

9 December 2014

COUNCIL RESOLUTION 14-09

Instruction to the Secretariat of the Commission for Environmental Cooperation with regard to submission SEM-12-001 (*British Columbia (BC) Salmon Farms*) asserting that Canada is failing to effectively enforce the *Fisheries Act*

THE COUNCIL:

AFFIRMING that the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC or the “Agreement”) was established by the Parties of the NAAEC to provide an opportunity for residents of Canada, Mexico, and the United States to present their concerns regarding the effective enforcement of environmental law and to “bring facts to light” regarding those concerns;

ACKNOWLEDGING the role of the Secretariat, as the administrator of the Submissions on Enforcement Matters (SEM) process, to facilitate information-sharing between members of the public and the governments on matters concerning the effective enforcement of environmental law;

HAVING REVIEWED the submission filed by the Center for Biological Diversity, the Pacific Coast Wild Salmon Society, the Kwikwasu'tinuxw Haxwa'mis First Nation, and the Pacific Coast Federation of Fishermen's Associations, on 10 February 2012;

NOTING that Article 14(2) states that “in deciding whether to request a response, the Secretariat shall be guided by whether [...] (c) private remedies available under the Party's law have been pursued [...]”;

ALSO NOTING that Article 14(3) states that the Party named in the submission “shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further [...]”;

NOTING FURTHER that NAAEC Article 45(3) states that “[f]or purposes of Article 14(3), ‘judicial or administrative proceeding’ means: (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or

authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and (b) an international dispute resolution proceeding to which the Party is party.”;

RECALLING that Guideline 9.6 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* states that “[i]f, in its response under Article 14(3), the Party informs the Secretariat and explains in writing that the matter raised in the submission is the subject of a pending judicial or administrative proceeding, as defined in Article 45(3) of the Agreement, the Secretariat will proceed no further with the submission and will promptly notify the Submitter and the Council, in writing, that the submission process is terminated without prejudice to the Submitter’s ability to file a new submission [...]”;

NOTING FINALLY that Party positions presented in the majority and minority explanations for the following instructions should not be understood as views held by the entire Council.

HEREBY DECIDES BY A TWO-THIRDS VOTE:

TO INSTRUCT the Secretariat not to prepare a factual record with respect to this submission; and

UNANIMOUSLY DECIDES:

TO DIRECT the Secretariat to post the reasoning of the members of the Council for their votes in the SEM public registry.

ON BEHALF OF THE COUNCIL:

Dan McDougall
Government of Canada
In support of the Instruction Not to Prepare a Factual Record

Enrique Lendo Fuentes
Government of the United Mexican States
In support of the Instruction Not to Prepare a Factual Record

Jane Nishida
Government of the United States of America
In opposition to the Instruction Not to Prepare a Factual Record

**Reasons for Council Instructions,
by a Two-Thirds Vote, Regarding
Submission SEM-12-001 (*British Columbia (BC) Salmon Farms*)**

Pursuant to its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation responsible for overseeing the implementation of the *North American Agreement on Environmental Cooperation* (NAAEC or the “Agreement”), the Council of the Commission for Environmental Cooperation (the “Council”), hereby makes public the reasons for its instructions, decided by a two-thirds majority, to the Secretariat regarding submission SEM-12-001 (*BC Salmon Farms*).

1. Notification by a Party of pending judicial and administrative proceedings under NAAEC Article 14(3)(a)

- a. Pending proceedings under the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”)

NAAEC Article 14(3) states the following:

The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further. [emphasis added]

For further clarification, NAAEC Article 45(3) defines a “judicial or administrative proceeding” as:

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

To support the implementation of Article 14(3), Guideline 9.6 of the Guidelines states that:

If, in its response under Article 14(3), the Party informs the Secretariat and explains in writing that the matter raised in the submission is the subject of a pending judicial or administrative proceeding, as defined in Article 45(3) of the Agreement, the Secretariat will proceed no further with the submission and will promptly notify the Submitter and the Council, in writing, that the submission process is terminated without prejudice to the Submitter’s ability to file a new submission. [emphasis added]

According to Article 14(3), the Party named in a submission is responsible for advising the Secretariat of pending judicial or administrative proceedings in a timely manner. The NAAEC and the Guidelines are very clear on the steps to be taken following the Party notification: the Secretariat is required to proceed no further with the submission and promptly notify the Council and Submitter that the submission file has been terminated without prejudice to the submitter’s ability to file a new submission. The Secretariat is neither directed nor authorized (explicitly or

implicitly) by the NAAEC or the Guidelines to perform an additional analysis of a Party's notification, including assessing the validity of the pending proceedings addressed in such notification.

b. Pending proceedings related to the *BC Salmon Farms* submission

The submission provided information regarding a private remedy being pursued by one of the Submitters, the Kwikwasu'tinuxw Haxwa'mis First Nation (KAFN), "against the British Columbia government over the negative impact of commercial salmon feedlots on wild salmon" (*Kwicksutainneuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*). The Government of Canada was later added as a defendant in this suit.

