such as MWLAP, MEM or MOF have primary enforcement responsibilities for the terms of these independently issued permits and approvals.

EXPERIENCE WITH THE *ENVIRONMENTAL ASSESSMENT ACT*

Project Committee recommendations do not always appear in Project Approval certificates

Perhaps the most problematic issue with regard to EA is that not all of the recommendations of the Project Committee (the intergovernmental committee tasked with overseeing the EA review) are necessarily addressed in the certificate that sets the conditions under which the mine may operate. The technical and other work overseen by this Committee is intended to ensure that, at the end of the day, the project does not cause unacceptable environmental impacts. During the EA process, proponents commit to doing certain things in order to make the project acceptable. But if the commitments are not incorporated into the certificate, there is no guarantee that they will be transposed into binding statutory permits.

Project Approval Certificate conditions are not always enforced or reflected in permits

As of October last year, the EAO had undertaken no enforcement activity pursuant to the terms of the 38 project approval certificates granted.³⁰ The penalties outlined in the Act have never been applied. Recognizing this as a concern, it has begun an audit to review compliance with the conditions of three of the 37 active certificates. One mining project, South Kerness, is being included in this review. In order to improve accountability for new projects, the EAO is taking measures to ensure that permit requirements are linked to conditions on project approval certificates.³¹

It is hoped that the EAO audit will also recognize the following problems, and seek to remedy them.

The main issue is that even where commitments made by the company are incorporated into a project approval certificate, not all conditions imposed in the certificate are reflected in the binding operating permit for a mine. For example, a project approval certificate may contain provisions that require the company to address the potential impacts of the project on wildlife; yet this requirement may not appear in any of the permits issued for the mine to operate.

³⁰ Statement by EAO, Environmental Assessment Advisory Committee Meeting, 31 October 2000, Victoria. While 38 EA project approval certificates have been granted, only 37 are valid; the project approval certificate for the Tulsequah Chief Mine was overturned by the BC Supreme Court in January, 2001.

³¹ Personal communication with project assessment director, EAO, October 2001.

A second issue is that some regulatory conditions for environmental protection implied by the certificate may not be applied until a mine is operational. This can create problems during the critical construction phase. For example, the high potential for soil erosion from construction activities was identified during the South Kerness mine EA process. Regulatory safeguards such as water quality standards were not set out in a MWLAP effluent permit for the construction phase. Consequently, there was a critical gap in permitting and enforcement while that mine was under construction. There was no permit to enforce, thus, the MWLAP pollution prevention officers were not on site at a time when there was severe erosion/stream sedimentation, and subsequent impact on fish and other aquatic life.

Vague certificates or lack of consistent implementation create confusion for all stakeholders. Often the costs to the environment and to the company are greater as a result of this lack of certainty. Furthermore, this may result in the requirement for more government intervention, leading to greater conflicts and costs related to regulatory enforcement.

Clearly, the implications and outcomes of the EA process are significant for environmental enforcement. Meaningful, effective application of the EA process may reduce the need for enforcement at a subsequent time.

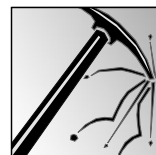
Recommendation: That all of recommendations of a project committee be reflected in the language and conditions of the project approval certificate.

Recommendation: That all of the requirements of an EA project approval certificate be mandatorily transposed into related permits and approvals.

THE *MINES ACT*

The *Mines Act*, which is administered by the Ministry of Energy and Mines, is the primary regulatory framework for mining in BC. It was designed to regulate mining activities during mineral exploration, project development, mine operation and closure. The *Mines Act* and the *Mines Act Health, Safety and Reclamation Code* (the Code) regulate the day-to-day activity in and around mine sites. They provide detailed information on worker health and safety issues, they are less detailed with respect to environmental protection. For example, section 10.6.1 of the Code, regarding reclamation, states:

It is the duty of every owner, agent, and manager to institute and during the life of the mine to carry out a program of environmental protection and reclamation, in accordance with the standards described in this section.



However, reclamation standards are loosely defined; for water quality, it is “a standard acceptable to the inspector.”³² For metals levels, the Act mentions harmful and safe levels of certain substances, but does not define harmful or safe.³³

Permitting

The Act establishes separate permit requirements for mineral exploration and mineral development. Prior to conducting exploration, an Exploration Activities and Reclamation permit must be obtained. The application for this permit is called the Notice of Work and Reclamation (NOW). The exploration permit authorizes exploration activities, and may contain terms and conditions to address issues and concerns raised during the review and referral of the Notice of Work. Generally, for both exploration and mineral development permits, the terms and conditions require that approved activities be carried out in accordance with the *Mines Act* and the Code.³⁴

Permits for mine development generally require the filing of a plan that includes various environmental criteria. There also must be a program for “reclamation of land and resources” (see below) from construction to closure and an estimate of the costs to carry out this program. Again, there is much discretion in the implementation of these requirements. The Chief Inspector retains the right to exempt mines from submitting these plans.³⁵ Section 10 of the *Mines Act*, which lists requirements and conditions for issuing permits, is virtually all discretionary; indeed, the Chief Inspector may even waive the requirement to obtain a permit.³⁶

Reclamation Bonding

The *Mines Act* states that the Chief Inspector of Mines may require security when issuing a permit under the Act for mine reclamation or for the protection of watercourses affected by the mine. If a security is required, the company estimates the cost of its proposed reclamation program, including the costs of long-term monitoring and abatement.³⁷ The amount and type of the bond are then established through a process of negotiation between MEM and the company, based on costs and risks. The details of the reclamation bond are outlined in the company’s *Mines Act* permit. In theory, bonds are set to cover the full costs of reclamation.

³² The Code: Section 10.6.10 (1) Watercourses shall be reclaimed to a condition that ensures long-term water quality is maintained to a standard acceptable to the inspector,

³³ The Code: Section 10.6.14 (1) Vegetation shall be monitored for metal uptake; (2) Where harmful metal levels are found, reclamation procedures shall ensure that levels are safe for plant and animal life.

³⁴ The description of proposed exploration activities in a Notice will be referenced in the Exploration Activities and Reclamation Permit, which authorizes the work program. (Mineral Exploration Code, Summary of Administrative Process, at <http://www.em.gov.bc.ca/Mining/Healsafe/mxready/MXCode05.htm#summary>

³⁵ See the mine permit provisions in sections 10(1) and 10(2) of the *Mines Act*, R.S.B.C. 1996, c. 293.

³⁶ *Mines Act*, section 10(2).

³⁷ The Code, section 10.1.2(6).

Inspections and Monitoring

The *Mines Act* establishes inspection requirements and protocols for worker health and safety,³⁸ but does not dictate or require inspection powers to be exercised for adverse environmental impacts, unless directed by the Chief Inspector.³⁹ This is yet another example of the excessive discretion afforded by the *Mines Act*. Given the broad scope of the potential environmental controls necessary to ensure an environmentally sound mine, concerns about this imbalance in the Act will be discussed below.

Enforcement

The enforcement provisions of the *Mines Act* are generally limited, but potentially significant where applied. Inspectors may order remedial measures, stop work or shut down a mining operation,⁴⁰ but only if the hazard poses a danger to persons or property; these provisions do not expressly envision harm to the environment. Arguably though, these provisions could be exercised to protect environmental damage to property off site. Enforcement of the Code involves ordering a person to comply. If a person fails to comply, the inspector's recourse is to apply to the Supreme Court for an injunction restraining the person from disobeying an order.⁴¹

The environmental provisions of the *Mines Act* and Code are either limited or too vague to enforce, making permit requirements the main provisions that govern the environmental behaviour of mines. However, the tools for enforcing *Mines Act* permits are extremely limited. The only real enforcement response is cancellation or suspension of a permit, an action that MEM staff are unlikely to take for all but the worst contraventions.⁴²

The only offences defined in the Act are interfering with an inspector, or contravening a provision of the Act, the regulations, the code or an order.⁴³ The maximum fine for violation of the act is \$100,000 or imprisonment for not more than 1 year. Further, there is potential for a maximum \$5,000/day for each day that the offence continues after receipt of notice from the Chief Inspector. Finally there is a provision that allows directors of the company to be liable for an *additional* \$100,000 penalty or imprisonment.

EXPERIENCE WITH THE MINES ACT

Two themes arise from this overview of the *Mines Act*. First, the primary emphasis of the Act and Code is on worker health and safety, not on environmental protection. Detailed requirements for health and safety are not mirrored in similar environmental protection

³⁸ *Mines Act*, section 15.

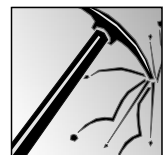
³⁹ *Mines Act*, section 7. "An inspector may, and on the direction of the chief inspector must, make an investigation of and report about an accident that has caused serious personal injury, loss of life or property, or environmental damage."

⁴⁰ *Mines Act*, section 15 (5).

⁴¹ *Mines Act*, section 35(2).

⁴² *Mines Act*, section 10(8) states that if a mine owner fails to comply with the conditions of a permit to the satisfaction of the chief inspector, then the chief inspector can cancel the permit and order the mining operation be stopped.

⁴³ *Mines Act*, section 37.



provisions. The limited environmental protection requirements are more general and defy objective, scientific outcome-based measures, making these provisions of the Act and its implementation somewhat unreliable.

Second, consistent application of the *Mines Act* may be hampered by an excess of discretion. Discretion to determine acceptable environmental quality is problematic because it does not ensure that standards are applied consistently either by the same inspector, or across regions by different inspectors.

Discretion in standards and enforcement is a concern with virtually all environmental legislation. For example, there is discretion in the *Waste Management Act* (WMA). However, regional waste managers under the WMA are primarily environmental regulators; unlike MEM officials who are answerable to a Minister who is responsible for promoting mining in BC and who may be less likely to proscribe mining activities. In addition, decisions made under the WMA can be appealed to BC's Environmental Appeal Board; there is no right of appeal to an independent, quasi-judicial tribunal available under the *Mines Act*. Thus, the discretion afforded under the *Mines Act* is of particular concern. *While discretion does not preclude people from doing good work; it tends to reduce the consistency and accountability for specific outcomes and standards of practice.*

Recommendation: That the *Mines Act* be amended to establish a right of appeal to the Environmental Appeal Board for decisions related to environmental matters.

Permitting

Mines Act permits cover a range of mining activities. The Act's focus on safe mine operation means that the permitting process cannot necessarily be relied upon as a means of ensuring environmental protection. In addition, the lack of cooperation and coordination between MEM and MWLAP with respect to environmental requirements at mine sites is well recognized. This lack of integration has, at various times, created delays, gaps in coverage, and poor data sharing. Fragmented jurisdiction is another problem. On-site problems are typically dealt with by MEM. Off-site environmental risks are the responsibility of MWLAP.

Reclamation Bonding

There is huge potential for environmental liabilities to accrue after a mine stops making money. In the absence of a bond, government has little recourse if the mining company is sold, or if its shares are transferred. Bonding ensures that government has access to funds to see that reclamation expenses are paid by the company.

Current estimates suggest that one-third to one-half of the reclamation liability is unfunded, although, according to MEM officials, this unfunded amount is considered to be low risk. In most cases, "hard" security must be posted, such as cash, irrevocable letters of credit, Canadian Government bonds, or term deposits for up to three years. In practice, under certain circumstances "credible companies" are allowed to self-assure and may not be required to post 100 per cent of their bonds up front. Where there are long-term concerns,

however, even credible companies may be required to post 100 per cent (such as Placer Dome with the Equity Silver Mine in northern BC).⁴⁴ Risk assessments to gauge the financial capacity of the companies and the risk of the project have not been formalized and are carried out on a case-by-case basis.

Currently, reclamation liability at BC mine sites totals \$400 million, while the sum available in security bonds is only \$172 million.⁴⁵ In some individual cases, reclamation bonds are woefully inadequate. For instance, in 1998, after the Huckleberry Mine in the Bulkley Valley was assessed as having only half the \$5 million bond necessary to cover off outstanding liabilities, the bond payments requirements were waived by the previous government as part of a bail-out package. Rather than doubling the bond to reflect real costs and liabilities, it was frozen. Now several years later, because the bond still does not reflect the potential environmental exposure, the taxpayers have absorbed the extra risks.

Of the various bonds posted for different mining activities the most common type forfeited are small exploration bonds. The clean-up of camp facilities, removal of fuel drums, and reclamation of access roads in these cases are left to MEM to complete to the best of its ability with available funds from the bonds (typically less than \$5,000). In these cases, the behaviour of various companies suggests that walking away and leaving someone else to do the clean-up is cheaper than doing the clean-up work themselves.

In the same way that an effective EA process eliminates the need for remedial enforcement action, meaningful and mandatory reclamation bonding ensures that mining companies live up to their commitment to minimize environmental harm, assume financial liability for their actions and obey the law. Reclamation bonding is another important item in the compliance toolkit.

Recommendation: MEM should complete a comprehensive policy with regard to reclamation bonding that is consistently applied across the province.

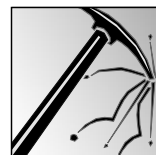
Inspections and Monitoring

The *Mines Act* does not specify the types of inspections that should occur at mine sites. The most frequent types of inspections conducted by MEM include health and safety, occupational hygiene, geotechnical, mechanical, electrical, and reclamation inspections. Inspection records are documented in the *Chief Inspector of Mines (CIM) Annual Report*.⁴⁶ This review has raised concerns both with the frequency and type of inspections being conducted, in particular, with regard to exploration. Mineral exploration often occurs in remote areas, where there are many natural values and competing economic interests (e.g., guide outfitters,

⁴⁴ CCSG Associates, *Financial Options for the Remediation of Mine Sites: a preliminary study*. Prepared for MiningWatch Canada, July 6, 2001, p. 20.

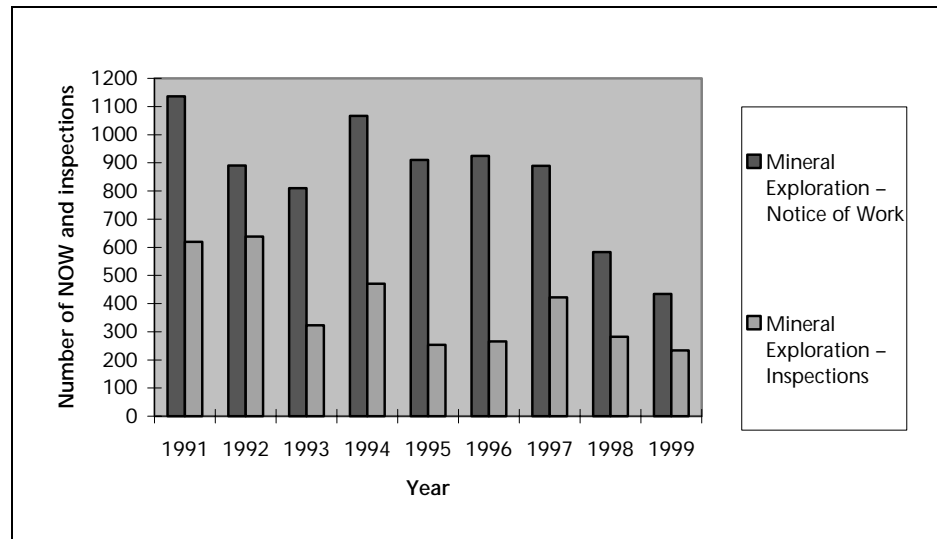
⁴⁵ Ministry of Energy and Mines, 2000. Presentation to the BC Reclamation Security Policy Committee.

