

**BC  
MINING  
LAW REFORM**



**Monitoring &  
Enforcement**

## University of Victoria Environmental Law Centre



---

For their generous support, thank you to:

vanouver  
foundation

 **Tides Canada**

---

This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/).

Cover photo: Garth Lenz ILCP

# Introduction

While mining can provide jobs to communities and revenue to governments, the industry can also have significant negative impacts—like long-term contamination of lakes and rivers, loss of fish and wildlife populations, habitat destruction, and damage to culturally significant areas. There is also risk of catastrophic failures of tailings dams (e.g. Mount Polley), both during mine operations and in perpetuity after mines close. In light of such hazards, a strong monitoring and enforcement regime is essential to mitigate risks and to maintain public confidence in government oversight. This brief outlines the problem with the current monitoring and enforcement system, and highlights examples of solutions from other jurisdictions.

The provincial Environmental Assessment Office (EAO), the Ministry of Environment (MOE) and the Ministry of Energy, Mines and Petroleum Resources (MEM) are all involved in monitoring and enforcement for the mining sector. However, the evidence suggests that these agencies don't have the resources and authority they need to be effective regulators. Unfortunately, BC's compliance and enforcement regime has been unable to prevent significant environmental consequences.

The BC Auditor General's 2016 report on compliance and enforcement in the mining sector was damning and described a "decade of neglect in compliance and enforcement program activities" within MEM.<sup>1</sup> The Auditor General highlighted the shrinking enforcement activity at MEM and MOE and pointed to insufficient resourcing—noting that "... compliance and enforcement activities of the two ministries are inadequate to protect the province from significant environmental risk."<sup>2</sup> She found, "major gaps in resources, planning and tools" for monitoring and enforcement and that the focus was on permit applications rather than the key regulatory activities of monitoring, compliance, and enforcement.<sup>3</sup> Along with deficits in staffing and resources, the Auditor General attributed substandard enforcement levels to a vague and highly discretionary inspection and enforcement regime. Despite continued growth in the mining sector, actual enforcement against lawbreakers has been rare. The issuance of temporary suspension or shut-down orders to non-compliant companies has been very uncommon, and enforcement tools (such as fines, penalties, court orders, or imprisonment) have seldom been applied.<sup>4</sup>

These findings are consistent with a 2011 West Coast Environmental Law critique, which found that the rate of environmental prosecutions for illegal mining activities had dropped to an historic low of 2.5% of all enforcement actions. The authors noted that hunters and fishers in BC were almost four times more likely to be convicted of an environmental offence than a large industrial mining polluter. When enforcement did occur against non-compliant mining activities, it was generally limited to the issuance of tickets and the imposition of nominal fines too small to deter rule-breaking.<sup>5</sup>

Public concern about oversight of mining has mounted as a result of the lack of enforcement in relation to the 2014 Mount Polley tailings breach, the largest mining disaster in BC's history.<sup>6</sup> Both the independent panel that investigated the breach and the Auditor General found the mine's operation was problematic and yet, still, no company or individual has been charged. This points to a problem of inadequate laws, or inadequate enforcement of the laws, or both.

The following sections offer potential reforms to address the shortcomings in the monitoring and enforcement system. Ultimately, environmental laws are only as good as their enforcement. Therefore, the recommendations below focus on ensuring that public oversight agencies have the powers, resources, and independence they require to effectively monitor and enforce mining rules.

## Separation of promotion and compliance

Independent oversight of the mining industry in BC is crucial. The Auditor General's 2016 report on compliance and enforcement called specifically for an "integrated and independent compliance and enforcement unit" outside of MEM. To date, however, this key recommendation remains to be implemented. The Auditor General identified the ministry's dual role of both *promoting* mining and *regulating* mining as a core problem that puts the ministry at risk of regulatory capture.<sup>7</sup> Specifically, her report noted that MEM exhibits most of the qualities that "give rise to a reasonable perception of, and increase the actual risk of, regulatory capture."<sup>8</sup> Independent monitoring and enforcement would significantly mitigate against this risk, and would address the issues created by the "irreconcilable conflict" between MEM's dual mandates.<sup>9</sup>

Other North American jurisdictions with comparable mining sectors have moved to separate promotion of mining from monitoring and enforcement—thereby reducing the risk of public oversight being weakened by a desire to promote the industry. For example, in Ontario the Ministry of Northern Development and Mines promotes mining while the Ministry of the Environment's Investigation and Enforcement Branch enforces environmental protection legislation. With this approach, Ontario achieves a higher conviction rate for environmental offences than BC.<sup>10</sup> In Alaska, industry promotion and environmental protection are separated as well. The state's Department of Environmental Conservation protects human health and the environment<sup>11</sup> while the Department of Natural Resources promotes mining.<sup>12</sup> It is important to note that after the BP Horizon oil rig mega-spill off the US Gulf Coast, the US acted to separate federal enforcement functions from other engagement with industry in order to guard against regulatory capture.<sup>13</sup>