On 12 February 2013, Canada sent a letter to the Secretariat regarding the KAFN case referenced in the submission. The letter explained that the submission and the KAFN case both allege government mismanagement, through authorization and regulation, of the salmon aquaculture sector in British Columbia, resulting in negative impacts on wild salmon stocks and habitat. More specifically, both instances concern issues related to sea lice, infectious diseases, and the application of pest and disease treatments. Moreover, Canada's letter indicated that the representative action filed by Chief Chamberlin on his own behalf and for other members of the KAFN had not been discontinued and that continuing the *BC Salmon Farms* submission process could duplicate and interfere with the KAFN case.

In its notification, dated 4 October 2013, Canada fulfilled its responsibility under Article 14(3) of the Agreement and advised the Secretariat that "[Government of Canada] records indicate that the representative action of Chief Chamberlin on behalf of the Kwicksutainneuk/Ah-Kwa-Mish First Nation has not been discontinued," and therefore constitutes a "pending judicial or administrative proceeding" in the sense of Article 45(3)(a) of the Agreement—namely a judicial proceeding—concerning the effective enforcement of subsection 36(3) of the *Fisheries Act*. Furthermore, in its notification, Canada also advised the Secretariat that another proceeding had commenced regarding the same enforcement matter raised in the submission (the *Morton* case).

In a subsequent letter dated 17 December 2013, Canada provided further clarification regarding the subject matter of the *Morton* case and the status of the *KAFN* case. In that letter, Canada explained that the submission and the *Morton* case both address the same matter addressed in the submission, namely: Canada's enforcement of its environmental law with regard to the same fish species (salmon), specifically with regard to the licencing terms for aquaculture operations in the same geographic location (British Columbia), and concerning the interaction between farms and wild salmon habitats. With regard to the KAFN case, Canada's letter makes clear that "[u]nless it is discontinued by the plaintiff [Chief Robert Chamberlin] or otherwise resolved, the representative action remains open, and Federal Crown officials are and will continue to be pursuing the case." As of the signing of this Council Resolution, the action has not been discontinued or otherwise resolved.

c. Analysis of the matter at issue in the *BC Salmon Farms* submission and the 2009 KAFN pending proceeding

The contentions of the *BC Salmon Farms* submission and the KAFN lawsuit appear to be framed by differing claims: the KAFN’s 2009 lawsuit alleges a failure to protect aboriginal fishing rights under section 35 of the Canadian *Constitution Act, 1982*, while the *BC Salmon Farms* submission asserts a failure to effectively enforce subsection 35(2) and subsection 36(3) of the *Fisheries Act*. However, the matter at issue in both instances is the same: the Government’s decision to allow the operation of salmon farms in British Columbia, which allegedly contaminate and disturb waters inhabited by fish.

The following table highlights the fundamental similarities between the matter at issue in the *BC Salmon Farms* submission and the KAFN’s “Statement of Claim” for the pending 2009 suit, drawing on excerpts from each.

| “The matter” asserted in the <i>BC Salmon Farms</i> submission | “The matter” presented in KAFN pending proceeding <i>Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)</i> |
|---|---|
| <i>Fisheries Act</i> subsection 36(3) “[...] 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.” | |
| Government allowing deposits of deleterious substances into water | |
| “the <u>addition of deleterious substances</u> to fish habitat (section 36)” | “allowing the <u>pollution</u> of Wild Salmon habitat” “permitting <u>Salmon Farms that allow the transmission of parasites and disease</u> to Wild Salmon by the use of permeable cages <u>causing free flow of contaminated water and waste</u> between the Salmon Farms and the marine environment” |
| Exposure to parasites (sea lice) | |
| “ <u>exposing wild salmon to amplified levels of parasites such as sea lice</u> viral and bacterial diseases toxic chemicals and concentrated waste” | “ <u>failing to prevent or adequately manage the concentration of parasites, including sea lice</u> ” |
| Transmission of disease from farmed to wild salmon | |
| “The potential for British Columbia salmon <u>feedlots to introduce, amplify and spread pathogens</u> also jeopardizes the health of every other wild salmon run along the Pacific Coast, as well as the entire West Coast salmon fishing industry, because <u>these stocks co-mingle.</u> ” | “ <u>failing to prevent or adequately manage the concentration of infectious diseases</u> at the Salmon Farms and the <u>transmission</u> of these infectious diseases <u>from the Salmon Farms to the Wild Salmon</u> ” |