⁴⁶ In 1991 and 1992, this report was known as the *Annual Report of the Resource Management Branch Mineral Resources Division*.



eco-tourism operators, trappers and others). These competing industries may be able to co-exist with responsible mining operations, but that co-existence can be threatened if the industry is not held accountable for its actions.

Graph 1: Number of Mining Activity Permits vs. Inspection of these Permits



Inspections of exploration sites are not being conducted on an annual basis

Mine exploration is often intrusive, involving road building, drilling, trenching and potentially thousands of tons of excavation at the bulk sampling stage. Graph Number 1 depicts inspections conducted at all exploration sites, in relation to the number of Notices of Work (NOW) for exploration projects.⁴⁷ From the graph, it is clear that there has never been a year when all exploration sites were inspected. Indeed, we were told that in one region, it is typical for inspectors to visit an exploration project, which may span several years, once in the initial exploration period, once during advanced exploration,⁴⁸ and once during the reclamation stage of the project.

If MEM is not inspecting all exploration sites, and MWLAP does not regularly play a role in this regard, exploration companies are effectively left to self-regulate.

Where exploration is conducted in sensitive wildlife habitat zones or riparian areas, this puts key environmental values at risk. This issue is of particular concern with the recent

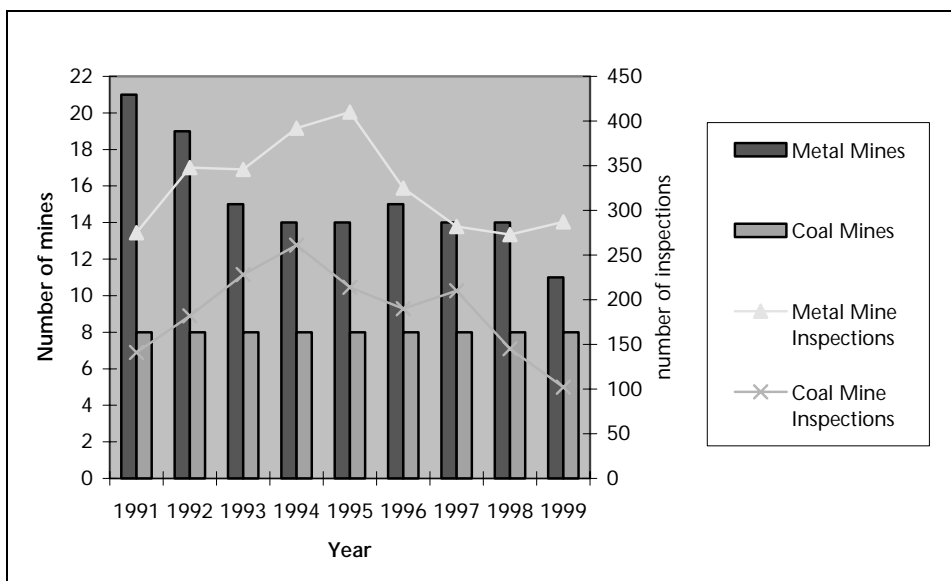
⁴⁷ Notices of Work contain information on a proposed exploration program. Once a NOW is screened by the Ministry, and the application is deemed acceptable, the work is authorized in an Exploration Activities and Reclamation Permit. A Notice of Work can cover several years of work. The statistics used above are from the *CIM Annual Reports*. Provides. Some, but not all of those reports mention that the NOW statistics represent exploration projects that have been *approved*, not simply those that have filed NOWs. Thus, for the purposes of this paper, we have assumed that the NOW statistics represent NOW approved, and therefore, they give a good representation of the number of active exploration sites.

⁴⁸ Advanced exploration is generally defined as the phase where geological and engineering considerations indicate that definition drilling, bulk sampling or underground exploration is required to fully evaluate a mineral or coal deposit.

completion of land use plans throughout the province which have a variety of Special Management Zone permit directions aimed at identifying and protecting valued ecosystem components within areas open to industrial activity. The establishment and enforcement of strong performance standards in these areas is of critical importance to the integrity of the land use plans and the reputation of the industry with other stakeholders involved in the implementation of the plans.

Recommendation: MEM should develop performance standards for NOWs based upon land use plans to ensure that the integrity of the land use planning process is respected.

Graph 2: Inspections Conducted at Operating Mines



The rate of inspections has dropped, despite consistent collection of a resource management fee

Graph 2 shows that the number of inspections conducted at operating metal and coal mines has steadily decreased since the mid 1990s, while the number of mines has stayed relatively constant.⁴⁹ One factor that clearly affects this trend is the number of inspectors employed by the MEM. An increase in inspections from 1991 to 1995 coincided with a 17 per cent increase in MEM staff, which resulted from an expansion of the MEM budget in 1992/93. Today, MEM employs just 28 inspectors.

⁴⁹ Source of data for the following three graphs: *Annual Report of the Chief Inspector of Mines/Resource Management Branch, 1991-1999*; and personal communication with Richard Booth of MEM to clarify some errors in the data.



In addition to an overall increase in the MEM budget, a “resource management fee” was introduced in the early 1990s to cover the cost of increased mine health and safety inspections to the mining industry.⁵⁰ This may have contributed to increased inspection capacity. But it, alone, was not enough to maintain a strong contingent of inspectors, because although this fee has been applied since 1992, and revenues from it have increased slightly with time, the number of inspectors and inspections has still fallen.⁵¹

Enforcement

MEM staff noted that their ministry is generally perceived (both within MEM and industry) to work cooperatively with the mining industry, while MELP is perceived to have a “policing” role. Most MEM staff appeared to prefer the fact that they did not need to issue fines in order to achieve compliance, and were adamant that their “working with industry” in no way compromised human and environmental health and safety. Staff noted that the ability of an inspector to threaten a stop work order or shut down pieces of equipment when practices or equipment do not meet the standards established in the *Mines Act* is usually adequate to ensure compliance.⁵²

⁵⁰ 1991-1992 Annual Report, Ministry of Energy, Mines and Petroleum Resources, p. 41. The fee was based on an assessment of 30 cents per \$100 of payroll, with a \$300 deductible per mine, and was imposed on all sectors including exploration, placer mines, sand and gravel and metal and coal mines.

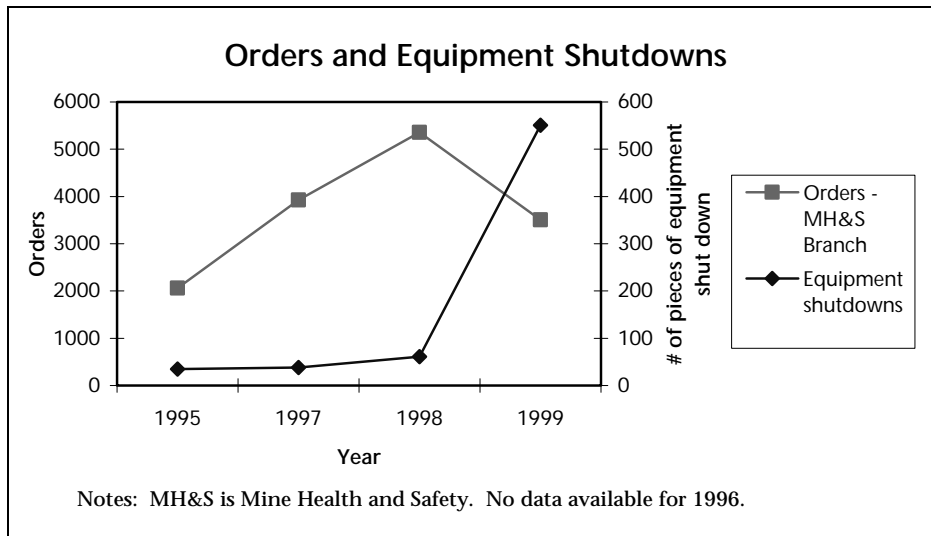
⁵¹

YEAR	FEES COLLECTED	SOURCE
1993/94*	\$1.19 million	93/94 Annual Report, p.35
1995/96*	\$2 million	95/96 Annual Report, p.45
1996/97	\$2.7 million	96/97 Annual Report, p.33
1998/99	\$2.5 million	98/99 Annual Report, p. 28

*Data from 94/95 are missing from the Annual Reports

⁵² MEM has rarely used the stop work order to shut down an entire mine site. In one region, the only example that was given was a placer mining operation being shut down because no one on-site would admit to being the manager. Most are not total site shutdowns – some examples include shutting down individual underground headings or a particular process in the mill, or a piece of equipment that is smoking. In 1995, 1996 and 1997, 35, 38 and 61 pieces of equipment were shut down, respectively (there were 22 active mines in 1995 and 1997, and 23 operations in 1996).

Graph 3: MEM Orders and Equipment Shutdowns



Shutting down a mining operation is indeed a powerful tool to ensure compliance. When mines stop operating, they stop making money. Revenue loss from a shutdown may be enough incentive for many companies to comply with regulations. But, as demonstrated in the Kemess case study below, an order may not always be adequate, particularly where a company is experiencing financial difficulties. Moreover, orders and shut downs may not always be issued prior to damage being done. Thus, there is much more that could be done to ensure that compliance is properly addressed beyond issuing orders.

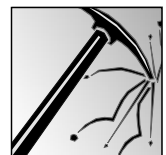
MEM is underutilizing the enforcement tools at its disposal

MEM has a number of different mechanisms available to it to ensure that the law is obeyed. For example, in 1999, the Forest Practices Board investigated non-compliance issues related to the construction of the power line to the South Kemess mine in northern BC. Ineffective enforcement allowed the licencees to continue to delay corrective actions for extended periods. The Board found that while MEM issued corrective orders under the *Mines Act*, it failed to enforce those orders and stated that this was a “significant breach of government’s enforcement duties under the (Forest Practices) Code.”⁵³

The Board was of the opinion that FPC provisions would have been a more effective and appropriate way to correct the problems at the Kemess site than using enforcement measures under the *Mines Act*. The FPC contains a range of enforcement provisions that enable the regional mines manager to impose administrative remedies, remediation orders and stop work orders, or enable government to carry out necessary works and impose a fine on the company in order to be reimbursed for incurred costs.⁵⁴

⁵³ Forest Practices Board Special Investigation 99002, *Significant breaches of the Forest Practices Code along the power line corridor for the Kemess South Mine*, June 2000, p. 21.

⁵⁴ *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c.159, Sections 117 (administrative remedies), 118 (remediation orders) and 123 (stop work orders). The Forest Practices Code, comparatively, contains a range of enforcement provisions that allowed the regional manager of mines, as a “senior



The FPC contains a range of enforcement provisions that enable the regional manager to impose administrative remedies, remediation orders and stop work orders, or enable government to carry out necessary works and impose a fine on the company in order to be reimbursed for costs incurred.⁵⁵ These mechanisms were recognized in the Forest Practices Board report on the South Kerness mine where it stated that enforcement of the FPC is the responsibility of all three government Ministries (MWLAP, MEM and MOF).⁵⁶

MEM justified its choice of using the *Mines Act* by saying that MEM staff had received only limited training in the application of the FPC; and that the MEM regional manager had no experience with exercising any powers under the FPC.⁵⁷

This recommendation applies to MWLAP as well. At the South Kerness mine, MWLAP and DFO laid charges under the *Fisheries Act* for sedimentation problems, yet only one of the 13 charges resulted in a fine, and no charges were laid for non-compliance with the requirements associated with construction of the power line, despite clear government recognition of this problem.⁵⁸ The Forest Practices Board was told that MWLAP decided not to investigate non-compliance at stream crossings along the power line corridor because “they believed it would be difficult to prove impact on fish or to identify the responsible parties,” and “that evidence would have limited value given the passage of time and limited information about fisheries values in the streams.”⁵⁹

The Board acknowledged that the problems outlined by MWLAP could limit the effectiveness of prosecutions under the *Fisheries Act*, but that those problems would not prevent effective enforcement of environmental protection measures under the Forest Practices Code. MWLAP officials are fully empowered “senior officials” under the Code, and can enforce the Code through penalties and remediation orders. .

MWLAP staff have informed the Board that they have had difficulties enforcing the Code for a number of reasons: inadequate funding and staffing; staff prefer to use other more familiar legislation, such as the *Fisheries Act* for enforcing environmental matters; and the fact that many of the higher level plans established through the land use planning processes are not enforceable. Until some of these challenges are overcome, there will continue to be a lack of enforcement of FPC by MWLAP.

Recommendation: Where other enforcement mechanisms, such as the FPC are available, MEM and MWLAP staff should receive the necessary training to understand how to use these tools.

official,” to impose administrative remedies, remediation orders and stop work orders to deal with any problems he or his staff observed. If remedial work is not done, government can carry out the work and impose a fine on the licensee to reimburse government for the costs of doing so.

⁵⁵ *Forest Practices Code of British Columbia Act*, Sections 117, 118 and 123.

⁵⁶ Special Investigation Report, p. 19.

⁵⁷ Forest Practices Board Special Investigation 99002, p. 13.

⁵⁸ *R. v. Royal Oak Mines*, (2001) 37 C.E.L.R. 290 (B.C. Prov. Ct.), Reasons on Sentence of the Honourable Judge M.J. Brecknell. See also Forest Practices Board Kerness Special Investigation Report, p. 19.

No Annual Public Reporting on Monitoring and Compliance

The *Chief Inspector of Mines (CIM) Annual Report*, required under the *Mines Act*, provides general statistics on the number of orders issued to mining companies in a given year, but limited detail on the nature or subject of these orders. Unlike MWLAP practice, there is no published non-compliance reporting system. The *CIM Annual Report* includes the number of orders and number of pieces of equipment shut down by mine health and safety inspectors but it does not include information on orders issued by inspectors involved in environmental (geotechnical or reclamation) issues.

Under the current system it is not possible to know what percentage of MEM resources are applied to environmental (as opposed to health and safety) issues. It is also unclear whether orders are issued repeatedly for the same offence.

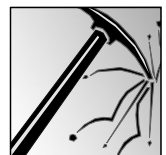
While a centralized Victoria database houses general statistics used in the *CIM Annual Report*, details on the orders at a particular mine can only be accessed from regional offices. This lack of published information makes it extremely difficult for the public to determine the type or nature of orders being issued on mine sites where they may be affected. Unless a person contacts the proper MEM regional office and speaks directly with an inspector, this information is inaccessible. Further, this lack of information means that there is no centralized system of records to understand generally how MEM's inspection and compliance powers operate.