In sharp contrast, the BC government rejected the Auditor General's primary recommendation to reorganize compliance and enforcement functions into a separate unit, independent from MEM. The current government has mandated the establishment of an independent oversight unit to increase worker safety in the industry. Beyond this commitment to independent safety oversight, however, limited action to establish an independent monitoring and enforcement body has been taken.<sup>14</sup>

- 1. RECOMMENDATION: Establish an independent mining compliance and enforcement unit outside the jurisdiction of the Ministry of Energy, Mines and Petroleum Resources with a mandate to protect the environment.**

## Transparency and public accountability

Transparency and accountability are fundamental to an effective regulatory system. They assist in identifying and correcting deficiencies, maintaining public confidence in the regulatory process, and protecting the environment and local communities. Unfortunately, the public does not have access to transparent data on mining compliance in BC. For example, there are shortcomings in BC's reporting on compliance and enforcement in the sector. As the Auditor General concluded in 2016:

*MEM's lack of meaningful environmental reporting may mean that the public and the Legislative Assembly do not have a complete understanding of the ministry's performance as a regulator, or of the environmental performance of B.C.'s mining sector.*

The Auditor General went on to recommend the ministry publicly report the results and effectiveness of their activities, as well as the estimated liability and security held for each mine.<sup>15</sup> Traditionally, MEM published only limited data on monitoring and enforcement. After the Mount Polley disaster in 2014, public pressure spurred the creation of a mine information website that provides details about mine permits, inspection reports, site monitoring activities, and compliance oversight.<sup>16</sup> However, updated transparency rules should also require regular public posting of information describing ongoing compliance with Environmental Assessment certificate conditions and permits in an easily understandable format (e.g. checklist), as well as all breaches of permits and laws.

Enhanced public access to mining companies' environmental monitoring data would also significantly enhance transparency for the sector. Currently, many companies present their environmental monitoring data in hard to decipher tables and charts.<sup>17</sup> Further, mine

monitoring data is often presented for a single monitoring cycle (i.e. one year) without incorporating data collected from the mine's previous monitoring cycles. As a result, it is extremely difficult for the public to assess how a mine is affecting contaminant levels in their surrounding communities, as well as how these impacts have changed over a mine's life span.

There are several simple regulatory changes that BC could adopt to increase public access to mining information, and thus strengthen accountability and transparency. For example, the province could require environmental monitoring and baseline data for all mines, and could mandate the sharing of that data with the public in understandable formats. Additionally, companies could be required to "make information on community health and safety risks and impacts and monitoring results publicly available," as is required by the 2018 Initiative for Responsible Mining Assurance ("IRMA") Standard for Responsible Mining.<sup>18</sup> At a minimum, companies should be required to routinely release all inspection reports, compliance orders, authorizations, convictions, contraventions and penalties.<sup>19</sup> Compliance with land-use objectives should also be publicly reported.

Beyond making key compliance and enforcement information easily accessible to the public, government should also be required to provide reasons for its decisions to deny or approve mining activities. BC's current mining laws allow for permitting decisions that ignore environmental and community concerns, but provide no explanation. For example, as noted in the Auditor General's 2016 report, in the case of the proposed Line Creek mine expansion project, the statutory decision maker was unable to issue an approval due to environmental concerns with proposed activities. Cabinet, however, stepped in and granted the approval without providing reasons. This opaque decision making on authorizations for activities with significant potential environmental impacts is even more concerning because there is no built-in appeal mechanism through which the public can challenge suspect decisions.<sup>20</sup>

**2. RECOMMENDATION: Require regular public posting of all mine environmental monitoring data and compliance and enforcement information in easily understandable formats.**

**3. RECOMMENDATION: Require that the responsible minister(s) provide written reasons for decisions to deny or approve mining activities.**

## Staffing and resourcing

In the last 15 years, cuts to civil service staffing, training and support have hollowed out MEM's inspection, monitoring, and enforcement capacity.<sup>21</sup> Given the inadequacy of internal resources described here, the province has relied heavily on professionals who work for mining companies to ensure that regulatory standards are met and that the public and the environment are protected.<sup>22</sup> This approach has, however, failed to protect the public interest. As the Auditor General concluded in 2016, inadequate resourcing has resulted in a system that is "inadequate to protect the province from significant environmental risks."<sup>23</sup>

Diminished government staffing in monitoring and compliance resulted in large gaps in the province's regulatory regime for mining in the 2000s. The number of inspectors within MEM was reduced by approximately 50% (from 80 to 40) even as the province was seeing a substantial increase in the number and complexity of permit applications.<sup>24</sup> Since the Mount Polley disaster in 2014 and the Auditor General's report in 2016, the province has augmented MEM's compliance and enforcement staff levels and established a 'Deputy Ministers Mining Compliance and Enforcement Board' to oversee compliance and enforcement planning across the province.<sup>25</sup> However, as of January 2018, civil servants still indicate they have insufficient resources to effectively fulfill their mandate of resource management in the public interest.<sup>26</sup> Steady increases in compliance and enforcement personnel and resources will be required to keep pace with the growing complexity and volume of mine-related authorization applications throughout the province.

