

WITHOUT PREJUDICE

September 19, 2016

VIA FAX: 604-666-1847

VIA FAX: 604-713-9517

Fisheries and Oceans Canada

Suite 200-401 Burrard St.
Vancouver, BC V6C 3S4

Environment Canada

401 Burrard Street
Vancouver, BC V6C 3S5

ATTN: Officer In Charge

To Whom it May Concern:

Re: Offence #1: Carrying on Work, Undertaking or Activity that results in serious harm to fish contrary to s.35(1) of the Fisheries Act, R.S.C. 1986 (the "Fisheries Act")

Offence #2: Deposit of Deleterious Substance contrary to s. 36(3) of the Fisheries Act

Offence Date: August 4, 2014

Defendant #1: Mount Polley Mining Corporation

Defendant #2: HMTQ in Right of the Province of British Columbia, as Represented by Minister of Energy and Mining

I am writing to follow up on my letter of May 27, 2016 wherein I requested, on behalf of my client MiningWatch Canada, that Fisheries and Oceans Canada and Environment Canada investigate the offences outlined above and lay charges as appropriate. We requested a response by June 30, 2016 but to date have not received the same.

I look forward to hearing from you at your earliest convenience.

Yours Truly,



Lilina T. Lysenko

LTL/

Encl.

Cc. Client, Jeff Jones, Ethan Krindle

1590 Bay Avenue
Trail BC V1R 4B3
Phone: 250-231-5019
Lilina@lysenkolaw.ca

WITHOUT PREJUDICE

May 27, 2016

VIA FAX: 604-666-1847

VIA FAX: 604-713-9517

Fisheries and Oceans Canada

Suite 200-401 Burrard St.
Vancouver, BC V6C 3S4

Environment Canada

401 Burrard Street
Vancouver, BC V6C 3S5

ATTN: Officer In Charge

To Whom it May Concern:

Re: Offence #1: Carrying on Work, Undertaking or Activity that results in serious harm to fish contrary to s.35(1) of the Fisheries Act, R.S.C. 1986 (the "Fisheries Act")

Offence #2: Deposit of Deleterious Substance contrary to s. 36(3) of the Fisheries Act

Offence Date: August 4, 2014

Defendant #1: Mount Polley Mining Corporation

Defendant #2: HMTQ in Right of the Province of British Columbia, as Represented by Minister of Energy and Mining

I have been retained by MiningWatch Canada with respect to the above noted matter. In that regard, I confirm the following:

Background Facts

Mount Polley Mine ("the Mine") is a copper and gold mine located in the Central Interior of British Columbia, approximately 65 km northeast of Williams Lake. The Mine is owned and operated by Mount Polley Mining Corporation (MPMC), a subsidiary of Imperial Metals Corporation, a Canadian mining company with its corporate head office in Vancouver, British Columbia. The Mine stored its tailings in a Tailings Storage Facility (TSF) located 3km southeast of the mill site. The TSF was a U-shaped earthen dam over 4km long and 50m high, and consisted of three embankments: the Main Embankment (ME), the South Embankment (SE), and the Perimeter Embankment (PE). The TSF served as a collection pond for mill tailings as well as mine runoff water.

The TSF was located above and adjacent to Hazeltine Creek, a local watercourse connected to Polley Lake at its upstream end and Quesnel Lake at its downstream end, as well as other connected watercourses such as Edney Creek and the Quesnel River, all of which contain fish habitat for one or more commercially significant species, such as Rainbow Trout and Chinook, Coho and Sockeye Salmon. On the night of August 3-4, 2014, the dam enclosing the TSF at Mount Polley Mine failed. Over the next 16 hours, the failure led to a progressive breach of the PE, releasing 25 million cubic metres of wastewater and mine tailings into the surrounding environment. The debris

flow entered Hazeltine Creek, scouring the channel and floodplain, and flowing upstream into Polley Lake and downstream into Quesnel Lake. A thick deposit of tailings plugged the outlet of Polley Lake, blocking the flow of water. The confluence point of Edney Creek, where it joins with Hazeltine Creek, was scoured, resulting in a 2m drop in elevation; the lower 850m of Edney Creek was, therefore, also affected by debris deposition. Approximately 18.6 million cubic metres of water and materials flowed into Quesnel Lake, some of which settled to the lake bottom and some of which remained suspended as “cloudy water” that returned to the surface of the lake in the late fall.

An investigation by the Chief Inspector of Mines (the “Chief Inspector's Report”) concluded that the TSF failed because the embankment slid on a layer of lightly overconsolidated glaciolacustrine clay located approximately ten metres into the dam's foundation. The UGLU had never been properly characterized by MPMC or its engineers. The Chief Inspector also found that several other proximate causes contributed to the dam breach: the downstream slope of the dam was over-steepened for its height; there was an unfilled excavation at the toe of the embankment; and there was an excess of supernatant water in the TSF combined with inadequate tailings beaches.