Recommendation: MEM should be required to provide more information on inspections and the nature and types of orders being issued in its Annual Reports.

Recommendation: The *CIM Annual Report* should provide a more detailed breakdown of types of inspections and outcomes. Better explanation of trends, reasons for these trends, and results would improve the transparency, and public understanding of MEM's inspection efforts.

Recommendation: There is a need for compliance reporting and a summary of charges and penalties levied under the *Mines Act*, similar to that which is done by MWLAP.

⁵⁹ Forest Practices Board Kemess Special Investigation Report, p. 18.



THE **WASTE MANAGEMENT ACT**

The *Waste Management Act* (WMA) is BC's primary environmental law. The Act prohibits waste⁶⁰ from being introduced into the environment unless authorized by a permit, regulation or other approval.⁶¹

Permitting

The WMA requires that mines in BC operate under the authority of a waste management permit, which establish site-specific standards for discharge quality, quantity and location.⁶² Permits can also specify terms for the management of structures and impoundments, include monitoring and non-compliance reporting or follow up requirements.⁶³ Permits vary from region to region, and from mine to mine.⁶⁴

Inspections and Monitoring

A permit site inspection procedure manual establishes a system for recording all permit site inspections.⁶⁵ The procedure is not prescriptive. It simply states that "inspections shall be scheduled to ensure adequate surveillance of the permitted discharge." According to the procedure, a separate summary of compliance status is to be maintained on an on-going basis for each permit, and updated following each inspection or review of monitoring results.

Enforcement

Part 5 of the WMA sets out MWLAP's investigative and enforcement powers to ensure compliance with the Act. For the most part, these powers are exercised by MWLAP conservation officers. For example, the WMA authorizes officers to enter onto company property and investigate any activity that is or may be causing pollution. This power

⁶⁰ The Act's definition of waste includes, but is not limited to, air contaminants, litter, effluent (a substance that is discharged into water or onto land and that is capable of injuring the health or safety of a person, property or any life form) refuse, and special wastes.

⁶¹ *Waste Management Act*, R.S.B.C. 1996, c. 482, s. 3(5).

⁶² Discharges at mine sites may be to air, water or land, and may include: tailings pond water (superatant), sewage, garbage/refuse, mill effluent, treated acid mine drainage, seepages from waste rock piles, sludge from water treatment plants, and air emissions, from for example, a water treatment plant.

⁶³ For example, at the Golden Bear Mine near Dease Lake in northern BC, the permit states that "The Permittee shall immediately notify the Regional Waste manager of any non-compliance with the requirement of this permit and take appropriate remedial action. Written confirmation of all non-compliance events, including available relevant test results, is required by facsimile within 24 hours of the original notification unless otherwise directed by the Regional Waste manager."

⁶⁴ "Consideration of federal requirements for the MMLER and the *Fisheries Act* may be incorporated into WMA permits through consultation with Environment Canada during the permit application process. In situations where the provincial requirements are more stringent than the federal Regulations, the provincial standards apply." MMLER report, p. 5.

⁶⁵ "Permit Site Inspections Procedure Manual," *MWLAP Environmental Compendium*, Volume 8, Section 1, Subsection 04.03.

includes the ability to conduct inspections, carry out testing, as appropriate, or examine and remove records relating to the pollution.⁶⁶

The WMA also authorizes Regional Waste Managers to issue orders to prevent or stop pollution. These pollution prevention and pollution abatement order powers are broad, and include current and past owners or occupiers, regardless of whether they actually caused pollution at a site.⁶⁷ Finally, the Act authorizes the Minister or a manager to suspend or cancel permits or approvals where the permit holder fails to meet terms and conditions of permit or approval; or fails to comply with an order issued under the Act. Additional powers exist where a site is “contaminated”; in such cases, MWLAP can issue remediation orders, and require other actions to ensure clean-up.⁶⁸

MWLAP’s ability to suspend or cancel permits is akin to MEM’s ability to issue stop-work orders or shut down mines when equipment or practices are unsafe. If a mine loses its WMA permit, it would, in most cases, have to mining or stop processing the ores.

However, the ultimate means of enforcement is MWLAP’s ability to prosecute polluters including the company officers and directors. This is the main enforcement provision in the WMA, and may have more impact than suspending permits or issuing pollution prevention orders. For minor violations, MWLAP can issue a ticket instead of initiating a court process. Tickets are akin to *Motor Vehicle Act* infractions; they are simple ways of entering a guilty plea and agreeing on a penalty. As with vehicle infractions, violators can contest the charge in court.

EXPERIENCE WITH THE *WASTE MANAGEMENT ACT*

While the WMA appears to contain ample powers to ensure that the environment is protected, there is a high incidence of non-compliance with WMA permits in practice. As will be shown below, many incidents are going unnoticed, due to lack of inspection and monitoring capacity; and of those that are noticed, many are likely not penalized, due to a lack of enforcement.

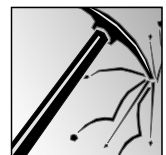
Permitting

The procedure for suspending activities permitted under the WMA is different from that used by MEM under the *Mines Act*. While MEM inspectors have the ability to issue on-the-spot stop-work orders, MWLAP inspectors do not. MLWAP regional waste managers can suspend and cancel permits, but because the manager is not the one inspecting a mine, there is a time lag between the observance of a problem and the suspension of the permit. In these cases, MWLAP’s practical role is limited to mitigation and damage control, not pollution prevention.

⁶⁶ WMA, ss. 29 and 30.

⁶⁷ WMA, ss. 31 and 33, respectively. Some representatives of the mining industry, and indeed the MEM itself, proposed that the mining industry be exempt from these ordering powers in 2000.

⁶⁸ WMA, s. 27.



Government appears to prefer to amend permits to increase pollution instead of prosecuting violations

When some permit breaches occur, rather than penalizing the company, the permits are amended to increase emission levels so that the company is no longer out of compliance. It is understandable that some requirements may change as mine plans or waste disposal options change, or as the Water Quality Criteria,⁶⁹ which form the basis for many of the standards found in effluent permits, are adjusted. It is also possible that a permit that reflects the most stringent possible standards be amended if necessary, instead of permitting lax standards from the beginning.

What raises concerns, however, are incidents where effluent permit standards are amended to allow companies to discharge *higher* concentrations of potentially harmful substances. This commonly occurs when a company has had problems achieving compliance with the concentrations set out in its permit.

For example, at the Eskay Creek mine, south of the Village of Iskut, oil and grease discharges exceeded permitted levels in February 1999; the permit was amended in March 1999 to increase allowable levels. In April 1996, nitrite levels were exceeded at the Snip mine on the lower Iskut River; the permit was amended to increase the allowable levels. In July and September 1996, and twice more in January 1997, nitrite exceeded the amended permit level at the Snip mine. This repeated non-compliance of the permit did not result in a fine or penalty.⁷⁰

This practice does not appear to be consistent with the WMA, which authorizes permit amendments where considered necessary, “and for the protection of the environment.”⁷¹

MWLAP has also allowed amendments that change monitoring locations once contaminants have been identified. For example, at the Golden Bear mine near Dease Lake in northern BC concentrations of mercury in the tailings water were higher than allowed.⁷² Instead of being required to pinpoint the cause of the problem and resolve it at its source, the company was allowed to continue discharging high concentrations of mercury into the tailings impoundment, as long as it did not show up in the water at the new monitoring location downstream.⁷³ Such an approach to the non-compliance issue does not increase our understanding of the mercury problem, so that we can learn how to prevent this from happening at this or other sites in the future.

⁶⁹ *British Columbia Approved Water Quality Guidelines (Criteria)* - 1998 Edition, updated 17 January 2001.

⁷⁰ MWLAP, Skeena Region mine files.

⁷¹ WMA, s. 13(1).

⁷² It was decided that instead of monitoring the concentrations in the tailings water, that the company would be allowed to measure the concentrations in water under the tailings impoundment (because that is where the tailings water would eventually end up and mix with the receiving or natural environment). While government employees who approved the amendment change were confident that mercury would not appear in the water beneath the tailings impoundment (due to chemical reactions that would bind mercury to the tailings materials), and would not allow it to leach out into the groundwater, they acknowledged that they still don't know why the concentrations of mercury were so high. These high concentrations were not predicted by the company.

⁷³ Personal communication with MWLAP pollution prevention officer, and Lisa Sumi, 30 August 2001.

Where permits have been amended to allow higher discharge levels of certain substances or the shifting of a compliance monitoring point, a company is generally required to carry out an environmental effects monitoring (EEM) program, where they will observe a number of different types of organisms in the receiving environment to determine whether or not their health is deteriorating because of the increased discharge of that particular substance.

Increasing permitted emission levels raises a number of concerns:

Lack of certainty increases environmental risk

Changing permit levels first and studying later creates considerable environmental risk, particularly where risks to the environment are greater because of an increase in contaminant discharge. This is essentially a 'post-mortem' approach to environmental management wherein companies are not asked to prove the safety of increased pollution prior to being allowed to pollute. This increases the potential for harm to the environment.

Greater uncertainty in expectations for both public and industry

Permits establish standards, and a degree of certainty, for companies, government and the public. Changes in permitted discharge levels mean that companies are not bound by their original permit standards. Can the public be assured that a permit level means something when it is set? Can industry be sure it is setting up its technology and its management practices for the 'right' standards?

When permit requirements shift with time, it means that the values set in a permit act as guidelines; not specific accountable outcomes which companies need to invest in and take seriously. It also casts doubt on the basis on which the initial contaminant levels in the permits were set in the first place. Were they set on scientific standards? If so, has the science changed? Why are they negotiable? These uncertainties beg questions about the rationale used for setting the amended standards. Industry regularly demands science-based justification for increases in regulatory standards. Thus, any reduction of established standards should similarly require proven scientific rationale.

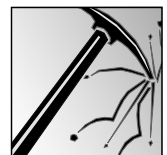
Easing permit requirements encourages irresponsible business practices

A company has nothing to lose in applying for a permit amendment. It is undoubtedly easier and less costly to apply for a permit amendment than obey a permit, particularly if obeying requires implementation of new technologies or construction of new works on site to control pollution.

Easing permit requirements for some players sends a mixed signal to markets about investing in environmental solutions

History shows that clear and firm regulations drive innovation and excellence, creating new opportunities for industry.⁷⁴ If the playing field is not level, companies who make sound investments in pollution prevention will be unfairly undercut by those who do not comply

⁷⁴ Porter, "Green Competitiveness," *Scientific American*, April 1991.



with the law, thereby undermining the incentives to comply and innovate towards better practices.

There is no guarantee that EEM studies will effectively predict or detect impacts related to increased contaminant levels

It is difficult to predict contaminant pathways and to identify species most sensitive to increased contamination. Concentrations of some substances may not reveal obvious environmental effects until a threshold level is achieved. Consequently, it is possible that this threshold might not be attained until some time after the mining operation has closed down and an EEM program has ceased. This is particularly likely with metals that accumulate in sediment or in the tissues or organs of various organisms. Finally, little is known about how the presence of how toxic metals interact with one another in the environment. Even the most comprehensive EEM monitoring may not capture these impacts. EEM programs cannot be a substitute for regulation of traditional parameters.

Toxic Ptarmigans: We have known for years that aquatic organisms are sensitive to high levels of cadmium. But only recently, a study has found that terrestrial species are also affected by high levels of cadmium in watercourses.

The unpredicted pathway? Streamside willows tap into river water, and take up cadmium. The ptarmigan feed on the willow, ingesting the cadmium. The study showed that ptarmigan accumulated high levels of cadmium from the willow, which caused them to have brittle bones, lay fewer and have more fragile eggs, raise fewer young and have higher mortality rates than healthy birds.⁷⁵

If the amendment leads to environmental damage, what then?

If companies are allowed to discharge higher concentrations of pollutants, what are the ramifications if the EEM studies show a negative impact on the environment? Will the company be charged, retroactively, for polluting? Or is that impossible because the government, by amending the permit, has essentially condoned the polluting activity? Are governments liable for condoning increases in polluting activity, particularly when it is not “for the protection of the environment,” as required by the WMA?

Recommendation: Strict, transparent, science based criteria should be developed by MWLAP to determine under what circumstances amendments increasing permitted emission levels will be considered acceptable.

⁷⁵ James Larison, “Cadmium toxicity among wildlife in the Colorado Rocky Mountains,” *Nature*, 13 July 2000, vol. 406, pp. 181-183.

Inspections and Monitoring

MWLAP exercises a significant amount of discretion in determining non-compliance, and in choosing to amend permits when non-compliance occurs. Our research raises concerns about another aspect of non-compliance – namely, incidents of non-compliance that go unnoticed. This is occurring largely because there are no longer resources to conduct adequate inspections and monitoring. Repeated budget cutbacks have resulted in a sometimes sharp decline in regular inspections. In the past, sites were visited as many as eight times a year, but in some regions this number has been cut in half. More remote mine sites may not be visited at all.

Inspections may not be occurring; no news is not necessarily good news

According to one staff member, “many incidents of non-compliance could be found if [they] were on-site looking, but all of that requires resources...”. Determining non-compliance requires staff to conduct site visits and that monitoring data be reviewed. Neither occur on a regular basis now.

MWLAP staff have a tremendous workload. While field staff make a serious effort to ensure that the environment is protected, the constraints of limited resources inevitably mean that some elements of MWLAP’s mandate suffer. Even in this period of relatively slow mineral activity, MWLAP staff who deal with mining cannot inspect or monitor mine sites adequately, including conducting appropriate reviews of water quality data.

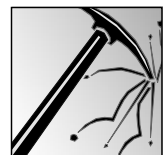
These concerns do not exist in the mining sector alone. A 1999 Report of the Forest Practices Board audited the government’s framework for enforcement of the *Forest Practices Code*, and reached a similar conclusion: funding limitations seriously constrain the ability of MWLAP to perform its enforcement duties, particularly for inspections.⁷⁶ The Report recommended increased assessment of the performance of compliance and enforcement measures.⁷⁷

A quantitative report of inspections and monitoring frequency is not possible given the availability of current records or information.⁷⁸ Our research, however, shows the following troubling trends:

⁷⁶ Forest Practices Board, *An Audit of the Government of BC’s Framework for Enforcement of the Forest Practices Code*, December 1999, p. 20. The report also states that “MWLAP has a long-standing conservation officer service that has assumed the ministry’s lead in enforcement of the statutes under its mandate, primarily through an investigative and enforcement-focused approach... Apart from the largely investigative performance of conservation officers, and with cutbacks to habitat protection officers, the ministry has a limited and uneven inspection capability and presence across its regions.”

⁷⁷ See Forest Practices Board, *An Audit of the Government of BC’s Framework for Enforcement of the Forest Practices Code*, December 1999, p. 6.

⁷⁸ We were hoping to be able to determine frequency of inspections by examining the files in the regional offices. The files kept on hand, however, date back only a few years (or less) or are archived in a government warehouse.