Effective compliance and enforcement requires funding, but there are options available to BC to ensure adequate resourcing without burdening taxpayers. For example, Quebec allows for the recovery of monitoring and reclamation costs from mining operators.<sup>27</sup> Similarly, in California surface mining operations must be inspected at least once a year and the proponent is legally responsible for the reasonable costs of the inspections.<sup>28</sup> Finally, as highlighted in "Polluter Pays," MOE has not increased its waste discharge fees since 2004—these rates should be brought up-to-date and revenues could be dedicated to monitoring and enforcement.<sup>29</sup>

**4. RECOMMENDATION: Ensure sufficient resources, staff and expertise to effectively enforce the law at BC mines.**

**5. RECOMMENDATION: Implement a funding mechanism that ensures mining companies contribute their fair share towards a robust monitoring and enforcement regime.**

## Monitoring and enforcement policy and standards

Monitoring and enforcement for the mining industry in BC suffers not only from staffing and resource shortages, but also from ineffective policies and a lack of robust legislative standards. Guidelines have been overbroad and discretionary, and allowed for inconsistent application. There are also no minimum legal requirements for BC's monitoring and compliance efforts—which enables regulatory authorities to choose when and how they enforce the law.

Significantly, the Auditor General's 2016 Report found that the Mount Polley mine tailings disaster might have been avoided if the mine had been monitored properly. The Auditor General found that government did not follow its own policy for annual geotechnical inspections—with large numbers of policy-mandated inspections never carried out.<sup>30</sup> She concluded that, if inspections had been done, inspectors may have identified problems and avoided the disaster.<sup>31</sup>

Monitoring and enforcement standards for mine reclamation were found similarly wanting, with the Auditor General highlighting a lack of required annual inspections of reclamation work. A survey of four mines over a three-year period found that only four reclamation inspections were done out of the 12 that were required by policy. In particular, the Gibraltar mine had no reclamation inspection at all from 2008 to 2012—and Myra Falls mine did not receive a reclamation inspection from 2006 until 2014. The Auditor General expressed "particular concern" that the MOE had not inspected the Myra Falls mine site in any of the three review years, even though the mine is in a provincial park and close to drinking water sources.<sup>32</sup>

Similar weak policies and standards for inspection and monitoring of closed mines contributed to the disaster at the Sunro Mine at Jordan River. This mine continues to pollute the Jordan River and prevent the re-establishment of fish populations in what was once a productive river. Recently, BC ordered Teck Resources to prepare a remediation plan for the site—but only because a concerned citizen drew attention to the ongoing environmental problem. In fact, pursuant to policy, BC had signed off on the mine's reclamation a quarter century ago and had never inspected it again, missing the continuing and devastating pollution.<sup>33</sup> This case highlights the importance of ongoing monitoring at closed mines and raises the question of how many other closed—but still polluting—mines are escaping inspection and remediation.<sup>34</sup>

MEM has also not systematically tracked mine operators' compliance with permit requirements and their responses to identified non-compliance. This has resulted in some serious unaddressed safety issues—e.g., MEM's documented failure to compel a fix of



seismic safety on one mine tailings dam for over 14 years.<sup>35</sup> Under existing standards and policies, inspectors assess risks informally using metrics such as length of time since last inspection, complaints received, input from other staff, and gaps in knowledge areas.<sup>36</sup> Instead, the Auditor General has recommended that a more rigorous, risk-based approach to monitoring and compliance be adopted—where inspection frequency is based on factors including a company's compliance record, its activities, expansions, financial state, seasonal risks, and the nature of the operations.<sup>37</sup>

**6. RECOMMENDATION: Mandate clear risk-based inspection policies for all mines (including closed and abandoned mines)—and legislate mandatory minimum inspection schedules and standards that meet or exceed international best practices.**

**7. RECOMMENDATION: Develop policies, procedures, and tools to systematically track compliance with regulations, permit conditions, environmental assessment certificate conditions and other regulatory requirements.**

## Fines and sanctions

The failure to impose adequate fines and sanctions for breaking environmental/mining laws encourages bad behaviour and undermines public confidence in the regulatory system. Historically, BC has rarely imposed penalties, and the fines against mines for environmental breaches have been too low to ensure compliance. For example, from 2006 to 2010, MOE took only six enforcement actions for coal and metal mine violations—and five of those penalties amounted to less than \$600 each.<sup>38</sup> Other studies have demonstrated the inadequacy of BC fines.<sup>39</sup>