Note: all emphasis is added.

It is, therefore, the Council’s majority determination that in various instances, including its Response, Canada has fulfilled its responsibility under Article 14(3) of the Agreement to advise the Secretariat that the matter at issue in the submission is the subject of pending judicial

proceedings. Accordingly, the Council's majority position is that the Secretariat should have terminated the submission in a timely manner pursuant to the Agreement and the Guidelines.

2. Further information on government actions taken by Canada

In support of the NAAEC objectives of transparency, openness and public participation, the Council would also like to share information with the Submitters and interested members of the public regarding actions taken by Canada directly related to the matter raised in the *BC Salmon Farms* submission.

The Government of Canada has recently proposed new *Aquaculture Activities Regulations* under *Fisheries Act* sections 35 and 36 (published in the *Canada Gazette Part I* on 23 August 2014) in order to continue to effectively enforce the *Fisheries Act* in the context of aquaculture operations.

The objectives of the proposed regulations are to:

- provide national coherence in the environmental management of licensed aquaculture activities;
- complement the objectives of the *Pest Control Products Act*, the *Food and Drugs Act*, the *Health of Animals Act*, and the *Canadian Environmental Protection Act, 1999*;
- streamline and coordinate a complex federal/provincial regulatory environment; and
- increase public transparency regarding the regulation of the aquaculture sector.

Background information on the *Aquaculture Activities Regulations* can be found at:

<http://www.dfo-mpo.gc.ca/aquaculture/management-gestion/aar-raa-proposition-eng.htm>. The Regulatory Impact Analysis Statement (RIAS) for the *Aquaculture Activities Regulations* also provides details on the proposed regulations and can be accessed at: <http://www.gazette.gc.ca/rp-pr/p1/2014/2014-08-23/html/reg1-eng.php>.

**Statement of the United States of America Explaining its Position and the Reasons for its
Vote Regarding Submission SEM-12-001 (*British Columbia (BC) Salmon Farms*)**

The Government of the United States of America wishes to explain its position and the reasons for its vote on the Commission for Environmental Cooperation (CEC) Secretariat's Notification that development of a factual record is warranted concerning SEM-12-001.

In its Response to SEM-12-001, the Government of Canada stated that the submission process should be terminated pursuant to Article 14.3(a) of the North American Agreement on Environmental Cooperation (NAAEC) because the matter raised in the submission was the subject of two pending proceedings: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia* and *Morton v Minister of Fisheries*. The United States is of the view that neither of these proceedings implicates subsection 36(3) of the Canadian federal *Fisheries Act*. The United States therefore believes that neither proceeding is on the same matter as the submission, and consequently that a factual record on the submission would not duplicate effort or interfere with either proceeding. In addition, neither of these proceedings is being "pursued by the Party" as stipulated in Article 45.3(a) of the NAAEC. Accordingly, the United States sees no basis upon which Article 14.3(a) of the NAAEC could be invoked in this instance to claim that the submissions process should halt with respect to SEM-12-001. Finally, because the Response does not address the substance of the submitters' assertions, the United States believes that questions are raised in the submission that have not been addressed by the Response and that could form the basis for a factual record.

The United States wishes to stress that its vote in support of the preparation of a factual record in this instance does not reflect a judgement on the part of the United States as to whether Canada is failing to effectively enforce its environmental law. The decision of the United States in this instance is based in part on a long-standing U.S. policy that favors the preparation of factual records by the CEC Secretariat as an important means of promoting public participation, transparency and openness on issues related to the enforcement of environmental law in the United States, Canada and Mexico. This long-standing U.S. policy is reflected in Executive Order 12915 of May 13, 1994, which requires the United States, to the greatest extent practicable, to vote in favor of a factual record being prepared whenever such preparation is recommended by the CEC Secretariat.