The ability of government to perform water quality sampling has diminished

MWLAP relies on company-collected water quality monitoring data. In the past, MWLAP staff would periodically collect their own samples as a means of reviewing company data and confirming that sampling methods were reasonable. In the Skeena region, when there was a mining technician, water quality samples were taken during site inspections. Currently, there is only a Pollution Prevention Officer and samples are rarely collected. Samples are collected infrequently in the Omineca-Peace region as well.

This diminished capacity raises concerns about government's ability to ensure adequate controls over monitoring data. In this regard, a study of two US pollution-monitoring programs that rely heavily on self reported data is noteworthy. The study concluded that Environmental Protection Agency oversight of pollution monitoring programs was unacceptable – regulators had inadequate controls to detect errors or fraud in sampling data, and most states rarely examine sampling procedures during basic inspections of facilities.⁷⁹

The ability to review monitoring data has declined

Weekly or monthly monitoring data submitted by companies is reviewed by staff on a regular basis. Yet, the ability to review and comment on monitoring data dropped dramatically when staff cutbacks eliminated mining technicians. Among other things, mining technicians used to write letters to mining companies, acknowledging receipt of monitoring data, and addressing any incidents of non-compliance. MWLAP staff noted that a monthly letter to the company was a good thing, regardless of whether or not there was a non-compliance problem, so the company would know that its data was being reviewed.

The importance of formal correspondence cannot be underestimated. A paper record outlines the responsibilities and expectations of the company in the event of a problem, and is also a means of holding the company, or responsible government officials, accountable if a problem worsens and serious environmental damage occurs. MWLAP's role in outlining company obligations is essential; if these responsibilities are not formally explained on paper, then it is virtually impossible to confirm that the company was aware that it had to act. For example, there is a recent situation where a mine has been collecting additional monitoring data but will not share the results with MWLAP, even though they have asked for it verbally, *because there is nothing in writing requiring them to do so.*

Recommendation: MWLAP should implement a more consistent outcome based permitting system that requires companies to meet specific environmental performance targets with a clear set of rewards and penalties associated with success or failure to meet those outcomes.

⁷⁹ US General Accounting Office, Environmental Enforcement: EPA Cannot Ensure the Accuracy of Self-Reported Compliance Monitoring Data, Washington, March 1993. The two programs surveyed were the wastewater discharge program or National Pollutant Discharge Elimination System (NPDES) under the *Clean Water Act*, and the hazardous waste program under the *Resource Conservation and Recovery Act*.

Recommendation: To encourage greater accountability to the public this outcome-based approach, a reporting system that allows for ongoing, up-to-date and publicly available information on the status of company performance at each mine.

Spills of environmentally harmful materials are often not adequately reported or investigated

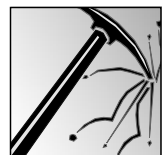
Twelve per cent of reported spills in BC between 1992 and 1995 were traced to mining operations. But, the vast majority of these spills did not result in on-site investigations. For example, there is a large file of spill reports for the South Kerness mine starting in 1996,⁸⁰ the year it went into construction, yet the regional spills officer did not visit the site until July 2000.⁸¹

Spills officers will often not go to mine sites because of their remoteness. If an inspector is unable to visit a mine site shortly after a sediment or toxic spill occurs, evidence required to successfully prosecute the company may be gone by the time the next inspection occurs. While companies are expected to report spills immediately, there have been several cases of spills not being reported in a timely way.⁸² It is common for MWLAP staff to require increased water quality sampling after a spill has occurred, however, any delay means that the contaminants may have already been carried downstream by the time the company collects the water samples. The violation of standards and the impact on the environment occurs without cost to the company and there is no incentive to avoid future failures.

⁸⁰ There were 28 spills reports related to the South Kerness mine between January 1996 and July 9, 2000. (Source: Omineca-Peace region spills file for Kerness).

⁸¹ Personal Communication. MWLAP Omineca-Peace Region staff and Lisa Sumi, during site visit of the South Kerness mine, July 2000.

⁸² For example, North American Metals was late in reporting a 5000 m³ spill of polishing pond water (Skeena region investigations report, PE8419, 94/09/22); Placer Dome failed to report a tailings spill (Skeena region investigations report, PE1307, 93/08/24); Imperial Metals was late in reporting a 2000-3000-gallon spill of tailings (MWLAP Dangerous Goods Incident Report # 93509, 6 March 1999).



6. COMPLIANCE REPORTING: PUBLIC ACCOUNTABILITY FOR ENVIRONMENTAL OUTCOMES

We reviewed and analyzed information published by MWLAP with respect to environmental compliance. Much of this section addresses environmental compliance generally, using mining as an example. The information compiled in this section also provides a more realistic overview of the state of environmental compliance if considered more broadly; as we found that there is very little information available on mining enforcement.

This section of the report is divided into 3 parts: a review of MWLAP's non-compliance reporting practices as they relate to mining; an assessment of MWLAP's Charges and Penalties Summary; and an evaluation of the economics of enforcement, based upon the information found in the Charges and Penalties Summary.

ENFORCEMENT: NON-COMPLIANCE REPORTING

MWLAP annually publishes a list of companies that have violated environmental laws. This Environmental Protection Non-Compliance Report (NC Report) used to be published bi-annually, but MWLAP recently reduced this to once a year.⁸³ We believe that regular is vital for government accountability and for making information about polluting activity at the local level available to the public. However, based on a review of reports dating back to 1993, it is clear that MWLAP's Non-Compliance Reports are not comprehensive, nor fully reflect the scope and severity of non-compliance faced by the Ministry. MWLAP's procedure for determining the contents of its non-compliance list is both discretionary and selective, in that it "identifies operations whose compliance record during the reporting period was of concern to the ministry."⁸⁴

The NC Report only tells a partial story

There are more incidents of non-compliance at mine sites than appear on the NC Report. Table 2 provides some examples of number of recorded incidents⁸⁵ of non-compliance with

⁸³ In response to a freedom of information request by West Coast Environmental Law, MWLAP released a Non-Compliance Report covering an 18 month period from October 1999 to March 2001 in August 2001.

⁸⁴ According to MWLAP's published web-version of the NC Report (<http://www.elp.gov.bc.ca/epd/epdnon/epnr.html>), the report "identifies operations whose compliance record during the reporting period was of concern to the ministry. The concern may be with regard to operations authorized by waste management permits, approvals, orders, waste management plans, operational certificates and regulations or with another activity, limitation or requirement under the Waste Management Act." NC Reports do not include minor non-compliance concerns such as minor exceedances or failures to submit monitoring data on time.

⁸⁵ In the Skeena region an "investigations file" is kept for each mining operation. This file contains documentation of non-compliance events, such as incidents where company monitoring data show that they have exceeded the pollution levels allowed in their permits; where required monitoring data has

permits, versus the number of times these mine sites have appeared on the NC Report. It indicates that the NC Report is not reflective of the real extent of non-compliance with the WMA.

This list is not exhaustive, and is based only on a subset of MWLAP's regional mine site files. Thus, it is likely that a more thorough review of all regional offices, and experience with other industrial sectors, such as oil and gas, or the pulp and paper sector, would reveal more incidences of non-compliance.

Table 2: Discrepancies between MWLAP Investigation Files and the NC Report

Mine	Time frame	Number of Entries in Investigation File	Number of times on the NC Report
Golden Bear	Sept 93 to Dec 98	13	0
Snip	Jan 91 to July 99	11	1
Eskay Creek	Oct 93 to Aug 00	29	3
Huckleberry	Jan 99 to June 99	7	1

Repeat offenders are common and apparently undeterred

Table 3 lists mining companies that appeared on the provincial NC Report more than three times for the same problem.

Appearance on the NC Report may not actually be changing company behaviour, as each of these corporate polluters repeatedly appear on this list. This may be sending a message that it is acceptable for current polluters to continue polluting, and to potential polluters that non-compliance is tolerable, and that there will be little or no consequences for violation of the WMA. The fact that the same mining companies continue to be reported for the same infractions year after year is a serious problem, and points to the need for stronger enforcement practices to respond to chronic non-compliance.

not been received by MWLAP; where spills of chemicals or fuel have occurred; or where tailings dam breaches, seepages leaks from pipelines or mill upsets have occurred.



Table 3: Mining Companies Who Appear Repeatedly On The NC Report between 1993 and 2001

Company	Issue	Number of Times Issue is on NC Report
Candorado	Non-compliance due to the failure to submit groundwater monitoring data and conduct dustfall monitoring as required by permit	6
Cominco	Various infractions related to air emissions from the lead smelter	14
Cominco	Breached lead smelter effluent permit requirements for a variety of substances, e.g., dissolved zinc, dissolved cadmium, copper, etc.	13
Copper Beach Estates Ltd.	Failure to collect all AMD and to discharge at depth to Howe Sound as required by a 1981 pollution abatement order; based on ministry information	13
Placer Dome	Infractions such as failing to maintain works as required by permit; poor berm construction at seepage recovery pond; exceeding permit limit for total suspended solids	6

Several other mines located across the province have appeared on the NC Report more than once:

- Bull River Mineral Corp. (three times, most recently in August 2001);
- Elkview Coal Corp. (twice, most recently in October 1998);
- Eskay Creek Mine, Homestake Canada/Prime Resources (three times, last time in November 1999);
- Fording Coal (twice, most recently in August 2001);
- Gibraltar Mine (twice, last time in September 1996);
- Inmet Mining Corp. (twice, most recently in March 1998);
- Premier Mine, Boliden Inc. (twice, last time in September 1996);
- Samatosum Mine, Inmet Mining Corp. (twice, most recently in March 1998);
- Snip Mine, Prime Resources Inc. (twice, most recently in June 2000); and
- South Kemess Mine, Northgate Exploration Ltd. (twice, most recently in June 2000).

ENFORCEMENT: CHARGES AND PENALTIES SUMMARIES

MWLAP's Charges and Penalties Summary Under Environmental Protection Legislation in BC for the past 5 years is available on the MWLAP website. We have reviewed these summaries; what follows are our comments and concerns based on the information available. The numbers below are based on province-wide environmental infractions of 5 different federal and provincial laws; they are not unique to mining.⁸⁶ These numbers indicate that the application of legal mechanisms, such as laying charges or fines, is underutilized, and support inferences about lack of meaningful enforcement drawn through our field research.⁸⁷

We recognize that measuring compliance is exceedingly difficult, and effective compliance and enforcement uses a variety of tools, ranging from informal relationships to actual prosecution. Yet the threat of prosecution or fines is an essential ingredient in the deterrent capacity of an enforcement regime.

Table 4: Summary of Environmental Infractions For All Industries

	95/96	96/97	97/98	98/99	99/00	TOTAL
Number of charges laid	219	270	237	77	165	968
Number of occurrences where charges laid ⁸⁸	49	60	38	27	23	197
Number of occurrences where all charges laid were stayed	9	19	15	9	17	69
Number of occurrences where all but one of the charges were stayed	8	20	8	3	21	60

Our key concerns based upon the information in Table 4 are:

⁸⁶ The environmental legislation and regulations included in this report are the *Waste Management Act*, R.S.B.C. 1996, c. 482, *Water Act*, R.S.B.C. 1996, c. 483, *Pesticide Control Act*, R.S.B.C. 1996, c. 360, the habitat protection provisions of the federal *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Forest Practices Code of BC Act*, R.S.B.C. 1996, c. 159. As well, this information may not be exhaustive, as a number of these annual summaries make a distinction between information disclosed in the report and information that is not disclosed in the report, and the system used by MWLAP to input this data may not be entirely up-to-date (Conservation Officer Reporting Service).

⁸⁷ The information in this section is based upon our detailed review of the statistics found in the Charges and Penalties Summary. This information was collated by categorizing and counting the charges indicated manually; we do not guarantee that our numbers are absolutely precise, as there are nuances in the data available. We are confident that these numbers do present a realistic "snapshot" of the extent and type of charges and penalties that are laid in BC.

⁸⁸ The number of occurrences was calculated based upon the number of charges laid. Where there are numerous charges for the same violator and the same date, we assumed that this is one occurrence.



The number of charges is significantly higher than the number of occurrences identified

Whereas the Summaries indicate that the total number of charges laid over the past 5 years is almost 1,000, closer review reveals that charges were only laid in some 197 occurrences. Many of the charges laid for the same occurrence are issued against different corporate directors, or under different legislation for the same infraction. For example, in the 99/00 report, 67 charges were laid against Eurocan Pulp and Paper in Kitimat, all on the same day. While laying multiple charges is generally good, we have concerns about situations where all charges end up being stayed. Thus, the table above indicates that while the number of charges is high, the number of occurrences or polluting events where MWLAP pursued charges is significantly less.⁸⁹

Laying a charge will not necessarily result in a penalty

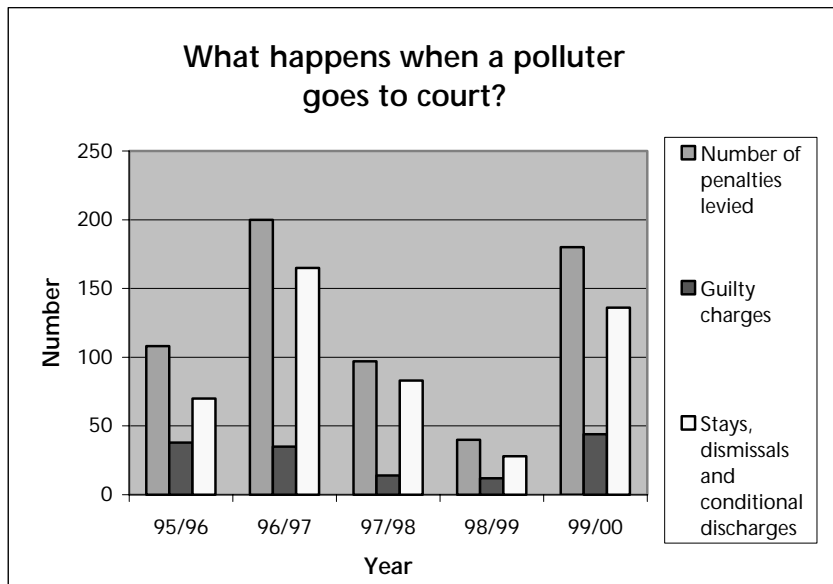
Comparing the number of times charges are laid to the number of times charges are stayed, it is clear that one in three charges are stayed. This means that approximately one third of violators charged never go to court, and are not subject to any form of legal penalty. While there may be legitimate reasons for staying charges, such as proof of due diligence or evidentiary concerns, we are concerned about this trend overall.

While charges laid in one year may not be adjudicated until a later year's cycle, it is clear that a relatively significant number of charges are stayed overall. In some instances, these cases may be resolved through plea bargaining, whereby a company charged with multiple offences will negotiate with the Crown to have some or all of the charges dropped in exchange for a guilty plea on one of the charges, or some other penalty arrangement. Plea bargains are subjected to approval by the court.