For a start, maximum fines should be increased significantly. The provincial Minister of Environment has already acknowledged the stark disparity between the larger fines available under the federal *Fisheries Act* and the much smaller fines that can be imposed under provincial environmental laws.<sup>40</sup> And even those larger *Fisheries Act* fines are far smaller than those available in the US.<sup>41</sup>

In addition, fines should be routinely increased for repeat offenders. Other Canadian jurisdictions have legislated progressive use of substantial fines for repeat offenders. Large corporations who violate Canada's federal environmental laws are liable for minimum fines ranging from \$100,000-\$500,000 and can face fines of up to \$12 million.<sup>42</sup> Repeat corporate

offenders in Ontario are liable for a \$500,000 fine for every subsequent conviction<sup>43</sup> while Manitoba authorizes fines of up to \$1 million for the same.<sup>44</sup> While BC's *Environmental Management Act* contains provisions for daily penalties,<sup>45</sup> these discretionary provisions appear to be seldom used to levy separate fines for each day of contravention.<sup>46</sup>

Fines and related sanctions should be modernized in other ways. Sanctions used elsewhere include imposing liability for damage to the environment and to Indigenous knowledge systems; cumulative fines for each animal, plant, or object harmed; profit stripping so that fines are equal to the profits made during the offence; and prohibiting offenders from applying for new licenses or permits for a specified period. Creative sentencing options also include reduction in production quotas.<sup>47</sup> Note that, in the context of oil spills, government has already proposed issuance of Environmental Management Orders to compel compensation for damages done to the environment and community.<sup>48</sup>

After Mount Polley, the Minister of Energy and Mines identified one important gap in BC law—the absence of the ability to impose Administrative Monetary Penalties for clear violations of mining rules. This has now been rectified, which is a positive step, as administrative penalties avoid costly prosecutions and allow governments to catch and enforce far more infractions.<sup>49</sup> In February 2017, administrative monetary penalties were introduced as an additional compliance and enforcement tool under the *Mines Act*. However, as of August 2018, this compliance and enforcement tool has not yet been used.<sup>50</sup>

**8. RECOMMENDATION: Establish a modern, progressive regime of fines and penalties to deter illegal and environmentally damaging mining practices.**

**9. RECOMMENDATION: Mandate cumulative fines for repeat non-compliance, a prohibition on future authorizations for serial offenders, and daily fines for continuing offences.**

# Indigenous and community-based monitoring

State governments are increasingly recognizing the importance of mobilizing Indigenous peoples and local communities to monitor and enforce environmental laws. Indigenous peoples and local stakeholders have unique knowledge and perspectives that can enhance the ability of government to deliver an effective monitoring and compliance system.<sup>51</sup>

In particular, Indigenous nations have a vital role to play in monitoring and compliance—a role that can complement their territorial jurisdiction. There are many examples of Indigenous-led community-based monitoring programs. Coastal First Nations in BC have created highly effective Guardian Watchmen programs to monitor, protect, and restore cultural and ecological values. They lack enforcement power but can monitor and collect data that can be provided to regulators to take enforcement action.<sup>52</sup> In Australia, the Indigenous Rangers program combines traditional knowledge with conservation training to protect and manage land, sea and culture. In 2018, over 800 rangers received meaningful employment and training while developing partnerships with research and educational organizations, engaging with youth, and generating additional income and jobs in the environment, biosecurity and heritage sectors.<sup>53</sup>

Community monitoring can bolster an environmental regulator's capacity, as it can increase the availability of environmental monitoring data, allowing for more efficient and effective enforcement decisions. In some jurisdictions, community-based monitoring programs have played a significant role in bolstering monitoring efforts and in providing local populations with a meaningful voice in the oversight of mining operations. Citizens Advisory Councils in Alaska offer examples of the important role that community-based programs can play in ensuring adequate monitoring and enforcement of environmental standards. BC can show leadership by requiring companies to engage communities in this way and to integrate their own health and safety monitoring with Indigenous-led and community-based environmental monitoring programs.

**10. RECOMMENDATION: Enable and fund Indigenous-led monitoring and enforcement programs for mining activities.**

**11. RECOMMENDATION: Require the establishment of citizens' advisory councils for proposed and existing mining projects; and empower the councils to develop, implement, and monitor long term health, safety and environmental plans.**

## Whistleblower protection

Whistleblower protection is crucial to enforcement and compliance because it encourages people with key knowledge about events in question to disclose information that they otherwise may not. Sometimes people within a company are the best source of information about environmental lawbreaking. However, they may be unlikely to divulge that information unless they are protected from retribution for speaking up. Whistleblowers can play a key role in documenting infractions and risks. Their protection must be an integral element of any environmental law enforcement regime.