The Ministry of Energy and Mines (“MEM”) is responsible for activities within the mine site. As stated in An Audit of Compliance and Enforcement of the Mining Sector prepared by the Auditor General in May, 2016 (the “Auditor General’s Report”), the MEM “must ensure the mine is designed, built, operated and reclaimed to an acceptable standard”. The Mount Polley mine, and specifically the TSF, was not built and operated according to design. The MEM knew of that fact as early as 2006, but did not avail itself of any of the enforcement mechanisms available to it to ensure that this was rectified. Further, the Auditor General, on pages 9, 66, and 76 of her report, indicated that MEM inspections did not meet their policy. Despite the fact that MEM policy requires that it inspect mine sites at minimum, on an annual basis, MEM performed no geotechnical inspections for a number of years. These inspections, had they occurred in accordance with MEM’s policy, would have alerted MEM that MPMC was not building or operating the tailings dam to the permitted design “and was raising the dam without any long-term planning”.

Similarly, MPMC’s conduct has been described as being below the “level of prudent industry norms or best practices”. The MEM raised concerns regarding deficiencies in the TSF as compared to the design, specifically with respect to an over-steepened slope of the dam structure and the lack of continuous beaches, on a number of occasions beginning in 2006. After the failure, the Chief Inspector of Mines’ report commented that “[p]lanning for water treatment and discharge should have been a high priority throughout the life of the mine”.

Immediate Investigation Needed

The release of an estimated 25 million cubic metres of wastewater and tailings is a clear violation of both s. 35(1) and s. 36(3) of the Fisheries Act, which states that:

Section 35(1):

No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.

Section 36(3):

Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

My client is requesting that enforcement of the *Fisheries Act* be applied to the named defendants, in the same fashion that it is applied to trucking companies, railroads and other companies that violate the *Fisheries Act*. The above noted conduct is a clear breach of the statute and displays a striking degree of carelessness for the environment and the Hazeltine Creek / Quesnel Lake watersheds. MiningWatch Canada is more than willing to meet with DFO and/or EC in order to discuss her observations and evidence at your convenience.

MiningWatch Canada is also requesting that Fisheries and Oceans Canada and/or Environment Canada staff conduct scientific invertebrate and fish sampling above and at several locations below the breach site. This should begin immediately. Understanding the long term impacts of this breach and its damage to the stream invertebrates and fish is essential.

Fisheries Act & Private Prosecutions

Parliament specifically contemplates private individuals laying a charge under the Fisheries Regulations. Section 62 of the Fishery (General) Regulations states that:

“where an Information is laid by a person in circumstances other than those referred to in Section 60 or 61 relating to an offense under the Act, the payment of the proceeds of any penalty imposed arising from a conviction for the offense, shall be made:

- a) $\frac{1}{2}$ to the person;
- b) $\frac{1}{2}$ to the Minister or, where all of the expenses occurred in the prosecution of the offense are paid by a Provincial Government, to that Provincial Government (bolding supplied).

Parliament has specifically created an incentive for private persons to enforce the Fisheries Act, even against the Federal and Provincial Crown, to ensure the protection of public resources such as fish and fish habitat. The present circumstances are a perfect example of why Parliament created this section.

Section 504 of the Criminal Code governs private prosecutions. It provides that:

“anyone who on reasonable grounds believes that a person has committed an indictable offense may lay an information in writing an under oath before a Justice, and the Justice shall receive the Information where it is alleged that:

that the person has committed anywhere, an indictable offense that maybe tried in the Province in which the Justice resides, and that the person:

- 1) is or is believed to be;
- 2) resides or is believed to reside within the territorial jurisdiction of the Justice;

Section 504 also provides that a person can lay a private Information if:

“the person, wherever he may be, has committed an indictable offense within the territorial jurisdiction of the Justice”

Section 507 of the Criminal Code provides that:

“once an Information has been laid by a private prosecution, the matter shall be referred to a Provincial Court Judge to consider whether to compel the appearance of the accused on the information.”

However, DFO and EC have been provided with very significant state resources and are mandated to enforce Canada’s regulations as well as protect fisheries habitat. While private prosecutions are one option for our citizens, it places a heavy burden on volunteers to enforce complex public welfare statutes.

Response Requested – June 30, 2016

MiningWatch Canada, together with community members, continues to spend significant time and effort in work that really should be discharged by our public regulators. I would ask that DFO and/or EC please provide me with a response by June 30, 2016 by 4:00 pm. Should DFO and/or EC refuse to enforce the *Fisheries Act*, I will be seeking my client’s instructions to take such further steps as may be necessary to proceed with a private prosecution.

As I stated above, MiningWatch Canada is ready, willing and able to meet with your enforcement staff to provide additional information at any time.

I look forward to hearing from you at your earliest convenience.

Yours Truly,



Lilina T. Lysenko

LTL/

Encl.

Cc. Client, Jeff Jones, Ethan Krindle