Graph 4 shows what happens when charges are adjudicated. For each of the years reported, the number of stays, dismissals or discharges has significantly exceeded the number of guilty determinations by a court. Given that a relatively high number of violators have all charges stayed, we are concerned that prosecution is not a meaningful deterrent in BC today. This indicator, combined with low penalties in situations where prosecution is successful, means that environmental enforcement may not be deterring polluters.

⁸⁹ Prosecution will generally be considered where available evidence indicates that there is a "substantial likelihood of conviction"; this is a relatively high threshold.

Graph 4: Court Dispositions of Environmental Infractions



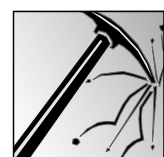
Ticketing is no more guaranteed to penalize a polluter than laying a charge

When a violation is found, MWLAP conservation officers have the option of issuing a ticket to the offender or laying a charge. A ticket is still a prosecution; it is a simplified process for entering a guilty plea. The decision to issue a ticket or lay a charge is discretionary, and usually based upon the severity of the offence. Tickets are often used for minor violations. The approach is similar to that used for *Motor Vehicle Act* infractions, and, in that context, is more cost efficient and effective than the standard criminal process of laying a charge and going to court.

However, a significant number of tickets may not be paid at all. Of the 451 tickets issued across all industries in BC in the time period, 280 resulted in a fine and the violator was guilty, but there are potentially 149 occasions where the ticket was withdrawn, dismissed, or no resolution was indicated. This is a high number considering that this is a simple administrative remedy to hold polluters accountable.

Table 5: What happens when a violator is ticketed

	95/96	96/97	97/98	98/99	99/00	Total
Guilty	53	33	45	32	117	280
Stayed	3	4	2	4	9	22
No resolution/ withdrawn/dismissed	30	24	27	37	31	149
Number of Tickets issued	86	61	74	73	157	451



THE ECONOMICS OF ENFORCEMENT

Recognizing that enforcing compliance cannot be measured stringently by statistics, it is also true that compliance cannot be evaluated on a purely financial basis. Nevertheless, the financial costs and implications of enforcement are indicative of the broader concern about resources allocated to environmental enforcement.

Table 6: Costs of Breaking the Law: Industry-Wide Amounts of Tickets and Fines

	95/96	96/97	97/98	98/99	99/00	Total
TICKETS						
\$200-350	15	7	16	9	41	87
\$500-600	37	22	29	23	64	175
TOTAL	52	29	45	32	105	263
PENALTIES						
\$0-999	11	2	2	3	9	27
\$999-9,999	22	16	3	6	16	63
\$10,000-19,000	1	3	4	2	3	13
\$20,000-\$50,000	1	1	2	0	7	11
\$50,000- \$75,000	1	0	1	0	0	2
\$75,000- \$100,000	0	1	0	0	0	1
NON-FINANCIAL	1	7	2	1	7	18
TOTAL	37	30	14	12	42	135

The data in Table 6 are drawn from the Charges and Penalties Summaries, and are based on province-wide environmental enforcement. Two main points arise from this table.

More often than not, violations of the law will be penalized with a ticket

In the past 5 reported years, MWLAP has issued almost twice as many tickets than it has had successful prosecutions (263 tickets in comparison with only 135 fines levied). Tickets are issued for the same infractions where prosecution is an option – MWLAP simply makes a decision to remedy the situation by issuing a ticket instead of pursuing a prosecution. Unfortunately, the dollar amount of the tickets is hardly significant enough to deter a major polluter. All but one of these tickets is under \$600.

A \$230 or \$575 fine is comparable to the cost of minor *Motor Vehicle Act* infractions. For example, a motorist who drives without insurance will be fined \$575, or can be fined up to

\$230 for speeding in a school zone. In the mining context the Huckleberry Mine was fined only \$2,000 in four tickets for a number of serious WMA infractions.

Amounts of fines are not enough to seriously deter major corporate polluters

Even where companies are subject to a more significant penalty, the vast majority of the fines are not a serious financial deterrent. In the past 5 years, 90 fines were under \$10,000, whereas only 45 fines were over \$10,000. These fines levied by the courts are generally inadequate to deter serious polluters.

In fact, the dollar value of fines is decreasing relative to the growth in our economy. A federal Department of Justice document indicates that between 1977 and 1988, fines for *Fisheries Act* offences ranged from \$2,000 to \$10,000. This average dollar amount has not changed in 25 years. In the Department of Justice's view, "a sentence should be a punishment, not a licence fee to pollute."⁹⁰

Maximum penalties available to judges under our environmental legislation are high, but have never been applied. Serious violations of BC's *Waste Management Act* or the federal *Fisheries Act* can result in fines of up to \$1,000,000. Subsequent offenders under the *Fisheries Act* can also be subjected to imprisonment for up to 3 years.⁹¹ These penalties have never been applied.

Table 7 summarizes the disposition of mining related charges based on the Charges and Penalties Summaries; the highest fine listed is \$18,000; and most infractions are punished through tickets. In terms of real impact on the company, economic theory would also require that these costs be discounted (in other words, that the future cost to the company in terms of ticket or penalty is even less significant). This trend of BC courts administering low fines is another enforcement failure.

⁹⁰ Department of Justice, *A Practical Guide to the Fisheries Act and Coastal Fisheries Protection Act*, Ottawa, 1995, Chapter 6, Section 2.

⁹¹ *Waste Management Act*, RS.B.C. 1996, c. 482, s. 54(3); *Fisheries Act*, R.S.C., c. F-14, s. 40(1) and (2).

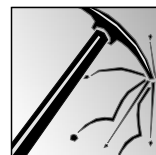


Table 7: Reported Environmental Infractions by Mining Companies

Year	Company	Action	Disposition
95/96	Ernie McLean and Nugget Creek Mining	14 charges laid for using water when not entitled to do so under the <i>Water Act</i> (s. 41(1)(o)); for introducing waste into the environment under the WMA (s. 3(2)); and for depositing deleterious substances into water frequented by fish under the <i>Fisheries Act</i> (s. 36(3))	In 96/97, all charges but 1 were stayed against Ernie Mclean; guilty for violation of s.3(2) of WMA; fined \$2,500. Nugget Creek Mining found guilty for violation of s. 3(2) of WMA; fined \$10,000
96/97	Thousand Hills Mining Ltd.	9 charges laid for harmful alteration to fish habitat and depositing deleterious substances into water frequented by fish under the <i>Fisheries Act</i> (ss. 35(1) and 36(3)); and for unlawfully constructing works under the <i>Water Act</i> (s. 41(1)(k))	No disposition indicated
	Westmin Resources	1 ticket for introducing business waste into the environment under WMA (s. 3(2))	\$200
97/98	Kinross Gold	1 ticket for failure to comply with requirements of an approval under the WMA (s. 54(7))	\$500
	Westmin Resources	1 ticket for unlawfully constructing works under the <i>Water Act</i> (s. 41(1)(k))	\$230
	Huckleberry Mine	4 tickets for introducing business waste into the environment under the WMA (s.3(2)), and for failure to comply with requirements of an approval (s. 54(6))	2 at \$500 2 at \$575
	Fording Coal	Guilty of harmful alteration or disruption of fish habitat under the <i>Fisheries Act</i> (s.35(1))	\$18,000
	Manalta Coal	1 charge of introducing business waste into the environment under WMA (s. 3(2))	No disposition indicated
	Jesse Lake Placer Mines	2 tickets for using water when not entitled under the <i>Water Act</i> 9s. 41(1)(p))	2 at \$230
99/00	Candorado	Guilty of 2 charges of failure to comply with the requirements of an approval under the WMA (s.54(6))	1 stay, 1 conviction; fined \$15,001; \$15,000 payable to Habitat Trust Conservation Fund
	Arrow Minerals	1 ticket for breaching the terms of a licence under the <i>Water Act</i> (s.41(1)(t))	\$230
	Elkview Coal	2 charges for introducing waste into the environment and failure to comply under the WMA (s. 3(1)(a) and 54(6))	1 stay, 1 conviction and fine of \$15,000
	Fording Coal	2 tickets for releasing special waste and failure to comply with requirements of an approval under the WMA (ss.4(2) and 54(7))	No disposition indicated

7. HOW THE LAW IS UNDERMINED

In addition to the problems with enforcement practices, there are a number of systemic barriers that work against effective implementation of the law. This section highlights ways in which the public's right to strong environmental standards is undermined. These limitations operate within the legal system and through the government's policy process. Again, while mining practices have formed the main focus for this study, these recommendations are applicable to environmental enforcement generally.

LEGAL LIMITATIONS

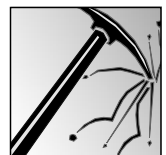
HOW THE LEGAL SYSTEM WORKS

In order to understand how the law is undermined, one must first understand how the law works. An individual or group who is concerned about environmental protection has three basic courses of action to pursue enforcement of the law – private prosecutions, actions for damages against the government, or applying for a judicial review of a government decision to exercise or not exercise enforcement authority.

The first mechanism, private prosecutions, provides citizens with the right to charge a polluter directly for violating a law. In theory, if a private prosecutor can prove, "beyond a reasonable doubt," that the company or individual is guilty of violating the law, then a court will subject the violator to the penalty or fine outlined in the statute under which the offence was committed. Private prosecutions are not permitted to proceed in BC at this time (see discussion below).

The second mechanism entails commencing an action for damages against the Crown for failure to enforce its own law. Such an action would be founded in the law of negligence, on the basis that the government, or Crown, had a duty to act in a particular situation, and failed to do so. There are a number of different ways in which these "regulatory negligence" actions could be commenced. Some examples include:

- The Supreme Court of Canada found the BC Department of Highways liable for a fatal accident where boulders came loose from a slope above the highway and fell on the plaintiff's car. The provincial authority was found negligent in implementing its system of inspections of rock faces for highway safety.
- The Federal Court of Appeal found Transport Canada negligent in its failure to enforce aviation safety regulations in the death of six persons in a small airplane crash. The evidence showed that prior to the crash, the aviation company consistently flouted



regulations and safety standards, yet Transport Canada only issued warnings and collected evidence.⁹²

This avenue is not widely available. The threshold for proving public authority negligence is high. To succeed, the plaintiff must prove that he or she suffered damage as a result. This is difficult to establish in situations where there is harm to the environment, as there is not always a direct private interest to be protected. Indeed, most of the cases that are successfully argued on this basis deal with fatalities or damage to property (such as negligent inspection or construction of buildings) based on failures in the regulatory system. In Canada, courts generally do not give damages for harm to public resources, as trees or fish have no “standing” to commence an action.

The third mechanism is an administrative law remedy, whereby a party commences a judicial review of a decision to not exercise enforcement authority. The success of this mechanism would be highly dependent on the obligations outlined in the government’s policy regarding enforcement, as courts have indicated that government can only be liable for a failure to enforce laws where there is a duty to act proscribed in policy. In such a case, the plaintiff would have to meet the standing test. If successful, this route may only result in the decision being sent back to the government decision maker. That decision maker would then reconsider the issue ensuring that all legal requirements were followed; it would not necessarily result in a different decision or a remedy for environmental harm.

Generally, recourse to the legal system, be it a private prosecution (in jurisdictions where they are permitted), or a civil or administrative action, is costly and time consuming, and is never the first course of action for an aggrieved person. It also offers an after the fact remedy, that compensates harm financially, but does not prevent the damage from occurring or protect the environment.⁹³

THE ROLE OF THE COURT

We routinely assume that those who break the law face the consequences of their actions in court. As we have seen, however, there are many instances where infractions go unnoticed or unidentified. Court is a last resort for dealing with non-compliance, and very few violators ever appear before a judge. In part, this is because the prosecution process is perceived as time consuming and costly. However, if used promptly and effectively, prosecutions can be an efficient remedy. Perhaps the strongest deterrent to a chronic polluter is the stigma and cost associated with a strong conviction. Court is a key means to ensure that compliance is taken seriously.

According to Environment Canada, enforcement of standards is part of an extended process of research, communication, negotiations and, if necessary, punitive action. It identifies eight stages to its enforcement cycle, which can take anywhere from 5 to 10 years. In practical terms only one half to two percent of all polluters will be prosecuted for violating

⁹² *Just v. B.C.* [1989] 2 S.C.R. 1228 (S.C.C.) and *Swanson Estate v. Canada* (1991), 80 D.L.R. (4th) 741 (Fed. C.A.).

⁹³ Unless a plaintiff is seeking an injunction to stop environmental harm from occurring, which has an even higher threshold, and is an even more difficult case to make before a judge.

environmental legislation, and only ½ to 2 percent of the polluters in an industry group will actually be convicted and fined.⁹⁴

In a recent prosecution of Royal Oak Mines for violation of the *Fisheries Act*, a BC judge increased the sentence that had been agreed upon by both BC and federal counsel as being inadequate to deter the company in the future. The judge also noted that the fine originally proposed by the prosecutors in this case was a mere 1/300th of the maximum allowed under the *Fisheries Act*.⁹⁵

It is arguable that the low number of charges and fines means that compliance with the law is generally good. While this would be a comforting conclusion to draw it is an unlikely one. Both the federal and provincial governments admit that they do not have adequate resources to enforce their laws. The number of repeat offenders on the NC Reports, the fact that internal investigations files reveal more permit breaches than are reported, and the steady decline in inspections and monitoring indicate that the low number of charges and fines means that there are significant but often hidden problems with compliance.

There is no question that courts play a role in ensuring deterrence. Clear, consistent and strong sentencing guidelines, that establish minimum mandatory penalties would alleviate situations like the Royal Oak case above. Courts can be a lever in effective enforcement; making fines more predictable would aid in making them a better deterrent.

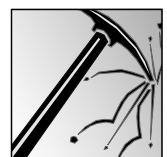
Recommendation: Government sentencing guidelines should be publicly reviewed, strengthened and should impose minimum mandatory penalties.

THE PRIVATE PROSECUTION STAY POLICY – REPLACING CITIZEN ACTION WITH GOVERNMENT INACTION

The right of a private citizen to charge a polluter for a violation of a law, or for failing to adhere to the terms of a licence or approval exists in theory, but not in practice, in BC. One of the underlying principles the common law is that private citizens are entitled to seek to enforce our laws at their own behest. This ability to bring a private prosecution, which is

⁹⁴ The 8 phases are: Problem Definition and Scientific Assessment; Development of Best Management Practices; Development of Formal Inspection Techniques and Compliance Promotion; Expanded Inspections; Strategic Enforcement Initiatives; Prosecution; Convictions, Fines, Penalties and Court Orders; and Compliance Maintenance Inspections. See Peter Krahn, *Enforcement vs. Voluntary Compliance: An Examination of the Strategic Enforcement Initiatives Implemented by the Pacific and Yukon Regional Office of Environment Canada, 1983 – 1998*, DOE FRAP 1998-3, Regional Program Report 98-2, March 1998.