Following the Mount Polley mine disaster in 2014, the Environmental Law Centre (ELC) and several unions and First Nations wrote to the Premier to express concern that the investigation into the event would be compromised by a lack of whistleblower protections. These groups worried that government and company employees might withhold essential information from investigators for fear of being disciplined or losing their jobs. In the end, the only employee who voiced concerns about how the tailings dam had been maintained had just won the lottery, and therefore had no reason to fear reprisal or job-loss. No one else spoke up.<sup>54</sup>

In April 2018, the government introduced the *Public Interest Disclosure Act*<sup>55</sup>—a new piece of whistleblower legislation that increases protection for public service employees who report wrongdoings.<sup>56</sup> However, private sector whistleblowers remain relatively unprotected. While most Canadian jurisdictions now have whistleblower protection for public servants,<sup>57</sup> only Saskatchewan and New Brunswick have protections for private sector workers. The federal *Criminal Code* contains some provisions to protect whistleblowers in both sectors,<sup>58</sup> but they are difficult to enforce and do not protect whistleblowers who contact a media source or an outside agency.<sup>59</sup> Citing examples from other jurisdictions, the ELC has recommended a strong whistleblower law with certain key features, including the protection of private sector workers.<sup>60</sup>

**12. RECOMMENDATION: Enact robust whistleblower protections to protect private sector whistleblowers, including mineworkers, contractors and others who report unlawful or unethical actions that endanger public health, safety, and the environment.**

## Citizen enforcement—private prosecutions and citizen suits

When government is not able to stop lawbreaking polluters, private citizens and the courts can play an important role in upholding environmental standards and protecting human health. Historically, the common law has allowed 'private prosecutions,' which enable members of the public to bring charges over illegal environmental practices. For example, in the early 1980s, private prosecutions led to convictions of North Vancouver for its landfill operations and the Greater Vancouver Regional District (GVRD) for its Iona sewage plant practices. These suits led to major upgrades of those facilities to improve environmental performance.<sup>61</sup>

Unfortunately, in recent years private prosecutions have generally been barred by the BC Prosecution Service.<sup>62</sup> For example, in 2017 the Attorney General used his discretion to quash the efforts of citizens to seek redress in the courts for the Mount Polley mine disaster.<sup>63</sup> BC's general prohibition of private prosecutions stands in contrast to jurisdictions such as the federal government, Ontario and the Yukon jurisdictions which broadly allow them.<sup>64</sup> Private prosecutions should be restored as a legitimate enforcement tool in BC so that citizens can still act on behalf of the environment even when government does not.

Another way of empowering citizen enforcement would be to legislate "Citizen Suit" rights, as is commonly done in the US. For example, under the US *Clean Water Act*, private citizens are empowered to sue companies civilly for breaking statutes and regulations. Thus, citizens can give teeth to the law when government fails to act. Such citizen suits have been one of the most effective enforcement provisions in the US.<sup>65</sup>

Public enforcement through private prosecutions and citizen suits can guard against government negligence and regulatory capture, lessen the workload for the civil service, reduce public expenditures, and provide citizens an important participatory role in law enforcement.<sup>66</sup> Governments should endeavour to promote this mechanism of enforcement by shielding responsible citizens against adverse cost awards and providing monetary incentives through apportionment of fines when citizens charge environmental offenders.<sup>67</sup>

**13. RECOMMENDATION: Enable private prosecutions and/or enact citizen suit provisions for environmental violations.**



# Endnotes

- 1 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 57.
- 2 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria) at p. 11.
- 3 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 3 and 6.
- 4 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016), at p. 60.
- 5 Andrew Gage, "Polluters get off more lightly than hunters", *Environmental Law Alert Blog* (2011 November 26) online: <https://www.wcel.org/blog/polluters-get-more-lightly-hunters>
- 6 Just 40 percent approve of the job the government of British Columbia is currently doing when it comes to regulating and monitoring the mines." British Columbians overwhelmingly support mining reforms—poll (October 8, 2015). SkeenaWild and Salmon Beyond Borders, online: <https://skeenawild.org/news/british-columbians-overwhelming-support-mining-reforms-poll>.
- 7 Where a regulator serves industry's interests rather than the public's.
- 8 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 44.
- 9 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 4.
- 10 Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013), at p. 315 online: <https://www.fairmining.ca/wp-content/uploads/2018/05/Fair-Mining-Practices-A-New-Mining-Code-for-BC-Web-Copy.pdf>.
- 11 Alaska Department of Environmental Conservation, *SPAR Annual Report Fiscal Year 2017*, p. 3 online: <http://dec.alaska.gov/media/2052/fy17-spar-annual-report.pdf>.

