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COUNCIL RESOLUTION 15-01

Instruction to the Secretariat of the Commission for Environmental Cooperation with regard to submission SEM-10-002 (*Alberta Tailings Ponds*) 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;

RECOGNIZING that the Submissions on Enforcement Matters (SEM) process is designed to promote information-sharing between members of the public and the governments on matters concerning the effective enforcement of environmental law;

CONSIDERING the revised submission filed by Environmental Defence (Canada); the Natural Resources Defense Council (United States); John Rigney of Fort Chipewyan, Alberta; Don Deranger of Prince Albert, Saskatchewan; and Daniel T'seleie of Yellowknife, Northwest Territories; and the response provided by the Government of Canada on 31 January 2014;

HAVING REVIEWED the 29 July 2014 Notification by the Secretariat recommending the development of a factual record regarding submission SEM-10-002; and

NOTING that Party positions presented in the Council's reasons for the following instructions should not be understood as views held by the entire Council;

HEREBY UNANIMOUSLY DECIDES TO:

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

INSTRUCT the Secretariat to post the reasons of the members of the Council for their votes in the SEM public registry.

On behalf of the Council:

JAN 16 2015

Dan McDougall
Government of Canada

Enrique Lendo Fuentes
Government of the United Mexican States

Jane Nishida
Government of the United States of America

Reasons for Council Instructions Regarding
Submission SEM-10-002 (*Alberta Tailings Ponds*)

Pursuant to its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation (CEC) responsible for overseeing the implementation of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement"), the Council of the CEC (the "Council"), hereby makes public the reasons for its decision regarding submission SEM-10-002 (*Alberta Tailings Ponds*).

I. Reasoning of Canada and Mexico

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

According to Article 14(3) of the NAAEC, the named Party in a submission is responsible for advising the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") whether the matter is the subject of a pending "judicial or administrative proceeding" in a timely manner. The NAAEC and Guideline 9.6 of the SEM Guidelines are very clear on the steps to be taken following such a notification from the Party: the Secretariat "shall 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."

b. *Pending proceedings for submission SEM-10-002 (Alberta Tailings Ponds)*

In its response dated 31 January 2014, Canada advised the Secretariat that a private citizen (Anthony Boschmann) had filed a complaint (Swearing an Information) before the Alberta Provincial Court to request a process hearing on matters related to the submission, constituting a "judicial proceeding" in the sense of Article 45(3)(a) of the Agreement. The response specified that the process hearing was to be held on 27 February 2014, and provided court filing documents. It also requested that the Secretariat proceed no further with the submission, as required under Article 14(3)(a) of the Agreement, and promptly inform the Submitters and the Council that the submission was considered closed, in accordance with Guideline 9.6 of the SEM Guidelines.

In a letter dated 14 May 2014, Canada maintained that, based on court rules, the case referenced in its response was still pending, and that, accordingly, the submission process should be terminated pursuant to Guideline 9.6 of the SEM Guidelines and Article 14(3) of the Agreement.

Based on the above, Canada fulfilled its responsibility under NAAEC Article 14(3)(a) to advise the Secretariat in a timely manner that the matter at issue in the submission was the subject of a pending judicial proceeding. Accordingly, the Secretariat should have proceeded no further in its analysis and terminated the submission pursuant to the Agreement and the SEM Guidelines.

II. Reasoning of the United States of America

In submission SEM-10-002 (*Alberta Tailings Ponds)*, the submitters assert that tailings ponds from the extraction of bitumen from mined oil sands deposits in northern Alberta contain a large

variety of substances that are deleterious to fish, and that these substances are able to migrate to ground waters and surface waters. The submitters also assert that Canada is failing to effectively enforce subsection 36(3) of the Canadian federal *Fisheries Act* with regard to these substances. The submitters assert that, "[t]here are documented cases of contaminated tailings substances reaching or projected to reach surface waters in Jackpine Creek (from Shell), Beaver Creek (from Syncrude), McLean Creek (from Suncor) and the Athabasca River (from Suncor)." SEM-10-002 at page 2.

On January 31, 2014, Canada informed the Secretariat that an information had been sworn (i.e., a complaint had been filed) on September 12, 2013, by Anthony Neil Boschmann, a private Canadian citizen, before the Alberta Provincial Court alleging, among other things, that Suncor, a company operating in the Alberta oil sands region, allowed the deposit of deleterious substances into the Athabasca River in violation of subsection 36(3) of the *Fisheries Act*. Canada took the position that the Secretariat must proceed no further with its examination of SEM-10-002 because the filing of this "information" constitutes a pending judicial proceeding within the meaning of Article 14(3)(a) of the NAAEC.

While it is not clear to the United States from the information provided by Canada that the "information" filed by Mr. Boschmann involved leakage from tailings ponds, it is clear that it involved alleged actions taken by Suncor in Alberta that purportedly resulted in the deposit of deleterious substances into the Athabasca River in violation of subsection 36(3) of the *Fisheries Act*. These elements are also present in the assertions made by the submitters in SEM-10-002.

The United States is therefore of the view that enough information was provided by Canada for the Secretariat to conclude that there could be a pending criminal proceeding on the same subject matter as that raised in the submission, or on a closely related matter. While the United States is not satisfied that the "information" filed by Mr. Boschmann would have constituted a pending judicial proceeding within the meaning of Article 14(3)(a) of the NAAEC, the U.S. believes that the Secretariat should have exercised caution and refrained from continuing to process SEM-10-002.

There are two reasons for this. First, at the time Canada notified the Secretariat that an "information" had been filed, a pending criminal proceeding may have been initiated that could potentially have addressed enforcement issues raised in the submission. Second, the production of a factual record on SEM-10-002 might have interfered with such a proceeding. The United States is of the view that these same considerations of non-interference and avoiding duplication of effort form part of the rationale for Article 14(3)(a) of the NAAEC when a pending judicial or administrative proceeding is being pursued by the Party that is the subject of a submission.

The United States also notes that nothing in the NAAEC would have precluded the submitters from filing another submission on these issues had the Secretariat ceased to process SEM-10-002. For all of these reasons, the United States believes it important to vote against preparation of a factual record in this instance.