⁹⁵ *R. v. Royal Oak Mines*, (2001) 37 C.E.L.R. (N.S.) 290 (B.C.S.C).



launched by an individual instead of by the Crown, has existed for hundreds of years, and dates back to a time when most criminal prosecutions were begun by private citizens.⁹⁶

Paralleling the right of a citizen to commence a private prosecution is the right of the Crown to “stay” a prosecution. A stay is a procedural device that the Crown uses to effectively end a prosecution, prior to it being adjudicated. Once a prosecution is stayed, only the Crown can recommence, or re-open the case. The Crown’s discretion in such circumstances is considered unreviewable.

Since at least 1990, the BC Ministry of the Attorney General has operated under a policy of “staying” private prosecutions.⁹⁷ This means that where an information, or charge, is laid by a private citizen, the Crown intervenes, and conducts the prosecution or initiates other appropriate action. If circumstances warrant, the Crown will direct a stay of proceedings on behalf of the Attorney General. The practical effect of this policy is that the provincial government takes over and effectively stops virtually all private prosecutions. In the past 10 years, the government has taken over 5 prosecutions commenced through the Sierra Legal Defence Fund, and then failed to proceed with the charges, despite what was considered strong evidence.⁹⁸ Even more troubling is that the Crown is not required to provide reasons to justify its decision to stay such proceedings. Since these decisions are considered unreviewable, a citizen cannot even go to court to have the decision to stay the prosecution set aside by a judge on the basis that the discretion was exercised inappropriately.

The implications of this policy are significant. Given that the province often has primary responsibility for enforcement of environmental laws, this discretion to stay extends to those commenced under federal legislation as well.

This policy operates as a bar to citizen enforcement of environmental laws in BC. At a time when rigorous government initiated enforcement action is diminishing, or more dramatically, where government abdicates its own responsibility, our environment cannot be protected if no one has the capacity or ability to safeguard it. Interestingly, Ontario permits private prosecutions to proceed, despite years of government cutbacks and deregulation.

Recommendation: The government should end the policy of automatically staying private prosecutions and allow citizen initiated private prosecutions to proceed.

⁹⁶ For a discussion of the origins and nature of private prosecutions, see Bryce C. Tingle, “The Strange Case of the Crown Prerogative over Private Prosecutions or Who Killed Public Interest Law Enforcement?,” (1994) 28 *U.B.C. Law Review* 310.

⁹⁷ The first sentence of this government policy reads – “Generally speaking, the policy of the Ministry of the Attorney General does not permit a private prosecution to proceed.” The written policy requires the Ministry to intervene, and in practice, private prosecutions are stayed after the Ministry has intervened; Ministry of the Attorney General, Private Prosecutions Policy, BMC 6-27-96, PMC 11-06-90.

⁹⁸ Sierra Legal Defence Fund Newsletter, May 1999, p. 3, “Private Prosecutions: Citizens Taking Action When Governments Fail,” at www.sierralegal.org.

BENEFITS OF PROSECUTION

The impacts of prosecution are numerous. Allowing private prosecutions to proceed would send a signal to polluters that the government is serious about environmental protection. Lawbreaking should not be tolerated. If government does not have the resources to enforce the law, then permitting citizens to do so is entirely consistent with the spirit and intent of these laws. Someone needs to hold polluters accountable. We have already established that the threat of punishment is a meaningful deterrent for polluters. It provides reassurance to law abiders that their efforts to comply with the law will not be in vain, as it operates as a disincentive to “free riders” who would otherwise disregard the law while some companies work to ensure compliance. Finally, it encourages companies to shift toward pollution abatement technology.⁹⁹

The mere exercise of commencing a prosecution can also be efficient under certain conditions. According to one government prosecutor, a prosecution can be concluded in less than a year, whereas the process of investigating and negotiating to achieve compliance can take a number of years. The deterrent effect alone of laying a charge may result in pollution abatement, regardless of the result. Finally, the use of private prosecutions as a tool recognizes that in some circumstances, “no amount of persuasion or administrative action will bring to light the deliberate and surreptitious activities going on in certain industries the way a prosecution can.”¹⁰⁰ Based upon the Environment Canada study, if only one half of a per cent to two per cent of all polluters end up in court. This hardly constitutes a drain on the justice or the court system.

As one official bluntly stated in reference to a particular problem mine, “the company knows we don’t have the resources to follow-up on the prosecution so they’re laughing at us.” While we are not advocating that all violators be brought directly before a judge, it is clear that the court system (both in terms of number of polluters who appear before a judge and level of fines levied) is underutilized. According to one commentator:

Regulatory targets will respond according to the size of the potential penalty, discounted by the probability that they will escape liability. Hence, regulators may generate the appropriate level of compliance by adjusting either the likelihood of detection and conviction, or the size of the penalty.¹⁰¹

Given that only one per cent of identified polluters will face a judge, and the court’s record of imposing low fines, the deterrent capacity of the court is negligible. Unless the threat of prosecution becomes real for a company, and as long as a court ordered fine is negligible relative to business profits, it is not likely that polluters will change their behaviour.

⁹⁹ John Swaigen, “A Case for Strict Enforcement of Environmental Statutes,” in *Proceedings of the National Conference on the Enforcement of Environmental Law*, Alberta Environmental Law Centre, 1985, p. 3.

¹⁰⁰ Swaigen, “A Case for Strict Enforcement,” p. 7.

¹⁰¹ Shermer, “The Efficiency of Private Participation,” p. 474.



POLICY LIMITATIONS

In addition to the legal system's structural limitations, political and policy decisions have a real impact on environmental enforcement.

LACK OF RESOURCES

Perhaps the most significant bar to effective enforcement is government's unwillingness to allocate adequate resources for inspection and enforcement. Woven throughout this report are federal and provincial examples of program and staff budget reductions. Since the 1990s, there has been a steady reduction in the levels of government funding available to ensure environmental protection. This approach represents a false economy that actually increases future costs.

While short-term savings may appear on the government balance sheet, it is clear that the taxpayers of BC pay in larger future liabilities. A similar situation is occurring at the federal level, and has been recognized by the Auditor General of Canada who recently required the federal government to formally account for the clean-up costs associated with contaminated sites. He stated that "[t]he Government of Canada should disclose in the Notes to the Financial Statements and in the Notes to the Annual Financial Report *those potential federal liabilities related to contaminated site clean-up that it can determine and reasonably estimate.*"¹⁰² This full costing approach clearly and quickly points to the relative value of preventative measures as opposed to expensive clean-up costs.

The environmental protection system should be seen as a preventative maintenance regime that, in the case of mining can prevent transfer of liabilities to taxpayers, and prevent important resources such as drinking water and fish habitat from being lost to future generations.

In 1995, the budget for the former MELP was \$263 million. In 2000, the budget for the Ministry decreased to \$188 million. Only after intense lobbying from the public to improve resources for wildlife, habitat, fisheries and parks programs was the 2001 budget increased to \$201 million. This budget decrease has had numerous effects throughout this Ministry. At the regional level, where inspection and enforcement activities occur, it means that operational budgets, which enable staff to implement programs, such as sampling, training, and site visits, are diminished. It also means that staffing levels are reduced and the key personnel are not always available for enforcement purposes.

Recommendation: That the BC government take steps similar to those recommended at the federal level, and disclose the potential liabilities associated with mine site clean up in BC.

¹⁰² Auditor General of Canada, *1995 Report*, Chapter 2, Environment Canada: Managing the Legacy of Hazardous Waste; Wayne Cluskey and Cameron Young, Ottawa, 1996.

Operational Budgets

In the late 1980s, one of the MELP regional offices had an operational budget of approximately \$13,000 per person. At the time of this report, that budget had dropped to \$3,000 per person per year. This reduction has significant implications on the ability of (now) MWLAP officials to conduct site inspections. For example, one hour of helicopter time costs \$500 and many mine sites, especially placer mines, are located in remote areas that require helicopter access. One remote site visit would use virtually the entire yearly budget for one staff person. The alternative to helicopter access may be a day's drive, which means two days of staff time, plus ground transportation and accommodation expenses. The result is that staff simply cannot inspect most remote sites.

To their credit, MWLAP staff have become innovative in attempting to fulfil their responsibilities in this context. Often, inspectors will fly into sites on company planes. But this is far from ideal from a public perspective. It reduces the independence of the inspector; provides the mine with advance notice of the site visit; and allows the company control over inspection schedules and time to avoid situations that might indicate that non-compliance is a concern.

One approach to dealing with budget constraints used by the Department of Fisheries and Oceans is to adopt a cost recovery strategy and to urge the courts to order that fines be used to restore damaged fish habitat or fisheries resources. For example, over two-thirds of the more than \$630,000 in fines reported in the Pacific Region were used in this way.¹⁰³

Recommendation: That the government consider cost recovery strategies that direct penalties specifically to remediation and rehabilitation activities.

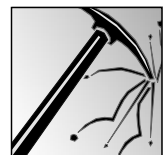
Staffing

Funding allocated for salaries has also decreased. Since the 1996/97 fiscal year MWLAP staff has been cut by 21 per cent.¹⁰⁴ According to MWLAP, its ability to conduct inspections and report on incidences of non-compliance with pollution permits is seriously constrained by staff cutbacks of over 40 per cent in the past few years. In the mining context, this translates into substantial cutbacks in MWLAP's ability to employ technicians. Indeed, both the Skeena and Omineca Peace region once had technicians dedicated to ensuring mining compliance; this capacity no longer exists. Again, the implications are significant. Technicians had responsibilities that included site visits, sampling, and the review of company monitoring data for compliance with permit requirements.

The loss of technicians has meant that other staff, such as pollution prevention officers, have had to take over these responsibilities, which in turn has diminished their ability to fulfil

¹⁰³ See Chapter 6 of the 1997 DFO Annual Report at www.ncr.dfo.ca/habitat/annrep97/english/chap6_e.htm.

¹⁰⁴ *Environmental Protection and Management in BC: A report from the men and women who safeguard our environment*, Victoria, BC Government Employees Union, July 1999.



their other responsibilities.¹⁰⁵ In addition, demands on government staff are increasing. For example, the requirements of the EA process often mean that staff such as impact assessment biologists and wildlife habitat biologists may now spend a great deal of time participating in the EA process. This takes away from their ability to do the important fieldwork for which they were originally hired.

Timing

These resource concerns are further complicated by persistent industry calls for faster permitting and approval processes, in order to not delay economic development. Thus, government is under pressure to impose stringent deadlines in processing permit applications and issuing approvals. Both the BC *Environmental Assessment Act* and the Mineral Exploration Code have time allocations for agency input and response to the applicant. There is also significant industry pressure to impose timelines regarding the implementation of the contaminated site remediation process in BC.

This pressure to streamline the regulatory process must be balanced with a recognition that government can only do so much when budgets have been dramatically cut. *If timeliness is the priority for business then it follows that the public service must be provided with adequate resources to thoroughly and promptly fulfil their important regulatory functions.* An obvious consequence of resource cutbacks is delays and possible mistakes as agencies experience a loss of in-house expertise and an inability to physically process permit-related information in the time allotted. There is a regular and ongoing personnel crisis throughout the public service.

Recommendation: Government must recognize that responding to industry demands for timeliness will require that a balance be struck elsewhere in the system; increased timeliness will require an increase in resources.

EVOLVING GOVERNMENT POLICY: CURE OR COMPLACENCY?

Both the federal and provincial governments acknowledge their lack of capacity to ensure enforcement of our environmental laws. MWLAP has developed a response designed to help it adopt to the pressures and limitations of budget and resource constraints. While this new “shared governance” approach will address some of the challenges, it may well have an opposite effect.

By explicitly recognizing its own inability to enforce the law, and by reducing the policy framework requirements accordingly, *this approach may institutionalize the government's own*

¹⁰⁵ These responsibilities include: thorough analysis of data; trend assessments of data; analysis of environmental effects monitoring (EEM) results; detailed technical reports to justify permit levels; routing sheets for decision-making, data entry/data management; inspection reports; response to and communications with companies and the public, and water quality sampling.

weakness in protecting the public interest. Lowering standards and expectations of the public and industry could well result in increases in both economic and environmental risks, potential liabilities and ultimately costs.¹⁰⁶

Mining in particular is an industry in which history has shown that weak standards and enforcement incur much higher long-term costs. There are many cases across Canada and the US – the multi million dollar public clean-up resulting from the Summitville Mine disaster in Colorado, the 27 dead miners in the Westray Mine explosion in Nova Scotia, and the quarter billion dollar price tag for the clean-up of underground storage of arsenic trioxide at the Giant mine in NWT to name only a few – where effective prevention and proper standards could have saved human lives, protected human health, ecological integrity, *and* saved hundreds of millions of dollars.

A Crisis in Confidence: The Public Service Mandate is Suffering

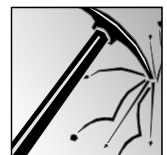
A recent survey conducted by the BC Government Employees Union of its membership responsible for environmental protection resulted in the following indictment of the state of Canada's "meanest and greenest" province, the place in which the mining industry says it cannot attract investors because of over-regulation:

- 88 per cent of BCGEU members who work for the ministry say they do not have enough operational funding and support needed to effectively protect the environment;
- 90 per cent do not have enough support, resources and time to do proper field work; and
- 90 per cent say permits are not adequately inspected, monitored or enforced.

Those who work for MWLAP believe that it's enforcement, monitoring, assessment, and inventorying of habitat, water, fish and wildlife is inadequate. In every area, staff and resource shortfalls undermine the government's stated commitment to safeguarding our environment, the result is that:

- Fieldwork to protect, manage and make informed policy decisions about the environment is not being done. Analysis is generally fragmented and incomplete, frustrating integrated, ecosystem-based understanding of problems or solutions;
- Inadequate inspection, monitoring, and enforcement have rendered the permit system meaningless. The loss in baseline knowledge, trend analysis and institutional capacity is long term; and
- MWLAP does not adequately assess environmental problems to prioritize for planning, prevention or remediation efforts. It is a vicious circle of inefficiency and ineffectiveness.

¹⁰⁶ This concern is particularly pronounced in the context of regulatory negligence actions, discussed above.