- 12 Alaska Department of Natural Resources, "About Us," online: <http://dnr.alaska.gov/mlw/aboutus.htm>. The federal Environmental Protection Agency also monitors and enforces, investigating prohibited discharges of mine pollutants into water systems and enforcing penalties under the *Clean Water Act*; see: United States Environmental Protection Agency, "Clean Water Act (WA) Compliance Monitoring", Compliance, online: <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring>.
- 13 Environmental Law Clinic Student, *Oil and Gas Law Reform* (Victoria: Environmental Law Centre, July 2012) at pp. 10-16 online: [http://www.elc.uvic.ca/wordpress/wp-content/uploads/2015/02/Oil-and-Gas-Reform\\_2011-03-12\\_2012July.pdf](http://www.elc.uvic.ca/wordpress/wp-content/uploads/2015/02/Oil-and-Gas-Reform_2011-03-12_2012July.pdf)
- 14 Since the Auditor General's Report was released in 2016, the Ministry of Energy, Mines and Petroleum Resources has taken steps to increase compliance and enforcement oversight. In 2016, the Ministry of Energy, Mines and Petroleum Resources created and filled a new 'Deputy Chief Inspector of Mines, Compliance and Enforcement' position, as well as the 'Deputy Ministers Mining Compliance and Enforcement Board' ("Board") to oversee compliance and enforcement of mining in the province. The Board includes representatives from the Ministries of Environment and Energy, Mines and Petroleum Resources and the Environmental Assessment Office, and aims to increase monitoring and enforcement coordination between the ministries and access to shared resources: British Columbia, "Deputy Ministers Mining Compliance & Enforcement (C&E) Board," online: <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/compliance-enforcement/board>.

However, the province has still not implemented the Auditor General's recommendation for an "integrated and independent compliance and enforcement unit" that exists outside of the Ministry of Energy, Mines and Petroleum Resources. The province has stated that "work is underway to develop options for implementing this commitment": British Columbia, "Recommendations from the Auditor General's Report on Mining" (2018 February 13) at p. 1, online: [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/oag\\_recommendationstable\\_february2018.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/compliance-and-enforcement/oag_recommendationstable_february2018.pdf).

- 15 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 64.
- 16 British Columbia, "BC Mine Information", online: <https://mines.empr.gov.bc.ca>.
- 17 For example, this is the format in which Imperial Metals released its environmental monitoring data to the public in the aftermath of the Mount Polley mine breach; Correspondence with Dr. Gilles Wendling, Ph.D., P.Eng, Senior Hydrogeologist of GW Solutions, October-November, 2018.

- 18 Initiative for Responsible Mining Assurance, *IRMA Standard for Responsible Mining IRMA-STD-001* (2018), at p. 96.
- 19 Letter. Sergio Ortega and Calvin Sandborn. Received by Drew McArthur, Acting Commissioner, OIPC (2017 February 24) (Victoria: BC) online: <http://www.elc.uvic.ca/wordpress/wp-content/uploads/2017/03/2017Feb24-OIPC-ltr.pdf>.
- 20 Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013), at p. 274 online: <https://www.fairmining.ca/wp-content/uploads/2018/05/Fair-Mining-Practices-A-New-Mining-Code-for-BC-Web-Copy.pdf>.
- 21 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p.11.
- 22 This professional reliance model raises serious conflict of interest, accountability, and transparency issues. Professionals have conflicting duties and obligations to act in the best interests of mining operators while concurrently guarding the public interest in environmental decision making. Professionals are accountable only to their employers and professional associations while civil service staff are accountable to the minister and the public. As such, delegation to professionals makes the process inaccessible to the public and restricts public participation in natural resource management. See: Mark Haddock, "Reliance on Qualified Professionals in Environmental Regulations" in Calvin Sandborn, ed., *Maintaining Natural BC for Our Children: Selected Law Reform Proposals* (Victoria: Environmental Law Centre, November 2012) online: [http://elc.uvic.ca/press/documents/2013-MaintainingNaturalBC\\_WEB-VERSION.pdf](http://elc.uvic.ca/press/documents/2013-MaintainingNaturalBC_WEB-VERSION.pdf)
- 23 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 11.
- 24 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 46.
- 25 The Ministry of Energy, Mines and Petroleum Resources received a budget lift in 2017/18 focussed on increased staffing to strengthen the compliance and enforcement program. With this budget, 36 full-time equivalent (FTE) positions have been hired to date, 23 of which are delegated as inspectors. See: Email. Deputy Chief Inspector, MEMPR. Received by Articled Student, Environmental Law Centre (September 20, 2018). These new hires included the creation of a new 'Deputy Chief Inspector of Mines, Compliance and Enforcement' position. The Deputy Ministers Mining Compliance and Enforcement Board was established in 2016 and includes representatives from the Ministries of Environment and Energy, Mines and Petroleum Resources and the Environmental Assessment Office. The Board aims to increase monitoring and enforcement coordination between the ministries and access to shared resources;

British Columbia, "Deputy Ministers Mining Compliance & Enforcement (C&E) Board," online: <https://www2.gov.bc.ca/gov/content/industry/mineral-exploration-mining/compliance-enforcement/board>.