MWLAP'S COMPLIANCE APPROACH

Recognizing its own inability to play a meaningful role in environmental protection, and its exposure to potential claims of regulatory negligence, MWLAP has reviewed its approach to compliance, with a view to shifting it from its traditional regulatory “command and control” mechanisms, or the classic “big stick” approach toward what it calls “shared governance.” Some of the elements of this approach include:

Changing governance – a shift from a regulatory model to codes of conduct to regulate industry activity;

Accountability – the need to improve accountability as part the shift toward self monitoring and voluntary compliance;

Changing priorities – the use of stewardship as a means to promote compliance as opposed to enforcement;

Resource limitations – recognition that staff losses have resulted in increased workloads and new challenges faced by staff without training or background; and that prosecutions are increasingly expensive, and may not be efficacious;

Liability – concern about liability to meet compliance monitoring and reporting requirements; and

Court priorities – the belief that the court is becoming increasingly unsympathetic to “relatively minor environmental concerns in the context of other more pressing social issues.”¹⁰⁷

These rationale are disturbing, as they indicate that the government is diluting its independent regulatory or policing responsibilities on behalf of the public. While there is an understandable pragmatism in seeking partnerships with industry to work towards improved environmental standards, there is a conflict of interest in balancing public benefits with private costs for environmental protection. The Ministry also indicates that instead of turning to courts to deter polluters (as we recommend), the government is reluctant to provide direction to the courts. It is the role of the legislature to reflect and establish societal priorities, which are in turn interpreted by our courts. The legislature has the capacity to strengthen enforcement capacity – through legislation, policy direction and budgets – and courts would then be more inclined to give these provisions effect.

It is clear that these options envision an emphasis on stewardship, voluntary agreements and increased self-regulation for industry. To the extent that these tools are considered at all, they should be implemented as an adjunct to a meaningful enforcement program, NOT as a replacement. Experience with these “shared governance” mechanisms is problematic, by government’s own admission. The use of voluntary agreements alone, without the incentive of economic or legal consequences, do little to encourage compliance. Corporations are the ultimate rational economic actors; their actions are driven by financial costs and benefits, not by moral duty.

¹⁰⁷ MWLAP Compliance Approach, March 2000, pp. 4-5.

Drawing upon US experience as well, one author has noted that “private industry, if left to its own initiative, will procrastinate complying indefinitely, even at the expense of the environment.”¹⁰⁸

Regulation and Compliance – Evidence shows the stick is the carrot for improved performance

A study prepared by Environment Canada’s Pacific Region has found that regulated industries which relied solely on self-monitoring or voluntary compliance had a compliance rating of 60 per cent, versus a 94 per cent average for those industries subject to federal regulations. The study reported that compliance rates markedly improve when regulations are issued and a consistent inspection program is instituted.¹⁰⁹ The Environment Canada study notes that “the sole reliance on voluntary compliance was demonstrated to be ineffective for these sectors in achieving even a marginally acceptable level of compliance or benefit to the environment” and that “voluntary compliance programs and peer inspection programs could not achieve satisfactory levels of compliance.”

Compliance is not the only concern, however, the use of these approaches gives rise to two key governance issues:

1. Different standards for similar companies

The use of voluntary agreements undermines not only enforcement, but the certainty and fairness afforded by a standardized regulatory framework. The negotiation of voluntary agreements often results in different rules applying to different companies within the same targeted constituency. They may or may not include all companies in a sector. If there are companies who are not part of the agreement, then there is serious potential for unfairness to those companies attempting to take positive action voluntarily.

Conversely, the resources and expertise required to take advantage of many voluntary and self-regulatory agreements can exclude some players such as small businesses.¹¹⁰ Rather than levelling the playing field so that one set of standards apply to all, voluntary agreements can result in some companies benefiting from individually negotiated standards while others do not.

2. Loss of due process for the public

Any reduction in government oversight through voluntary or self-regulatory measures reduces opportunities for public involvement in devising standards and monitoring effects.

¹⁰⁸ Shermer, “The Efficiency of Private Participation,” p. 474.

¹⁰⁹ Environment Canada study found that compliance rates for metal mining regulations were 90% under mandatory federal regulations (1996 data). Krahn, *Voluntary Initiatives*, p. 21. The results of this study mirror those of an independent KPMG Canadian Environmental Management Survey which found that the most influential factors influencing actors to take action on environmental issues are: compliance with regulations (90%); board of director liability (70%); and employee pressure (60%). In contrast, among the least influential factors are voluntary programs (15-20%).

¹¹⁰ Paul Muldoon and Mark Winfield, *Brief to the House of Commons Standing Committee on Natural Resources Regarding Mining and Canada’s Environment*, CIELAP, Toronto, April 6, 1996



Environmental regulations establish a standard baseline of protection that is easily accessible by the public. With site specific agreements, there is no baseline standard, and the value of public input may be lost.

Similarly, public involvement in monitoring effects may also be diminished. There is already growing pressure on the public and civil society to fulfil some functions formerly accomplished by government, where resource-constrained agencies cannot carry out important monitoring or enforcement activities.¹¹¹ The increased use of self-regulation in any context will make these challenges even more difficult.

Recommendation: Voluntary measures and cooperative stewardship approaches should be used to complement, not replace a meaningful, adequately resourced environmental enforcement program based on clearly established standards.

IMPEDING COMPLIANCE THROUGH PRIVATIZATION AND DEVOLUTION: THE WALKERTON SYNDROME

Another trend emerging out of BC government policy is a shift toward privatization and devolution. *Privatization* generally occurs where services that were formerly provided in house, by government, are hired out to the private sector on a fee for service basis. Yet the private sector is not always subject to the same level of accountability as public employees. Nor do private sector actors have the same level of institutional background and experience as those in the public service charged with administering standards. *Devolution* occurs where the responsibilities of one level of government are passed on to another, usually subordinate, level of government. A key implication here is that while responsibilities may be devolved, funding to ensure that these responsibilities are achieved may not follow.

Concerns about privatization and devolution include:

- that passing responsibility, often without necessary resources, for basic environmental services to the municipal government, threatens environmental protection and possibly public health and safety;
- that privatization will result in a loss of institutional memory to understand and adapt to non-compliance problems over a period of time; and
- the economic inefficiency in hiring non-staff at consultant rates to carry out essential enforcement and reporting tasks.

¹¹¹ An example of this is Pacific Streamkeepers Federation, which helps groups in BC and the Yukon to implement a volunteer streamkeepers program. These volunteers and groups work to ensure protection of fish bearing streams; it involves community members in monitoring for protection of fish and fish habitat. This program is supported by DFO and MWLAP. Information is available at <http://www-heb.pac.dfo-mpo.gc.ca/PSkF/home.htm>

The most notorious example of risks associated with privatization and devolution is the tragic events in Walkerton, Ontario in 2000, where 7 people died as a result of *E.coli* bacteria contaminating their water supply. Budget and regulatory cutbacks left the government unable to ensure the safety of the town's drinking water. Indeed, the former provincial Environment Minister acknowledged that "after Ontario closed four of its five Environment Ministry water testing labs in 1996, there was no legal requirement for the private labs that took over to inform Environment or local health officials of problematic test results." And while inspections showed that bacterial contamination problems had gone back to 1994, Ministry of Environment recommendations to remedy the situation were not followed by the local public utilities commission, and the provincial government never went back to ensure that the problems were rectified.¹¹²

BC's Contaminated Sites Experts Roster: Concerns about Bias Need to be Addressed

Initiatives similar to those that ultimately resulted in the Walkerton tragedy are also underway in BC. For example, MWLAP has established a roster of private sector engineers who are certified to perform basic regulatory tasks with regard to contaminated site remediation. These experts undertake reviews and make recommendations regarding the issuance of approvals in principle and certificates of compliance for some contaminated sites in BC under the WMA. While MWLAP retains an element of regulatory oversight, the *responsibility for analyzing these sites is being undertaken by a private sector engineer, paid for by the company responsible for remediating the contaminated site.*¹¹³ Currently, this procedure is only in use for low to moderate risk contaminated sites, but there is pressure on MWLAP to extend this practice to higher risk sites, and to more activities.

A distinct problem with this system is that there is no opportunity to develop consistent in-house expertise or institutional memory on company behaviour and field conditions in the regional offices. Both of these elements are critical for effective and efficient public policy administration and should be valued and promoted. Another concern is the accreditation process for these professional experts. In 1999, only 2 of 24 applicants passed the accreditation exam, and in early 2001, MWLAP took the drastic measure of removing one of the experts from the roster for substandard work. While this provides some reassurance that MWLAP is attempting to maintain rigorous standards, we have serious concerns that pressure on the Ministry will result in these standards being lowered.¹¹⁴

Questions of accountability and liability must to be considered before making any further moves toward privatization or devolution. As was the case in Walkerton, *the apparent short term savings can translate into much higher long term costs and can be fatal.* Given that these arrangements generally envision a decreased regulatory role for government, there are a number of questions that must be fully answered before any such arrangements are even contemplated:

¹¹² Gallon Environment Letter, Vol. 4, No. 22, June 14, 2000.

¹¹³ *Protocol for Contaminated Sites – Independent Remediation for Low to Moderate Risk Sites: Extent manager may rely on statements by qualified professionals*, MWLAP 1999.

¹¹⁴ See www.elp.gov.bc.ca/epd/epdpa/contam_sites/roster/ministry_release_of_exam.html for the results of the 1999 exam; the removal of one expert from the Roster was mentioned by Ron Driedger at a Canadian Bar Association meeting on May 8, 2001, in Vancouver.



- Are the functions that are being privatized purely mechanical, or do they involve a level of discretion? If so, how extensive is that discretion? Should activities that involve discretion about public safety be administered by public servants who are responsible to ministers that are politically accountable?
- Who is responsible for oversight of contractors to ensure review, final sign-off, or approval of a recommendation by an independent expert? What are the costs of this oversight function?
- Who is accountable in the event of a finding of negligence or a failure in the system?
- Are the standards to certify private experts who deliver public health and regulatory functions high enough to reflect the reality that these important regulatory functions would be undertaken by experts who are paid for by the company? How will the government address any apprehension of bias?
- Are clear, rigorous and public audit procedures in place to monitor, review and enforce standards of practice? What is the role of the public in negotiation and implementation of privatization policies that affect our interests?
- Finally, is it really more efficient and cost effective to have these services delivered outside of the public service?

8. LOOKING AHEAD: HOW TO ENSURE COMPLIANCE IN AN ERA OF LIMITED ENFORCEMENT

This report builds a case for a reinvigorated approach to compliance and enforcement. The public's faith that government will enforce its laws and environmental protection standards is misplaced. We believe, and indeed, government has admitted, that it cannot guarantee that our environmental laws are obeyed given current resource and policy constraints. The alternatives represent a fundamental and potentially problematic shift in how government intends to operate as we settle into this new century.

Government's inability to ensure compliance with environmental standards has serious implications for public and ecological health, as evidenced by the Walkerton tragedy. Regardless of the reasons and whether government will not or cannot play a meaningful role in enforcement, the reality is that someone *must* do the job. If government isn't there, then it has a responsibility to open up the toolbox to allow for greater citizen participation.

THE CASE FOR INCREASED CITIZEN PARTICIPATION

Regardless of how and whether government enforces our environmental laws, the benefits of increased citizen participation in environmental enforcement would be significant relative to the costs. The current direction of giving companies more autonomy in meeting and reporting on regulatory requirements is, in some cases, creating conflict of interest situations. If government cannot perform its traditional watchdog function, then the public, not self-regulating companies in the private sector, must have the capacity to play this role. This can be achieved either through direct enforcement action such as private prosecutions, or, more preventatively, through monitoring and reporting.¹¹⁵

Why?

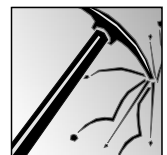
The Public has its Ear to the Ground

Citizens, through their local environmental knowledge, are more likely to witness the impact of polluting activities than a regulator, who often has to be called to a site. The earlier in the process that citizens are involved the greater the discouragement to potential polluters.

The Public is Not Subject to Regulatory Capture

Citizens are in a unique position to encourage the consistent and fair enforcement of environmental laws, as they are not subject to the political constraints and influence that often inhibit government action. Citizen enforcement ensures that environmental quality issues are dealt with on their own merits, as core values and rights to be protected. This is

¹¹⁵ For a broader discussion, see Shermer, "The Efficiency of Private Participation," pp. 476-479.



particularly a concern with the mining industry in BC, as there is sometimes contradictory pressure for MEM to act as both economic promoter and regulator for the industry.

Meaningful Enforcement Encourages, Not Discourages, Cooperation

Creating an environment where government cooperates closely with the public in environmental enforcement will allow for relationship building between the public and the regulated company, and improve the calibre and quantity of information being shared between the government agency and its constituency. These relationships are critical to the growing calls for accountability of both government and industry. Empowering citizens to participate in environmental enforcement may act as an incentive for better environmental performance, as individual relationships will have been established at the community level.

FLOODGATES: WOULD WE BE AWASH IN LITIGATION?

It is sometimes said that increasing citizen enforcement opportunities results in an overwhelming number of prosecutions being commenced and the courts being flooded with frivolous cases. In our experience, going to court is not the preferred course of action for addressing environmental harm. Court is costly, time consuming, and is seldom guaranteed to remedy the environmental damage once it has occurred. Private prosecutions are no exception. However, as we have discussed, the real threat of court sanctions has a huge deterrent effect that is underutilized at this time. While court is not the preferred option, the *possibility* must exist if we are to deter polluters.

In the context of civil actions, there are a number of factors that limit this notional “tidal wave” of litigation. The legal process contains procedural safeguards and mechanisms, such as standing rules whereby a plaintiff must prove that he or she is directly affected, and the possibility of adverse cost awards, whereby a judge may order a plaintiff whose case is considered “frivolous or vexatious” to pay the legal costs of the other parties. In some cases, a public interest plaintiff takes the risk that he or she will be subject to a suit for malicious prosecution or defamation if his or her statements are inflammatory enough. In addition, statutory notice provisions are another mechanism that can limit a citizen’s actions for regulatory negligence. These notice provisions basically state that before a citizen can commence a court action, the government must be given notice, which then provides the regulatory agency with an opportunity to encourage the violator to stop its polluting behaviour and remedy the situation.¹¹⁶

In terms of US experience, one author has noted that while the number of citizens actions challenging environmental problems has increased over the years (approximately twice as many suits were filed in 1990 compared to 1977) with respect to federal law, this is still a far cry from a “tidal wave” of litigation.¹¹⁷

Finally, relying on citizens to enforce the law takes significant time and dedication, which not everyone has. One public interest lawyer has rather wryly listed some of the preferred attributes of a private prosecutor as being:

¹¹⁶ *Judicial Review Procedure Act*, R.S.B.C., c. 241, ss. 15 and 16.

¹¹⁷ Shermer, “The Efficiency of Private Participation,” pp. 473 and 481.

- an affinity for sewage or toxic effluent;
- willingness to spend hundreds of hours of time working with these matters;
- expertise in chemistry, biology, sampling techniques, or an ability to master these skills within a few weeks;
- willingness to work without remuneration; and
- an ability to bake cookies or make quilts to raise money for the costs of an action.¹¹⁸

Clearly, with challenges such as these, the ability to pursue a private prosecution through to completion would still not be a preferred course of action for a concerned citizen.

MECHANISMS TO IMPROVE ENFORCEMENT CAPACITY IN A REDUCED BUDGET ENVIRONMENT

This report concludes with a number of recommendations that should be considered by the BC government to improve enforcement in an environment of reduced government budgets and staffing. Implementation of these concepts would allow for increased efficiency and effectiveness in protecting our environment and provide a more accurate picture of actual environmental performance by industry. Many of these recommendations are in effect in other jurisdictions and in other regulatory contexts; we believe that they are worth considering in this context as well.

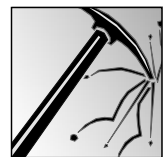
Recommendation: Incorporate Whistleblower Protection in Environmental Laws.

The term “whistleblower” is commonly used to describe anyone who makes public a valid concern about an operation that is not being dealt with through existing channels in order to reduce public harm or risk. After having made the disclosure, the whistleblower runs the risk of retaliation by being fired, demoted or punished in other ways. These risks can work against environmental protection and the interests of the public as they may prevent someone inside government or a company from speaking up about a serious problem.

If the government is serious about promoting and modelling accountability for compliance with environmental standards, public employees must be assured that, they will not suffer any adverse consequences for disclosing wrongdoing or non-compliance that they become aware of in the course of their work. In formally protecting responsible employees through whistleblower legislation, they can set up proactive and preventative processes through which concerns and solutions can be more effectively addressed. Models for whistleblower protection already exist in legislation in BC.¹¹⁹

¹¹⁸ Marilyn Kansky, “Private Prosecutions from the Public’s Perspective,” in *Proceedings of the National Conference on the Enforcement of Environmental Law*, Alberta Environmental Law Centre, 1985, p. 108.

¹¹⁹ See s. 173 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159. See also Ontario Management Board, *Whistleblowing: A discussion paper on protection of public employees who disclose serious wrongdoing*, Government of Ontario, September 1991.



Recommendation: Broaden Standing and Eliminate the Public Nuisance Rule.

Broad and flexible standing provisions give citizens access to legal remedies, and help hold corporate actors accountable. Currently, a citizen must be directly affected in order to be able to seek a legal remedy. This precludes people from acting in the public interest. If standing rules were broadened so that a citizen could commence an action for judicial review or in situations where there is harm to a public resource, but no direct effect on them or their property, we could better ensure environmental protection. This recommendation is particularly relevant for mining, which often occurs in remote locations, where property damage may not be an issue, but environmental harm is.

Similarly, there is a common law rule that only the Crown can sue in circumstances where a public nuisance has occurred. For our purposes, one example of public nuisance is environmental damage or harm that is suffered by everyone equally. This rule effectively prevents private individuals from suing for harm to a public resource, such as the environment. Citizens should be able to bring an action to prevent or remedy general environmental harm, without a direct link to property damage.

Recommendation: Develop an Administrative Monetary Penalty Regime for the *Mines Act* and the *Waste Management Act*.

The development of a system of administrative fines and penalties, whereby MWLAP conservation officers can issue a penalty on site would improve deterrence. Similar to tickets, administrative monetary penalties (AMPs) involve a penalty imposed by government officials rather than by the courts. However, the scope of an AMP regime could be more substantial than that which is currently in place through the ticketing system. It could include a detailed financial scale of dollar amounts payable for particular infractions. This is particularly useful in the environmental context where offences can vary between minor infractions with insignificant damage, to major occurrences resulting in serious environmental harm.

AMP schemes may also provide for relatively informal hearings prior to an AMP being levied and internal reviews of AMP decisions. Such a program would provide regulators with an additional enforcement option, which may in some cases be more practical than prosecution, and at the same time being more stringent, and more of a deterrent, than the ticketing regime.¹²⁰

¹²⁰ For a discussion of administrative monetary penalties, see Chris Rolfe, *Administrative Monetary Penalties: A Tool for Ensuring Compliance*, West Coast Environmental Law, paper prepared for the Canadian Council of Ministers on the Environment Workshop on Economic Instruments, January 24, 1997. One important consideration for an AMP regime would be the inclusion of an absolute liability provision, which would mean that the penalty would be payable regardless of whether the violator was negligent in allowing the offence to occur.

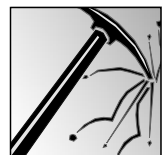
Recommendation: Apply Director's Liability Provisions More Consistently.

Our environmental laws provide that directors and officers of companies can be held directly liable for the polluting activity of the company. While this provision exists "on the books," it is not applied frequently in prosecution practice.¹²¹ We believe that a more stringent application of these provisions by prosecutors and the courts, would send a signal to corporate polluters that lax environmental practices will not be tolerated. Charges being laid against a company should also be laid, and pursued, against directors and officers of the companies responsible for the pollution. The threat of personal liability is a significant deterrent.

Recommendation: Apply the *Fisheries Act* Incentive Provisions.

The *Fisheries Act* provisions allowing successful private prosecutors to obtain half of a fine exist because they provide a clear incentive for the public to participate in environmental protection efforts AND they are recognized as a real deterrent. This incentive should be used. Windfalls received from fines and penalties by polluters could benefit the public and send a strong message to corporate community that lax environmental practices will not be tolerated.

¹²¹ See for example *Fisheries Act*, s. 78.2, and WMA, s. 54(14).



9. CONCLUSION

Problems with environmental enforcement exist throughout the system. While our primary focus has been on the mining sector, many observations and recommendations apply to environmental enforcement more generally. This is partially because of the lack of available data and inconsistent record keeping by government, which has meant that we drew upon more general information in conducting our research.

We have tried to be realistic in our assessment of compliance and enforcement issues, and in our expectations for changes to the system. We recognize that significant increases in Crown resources available for environmental monitoring and enforcement may not be made available any time soon. Yet we nonetheless are of the view that there is an urgent need for meaningful enforcement, particularly if the government is serious about its stated intent to deter polluters from breaking the law in the first place. *In this sense, the best carrot may be the threat of a stick: if corporate polluters know that meaningful sanctions are a possibility, they will be more inclined to exercise caution in the first place. Good actors have nothing to fear from well established and strong environmental standards.*

Meaningful enforcement is more than just a prosecution. Enforcement operates on a continuum, and responsible behaviour in the mining industry is best ensured by encouraging responsible conduct throughout the regulatory process – from the environmental assessment stage through to decommissioning and reclamation. Our research revealed that at almost every stage of the regulatory process, tools available to ensure environmental quality are underutilized, or, in some cases, unused altogether.

At the core of this Report is a belief that we should build on existing capacity, and resources (such as the willingness and concern of the public). Building this capacity improves our ability to deter potential polluters, be they mining companies or other industries in BC. *Detering polluters from polluting in the first place is perhaps the most cost effective form of enforcement.* And much of this can be done through inexpensive changes to government policy. The result, we believe, would lead to a situation where corporate leaders are clearly separated from the laggards who put public and private interests at risk.

To this end, we have taken the conclusions and recommendations woven through the Report and summarized them below. The BC government has clearly stated its commitment to leadership in environmental performance, accountability and transparency. Government plays a critical role in ensuring that companies meet public expectations for a clean environment. Our goal is to help find solutions that prevent costs to the environment, taxpayers and business through well considered, well measured and well rewarded environmental stewardship.

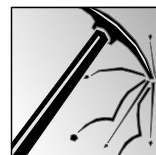
SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION

RECOMMENDATION

Funding & Resources

- | | |
|--|---|
| <p>1. Funding is inadequate and declining. Too few staff have too little resources monitor and enforce compliance with environmental laws.</p> <p>2. Government's ability to perform water quality sampling has fallen.</p> <p>3. The rate of mine inspections has dropped.</p> <p>4. Mining exploration site inspections are not performed on a yearly basis.</p> | <p>1. Restore funding for compliance activities including monitoring and enforcement.</p> <p>2. Industry demands for increased timeliness require increased resources.</p> |
| <p>5. Voluntary compliance ineffective in ensuring compliance if it is not accompanied by regulatory requirements.</p> | <p>3. Where other enforcement mechanisms, such as the Forest Practices Code are available, MEM and MWLAP staff should receive the necessary training in the use of these tools.</p> <p>4. Voluntary measures and co-operative stewardship should complement, not replace a meaningful, adequately resourced environmental enforcement program based on clearly established standards.</p> |



Public Accountability

- | | |
|---|---|
| <p>6. Public access to government monitoring data relating to mines is too limited.</p> <p>7. MEM does not report on monitoring and compliance with the <i>Mines Act</i>.</p> | <p>5. MEM should provide compliance reporting and a summary of charges and penalties levied under the <i>Mines Act</i>, similar to MWLAP reports.</p> <p>6. The CIM Annual Report should include compliance reporting and information.</p> <p>7. The Annual Report should provide a detailed breakdown of types of inspections and outcomes. Better trend and results analysis will improve the transparency and public understanding of MEM's inspection efforts.</p> <p>8. To provide public accountability for an outcome-based approach, the provincial government should provide ongoing-up-to-date public information on the status of company performance at each mine site.</p> |
| <p>8. Local, public knowledge of compliance issues is an underutilized resource.</p> <p>9. Staying private prosecutions effectively prevents the public from exercising legal rights and from playing a role in enforcement.</p> <p>10. Standing rules defining who can participate in environmental law legal proceedings are too restrictive.</p> <p>11. Public incentives for participation in enforcement under the <i>Fisheries Act</i> are too rarely utilized.</p> | <p>9. Broaden standing and eliminate the public nuisance rule.</p> <p>10. The provincial government should end the policy of automatically staying private prosecutions and allow citizen initiated private prosecutions to proceed.</p> <p>11. Apply <i>Fisheries Act</i> incentive provisions.</p> |

CONCLUSION (Continued)

RECOMMENDATION (Continued)

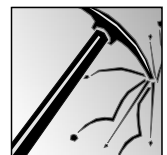
- 12. Corporate liability and taxpayer risk associated with mine site clean up is under estimated and not reported in BC.
- 13. The lack of meaningful appeal rights under the *Mines Act* permits too much discretion with little public accountability.
- 14. Whistleblower laws do not protect civil servants seeking to enforce the law.

- 12. The BC government should disclose potential liabilities associated with mine site clean up in BC.
- 13. Amend the *Mines Act* to establish a right of appeal to the Environmental Appeal Board for decisions related to environmental matters.
- 14. Incorporate whistleblower protection in environmental laws.

Setting Standards

- 15. Recommendations made through the environmental assessment process are not incorporated into enforceable permits.
- 16. Exploration site inspections have declined and exploration Notices of Work are not bound by performance standards related to standards set in recent land use plans.
- 17. Amendments to increase pollution limits are routinely made to pollution permits because it is easier and cheaper to raise limits than enforce the law.
- 18. Permit amendments that incrementally increase environmental damage are not made public, making them difficult to appeal.
- 19. The Environmental Assessment Office does not enforce terms and conditions found in Project Approval Certificates.

- 15. All recommendations of a project committee should be reflected in the language and conditions of the project approval certificate.
- 16. All the requirements of an EA project approval certificate should be mandatorily transposed into related permits and approvals.
- 17. MEM should develop performance standards for exploration Notices of Work based upon land use plans to ensure the integrity of the land use planning process is respected.
- 18. Establish strict, transparent, science-based criteria to determine under what circumstances amendments increasing permitted emission levels will be considered acceptable.
- 19. MWLAP should implement a consistent outcome based permitting system that requires companies to meet specific environmental performance targets with a clear set of rewards and penalties associated with success or failure to meet outcomes.



CONCLUSION (Continued)

RECOMMENDATION (Continued)

- 20. MEM does not have a clear and consistently applied policy on reclamation bonding, thereby exposing taxpayers to unnecessary risk.**

- 20. MEM should develop a clear, comprehensive policy on reclamation bonding and apply it consistently across BC.**

Penalties and Deterrence

- 21. Few charges result in penalties.**
- 22. MWLAP often opts to negotiate and encourage compliance over laying charges even in cases of repeat offenders.**
- 23. A high focus on ticketing to deal with environmental infractions means that the threat of prosecution is not a deterrent.**
- 24. Court ordered fines are not a deterrent because amounts are rarely significant.**
- 25. Directors are rarely found liable when penalties are levied against companies.**

- 21. Develop an administrative monetary penalty regime.**

- 22. Government sentencing guidelines should be publicly reviewed and strengthened and should impose minimum mandatory penalties.**

- 23. Apply director's liability provisions more consistently.**

Reporting and Information

- 26. Monitoring and reporting of enforcement activities is ad hoc and inadequate such that the provincial government cannot assess the true state of compliance.**
- 27. Discrepancies and inconsistencies in compliance reporting makes it difficult to determine what action has been taken with what consequences.**
- 28. Spills of environmentally harmful material are often not reported or investigated.**
- 29. MWLAP's Non-Compliance Report does not provide a full picture of the extent of non-compliance.**

- 24. Develop standardized criteria for compliance reporting and action. Reporting criteria should address accuracy and comprehensiveness.**
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APPENDIX: WHAT ARE THE ENVIRONMENTAL IMPACTS OF MINING?

Mineral development includes a broad range of activities, from exploration to closure, which may occur over a period of several decades. The potential impacts of these activities range from the most benign technologies for airborne surveys, to some of the most persistent and highly toxic industrial waste sites in the world.

Improvements in mitigation technologies and techniques have been significant in recent years, but significant uncertainty remains about controlling impacts from many aspects of mineral development - from our ability to manage access on exploration and mining roads, to the well-documented scientific uncertainty of Acid Mine Drainage prediction and prevention.

Development Phase	Potential Activities	Environmental Issues (subject to mitigation/prevention measures)
Exploration	Airborne and ground-based geochemical, and geophysical surveys, prospecting, claim staking, line cutting, stripping, drilling and trenching, road/trail building and/or helicopter transport, bulk sampling	<ul style="list-style-type: none"> • Land alienation from protection options, • Camp garbage, trail/road and trenching erosion, access-related over harvesting and fishing, habitat disruption, noise pollution, • Acid mine drainage
Mining and Milling	Environmental impact assessment, mine design and construction, stripping/storing of “overburden” of soil and vegetation, ore extraction, crushing/ grinding of ore, flotation or chemical concentration of ore, mine and surface water treatment, storage of waste rock and tailings	<ul style="list-style-type: none"> • Wildlife and fisheries habitat loss, changes in local water balance, sedimentation, containment of toxins in tailings ponds and/or leaching solutions, tailings ponds or leaching pads stability failure, potential acid generation from waste rock and pit walls, heavy metal leaching from acid mine drainage, cyanide solution containment at heap leach operations, wind borne dust
Smelting and Refining	Processing of mineral concentrate by heat or electro-chemical processes	<ul style="list-style-type: none"> • Sulphur dioxide emissions contribute to acid rain, toxic chemical (e.g., ammonia, sulphuric acid) use for processing, high energy requirements
Mine Closure	Recontouring of pit walls, and waste dumps, covering of reactive tailings dumps, decommissioning of roads, dismantling of buildings, re-seeding/planting of disturbed areas, ongoing monitoring and possible water quality treatment	<ul style="list-style-type: none"> • Seepage of toxic solutions into ground and surface water contamination from acid mine drainage, wildlife and fisheries habitat loss, • Revegetation failure, wind borne dust, slope and tailings impoundment failure