- 26 Government employee unions representing mining and environmental inspectors have criticized the government for its significant cuts to government professionals and its fettering of natural resource management to industry. A majority of members believe these cutbacks have negatively affected their ability to produce reports and documents. See: Professional Employees Association, *Professional Reliance Review* (2018 January 18) online: <https://engage.gov.bc.ca/app/uploads/sites/272/2018/01/Professional-Employees-Association.pdf>; BC Government Employees Union, *Submission to the Professional Reliance Review* (2018 January 19), online: <https://engage.gov.bc.ca/app/uploads/sites/272/2018/01/BCGEU-Part-2.pdf>.
- 27 Based on the nature and characteristics of their activities and the number and seriousness of any environmental convictions secured against them; Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013), at p. 312 online: <https://www.fairmining.ca/wp-content/uploads/2018/05/Fair-Mining-Practices-A-New-Mining-Code-for-BC-Web-Copy.pdf>.
- 28 Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013), at p. 304.
- 29 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 6.
- 30 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 56. Similarly, the Ministry Environment fell far short of policy requirements for inspections. That ministry also did not inspect numerous "high priority" mine sites annually, at p. 89.
- 31 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at pp. 8, 9, 66 and 71.
- 32 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 89.
- 33 Times Colonist, "Province should clean up mine sites" (2016 October 11), online: <http://www.timescolonist.com/opinion/editorials/editorial-province-should-clean-up-mine-sites-1.2362178>.
- 34 Letter. "Request for Establishment of a Judicial Commission of Public Inquiry to Rectify

- and Improve BC Mining Regulation." Calvin Sandborn & Kristy Broadhead. Received by the Honourable Christy Clark (2017 March 8) (Victoria: BC) at pp. 12-13.
- 35 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 58.
  - 36 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 54.
  - 37 Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector*, May 2016 (Victoria: Office of the Auditor General, 2016) at p. 14.
  - 38 Calvin Sandborn and Maya Stano, "Mining and Environmental Protection: The Failure to Inspect and Enforce" in Calvin Sandborn, ed, *Maintaining Natural BC for Our Children: Selected Law Reform Proposals* (Victoria: Environmental Law Centre, November 2012) at p. 35 online: [http://elc.uvic.ca/press/documents/2013-MaintainingNaturalBC\\_WEB-VERSION.pdf](http://elc.uvic.ca/press/documents/2013-MaintainingNaturalBC_WEB-VERSION.pdf).
  - 39 Andrew Gage. West Coast Environmental Law. "Poor mines enforcement undermines social licence." May 30, 2016 and David R. Boyd. "B.C. slow to enforce environmental laws." Times Colonist. April 26, 2016.
  - 40 Minister Heyman has stated that possible charges under the federal Fisheries Act "remain very much in play and, in fact, potential penalties are more significant." Ref: <https://www.cbc.ca/news/canada/british-columbia/mount-polley-investigation-ndp-1.4233234>. Note that the largest *Fisheries Act* fine against a mine in BC was \$3.4 million handed to Teck Metals in 2014. See <https://vancouver.sun.com/business/local-business/clock-ticking-for-environmental-charges-as-mount-polley-dam-failure-hits-four-year-mark>.
  - 41 See The Narwhal article at: <https://thenarwhal.ca/canada-s-environmental-fines-are-tiny-compared-u-s/>.
  - 42 Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013), at p. 305 online: <https://www.fairmining.ca/wp-content/uploads/2018/05/Fair-Mining-Practices-A-New-Mining-Code-for-BC-Web-Copy.pdf>.
  - 43 *Environmental Protection Act*, RSO 1990, c E.19, s 187(2).
  - 44 *Environment Act*, CCSM, c E125, s 33.
  - 45 *Environmental Management Act*, [SBC 2003], c. 53, s. 122; *Administrative Penalties (Environmental Management Act) Regulation*, BC Reg. 133/2014, s. 7.



- 46 A review of case law and discussion with civil servants leads to this conclusion. Note that the wording of the EMA appears to default to single penalties, with the option to impose daily fines at the discretion of the Director; in similar statutes, including BC's *Water Sustainability Act*, daily fines appear as the default response to continuing offences. See: Environmental Management Act, [SBC 2003], c. 53, s. 122(2), which states that "separate fines, each not exceeding the maximum fine for that offence, may be imposed for each day the offence continues" [emphasis added]. In comparison, the *Water Sustainability Act*, [SBC 2014], c. 15, s. 6 states that in the case of a continuing offence, an offender "is liable" [emphasis added] for "a fine of not more than \$200 000 for each day the offence is continued". See also the US *Clean Water Act*, which states that offenders "shall be subject to a civil penalty not to exceed \$25,000 per day for each violation" [emphasis added] (Federal Water Pollution Control Act, 33 USC 1319(d)).
- 47 Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013) at pp. 316-319.
- 48 As proposed in government's recent *Policy Intentions Paper for Engagement: Phase Two Enhancements to Spill Management in British Columbia*. See page 31 and following at: <https://engage.gov.bc.ca/app/uploads/sites/342/2018/02/Phase-Two-Intentions-Paper-February-28-2018-FINAL.pdf>.
- 49 In *Bill 8—2016: Mines Amendment Act, 2016*, online: <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/40th-parliament/5th-session/bills/third-reading/govo8-3>.
- 50 Email correspondence. Articled Student, Environmental Law Centre and MEMPR. (2018 August).
- 51 Mark Haddock, *Final Report of the Review of Professional Reliance in Natural Resource Decision Making* (2018 May 18) pp. 69-73 and Mike Morris, MLA, *Getting the Balance Right: Improving Wildlife Habitat Management in British Columbia* (2015 August).
- 52 Maya Stano and Emma Lehrer, *Fair Mining Practices: A New Mining Code for British Columbia* (Vancouver: Fair Mining Collaborative, March 2013), at p. 310 online: <https://www.fairmining.ca/wp-content/uploads/2018/05/Fair-Mining-Practices-A-New-Mining-Code-for-BC-Web-Copy.pdf>.
- 53 Department of the Prime Minister and Cabinet, "Indigenous Rangers—Working on Country" (Australian Government, 2018), online: <https://www.pmc.gov.au/indigenous-affairs/environment/indigenous-rangers-working-country>.
- 54 Letter. "Whistleblower Protection and the Independent Expert Engineering Review Panel Investigation." Calvin Sandborn, Chief Bev Sellars, Chief Ann Louie, Stephanie Smith, Scott McCannell & Stephen Hunt. Received by Premier Christy Clark (2014 November 19).

- 55 SBC 2018, c. 22.
- 56 Ministry of Attorney General, "Government introduces public interest disclosure legislation for public service," (Victoria: British Columbia, 2018 April 25) online: <https://news.gov.bc.ca/releases/2018AG0026-000729>.
- 57 See BC's new *Public Sector Disclosure Act*, SBC 2018, c. 22, which protects whistleblowers in the provincial public sector.
- 58 *Criminal Code*, RSC 1985, c C-46, s 425.1.
- 59 Yosie Saint-Cyr, "The State of Whistleblowing in Canada," *Slaw* (2013 June 6) online: <http://www.slaw.ca/2013/06/06/the-state-of-whistleblowing-in-canada>.
- 60 Rachel Forbes and Amanda Macdonald, "The Need to Protect Whistleblowers" in Calvin Sandborn, ed., *Maintaining Natural BC for Our Children: Selected Law Reform Proposals* (Victoria: Environmental Law Centre, November 2012) at p. 157 online: [http://elc.uvic.ca/press/documents/2013-MaintainingNaturalBC\\_WEB-VERSION.pdf](http://elc.uvic.ca/press/documents/2013-MaintainingNaturalBC_WEB-VERSION.pdf).
- 61 Jennifer Cameron, "Enhancing Citizen Enforcement Powers," in Calvin Sandborn, ed, *Maintaining Natural BC for Our Children: Selected Law Reform Proposals* (Victoria: Environmental Law Centre, November 2012) at p. 130.
- 62 Keith Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution," *JELP Vol. 13* (2003) at p. 153.
- 63 CBC News, "Province halts private prosecution against Mount Polley tailings spill" (2018 January 30) online.
- 64 "Reforming British Columbia's Private Prosecution Policy" February 2018 letter to Attorney General David Eby from Ecojustice, UVic Environmental Law Centre and West Coast Environmental Law. Also see Calvin Sandborn, ed., *Maintaining Natural BC for Our Children: Selected Law Reform Proposals* (Victoria: Environmental Law Centre, November 2012) at p. 131 online: [http://elc.uvic.ca/press/documents/2013-MaintainingNaturalBC\\_WEB-VERSION.pdf](http://elc.uvic.ca/press/documents/2013-MaintainingNaturalBC_WEB-VERSION.pdf).
- 65 Calvin Sandborn, ed, *Maintaining Natural BC for Our Children: Selected Law Reform Proposals* (Victoria: Environmental Law Centre, November 2012) at p. 130-131.
- 66 Calvin Sandborn, ed, *Maintaining Natural BC for Our Children: Selected Law Reform Proposals* (Victoria: Environmental Law Centre, November 2012) at p. 130.
- 67 Note the right of citizens who lay charges to recover a portion of the ultimate penalty under the *Fisheries Act: Fishery (General) Regulations*, SOR/93-53, s. 62.