
Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 14(1) and (2) of the North American Agreement for Environmental Cooperation

Submitter:	North Coast Steelhead Alliance
Represented by:	Richard Overstall and Christina Cook
Concerned Party:	Canada
Date received:	15 October 2009
Date of this Determination:	18 May 2010
Submission I.D:	SEM-09-005 (<i>Skeena River Fishery</i>)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC,” or the “Agreement”) provide for a process allowing any person, or non-governmental organization, to file a Submission asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”) initially considers Submissions to determine whether they meet the criteria contained in NAAEC Article 14(1)¹ and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (the “Guidelines”). When the Secretariat determines that a Submission meets the criteria set out in Article 14(1), it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the Submission merits a response from the NAAEC Party named in the Submission. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a Factual Record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it proceeds no further with the Submission.²

2. On 15 October 2009, the North Coast Steelhead Alliance (the “Submitter”) filed SEM-09-005 (*Skeena River Fishery*) (the “Submission”) with the Secretariat, in accordance with NAAEC Article 14. The Submitter asserts that Canada is failing to effectively enforce its environmental law in relation to fishing licenses issued by the federal Department of Fisheries and Oceans (“DFO”) to commercial fishers of salmon in

¹ The word “Article” throughout this Determination refers to an Article of the North American Agreement on Environmental Cooperation, unless otherwise stated.

² Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC website: <http://www.cec.org/citizen/index.cfm?varlan=english>.

the Skeena River, an inland marine fishery located on the north coast of British Columbia, Canada (“BC”).

3. On analysis of SEM-09-005 (*Skeena River Fishery*), the Secretariat finds that the Submission meets all the admissibility requirements of Article 14(1), and, pursuant to the criteria set out in Article 14(2), the Secretariat finds that the Submission warrants requesting a response from the Government of Canada. The Secretariat presents its reasons for this Determination below.

II. SUMMARY OF THE SUBMISSION

4. The Submitter asserts that Canada is failing to effectively enforce its environmental law, as set out in the Fisheries Act (R.S.C. 1985 c. F-14), by “allowing marine commercial salmon fishers on the North Coast of British Columbia, Canada, to ignore license conditions aimed at protecting and conserving certain kinds of fish, mainly steelhead trout, that are caught as ‘by-catch’, that is, during fisheries aimed at catching other kinds of fish, mainly sockeye salmon.”³ The Submitter notes the asserted failures primarily concern license conditions⁴ under the Fishery (General) Regulations (the “FGR”), i.e. those imposed by sections 22(1) (a), (h), (s) and 22(2) (“the laws at issue”). The Submitter also asserts that Canada failed to enforce the latter environmental laws “in violation of its obligations under Article 5(1)” of the NAAEC. In the following section, the Secretariat summarizes the details of the Submitter’s assertions.

5. According to the Submitter, DFO is failing to effectively enforce the following commercial license conditions: s. 22(1)(a) FGR, the license condition that concerns the species of fish and quantities thereof that may be taken or transported, and which does not permit the taking of steelhead trout (non-salmon fish species) at all times, and certain salmon species (chum, coho, and chinook) at certain specified times; s. 22(1)(h) FGR, the license condition specifying the type, size, and quantity of fishing gear and equipment that may be used, and the manner in which it may be used; s. 22(1)(s) FGR, the license condition making mandatory the segregation of prohibited fish by species on board vessels; and s. 22(2) FGR, which allows the Minister to amend licenses for the purpose of conservation and protection of fish.

6. The Submitter also outlines DFO’s power to issue “variation orders” which can “close specified areas to fishing for specified periods,” but notes that these orders are not the subject of the submission, and that information on them is included only to provide context.⁵ The Submitter states that variation orders may be issued in order to close

³ Submission, p. 2.

⁴ Submission, p. 7. In particular, the Submitter asserts that the gill-net and seine-net commercial fishing license conditions are being ignored.

⁵ Submission, p. 6.

specified areas to fishing for specified periods.⁶ The Submitter also provides information on the legal context for its assertions, describing the function of the Pacific Fishery Regulations, 1993 (the “PFR”) as to “give the Minister specific discretion to issue a commercial salmon fishing license on Canada’s Pacific coast.”⁷

7. The Submitter states that there are five salmon species in the northeast Pacific Ocean: chinook, chum, coho, pink, and sockeye.⁸ The Submitter states that these species begin life in fresh water then migrate, after a rearing period, to the ocean. There the fish remain, before returning to spawn and die at the same freshwater site where they began; they do this once in their life-cycle. The Submitter states that ocean-going steelhead trout, in contrast, can repeatedly migrate from fresh water to the ocean and back again to spawn.⁹ The Submitter alleges that the license condition amendments specifying the prohibited salmon species fall under s. 22(2).¹⁰

8. The Submitter also notes that the Skeena River Fishery boasts the second-largest run of sockeye salmon in Canada.¹¹ The Submitter states that since the 1970s this fishery has been a mixed-stock marine fishery, with incidental capture of non-target and protected species known as “by-catch.”¹² The Submitter opines that effective enforcement of fishing license conditions would protect and preserve steelhead through sorting of the fish by-catch, fish resuscitation in revival boxes aboard fishing vessels, and the immediate release of incidentally caught non-target fish (such as steelhead) back into the ocean. The Submitter notes that other fishing practices to ensure low amounts of fish by-catch could include adjusting the timing of the commercial fishing periods, specifying fishing locations, and methods such as adjusting net size, mesh size and type.¹³ The Submitter lists two types of fishing licenses that relate to their assertions: commercial gill-net licenses and seine-net licenses.¹⁴

9. According to the Submitter, the gill-net licenses at issue apply to the fishing of salmon species and to those species of fish permitted as by-catch. Such licenses specify that only sockeye, coho, pink, chum and chinook salmon may be taken, subject to closed periods.¹⁵ In addition, the Submitter asserts that the license specifies what fishing gear and equipment is permitted, and requires that each vessel be equipped with a fish-revival

⁶ Submission, pp. 6–8. Provisions for variation orders and notices are found in ss. 6 and 7 of the FGR, and ss. 53 and 54 of the Pacific Fishery Regulations, 1993. Provision for notices of amendments pursuant to FGR 22(2) is found in section 22(3) FGR.

⁷ Submission, p. 5.

⁸ Submission, p. 3.

⁹ Submission, p. 3.

¹⁰ Submission, p. 14.

¹¹ Submission, p. 3.

¹² Submission, p. 3.

¹³ Submission, p. 4.

¹⁴ Submission, p. 7.

¹⁵ Submission, p. 7.

tank.¹⁶ The Submitter notes that a salmon seine-net fishing license requires in addition that fishers brail and sort their catch.¹⁷

10. The Submitter states that the Skeena River salmon fishery is governed by the Fisheries Act¹⁸ and two sets of regulations adopted under it: the FGR¹⁹ and the PFR.²⁰ The Submitter notes that “DFO has delegated responsibility for steelhead management in their freshwater environment to the BC government, although it remains accountable to Parliament for such management,” and that DFO maintains “direct management responsibility for steelhead in the marine environment.”²¹ The Submitter states that the Fisheries Act and the provisions in the regulations at issue have a dual purpose, namely, the proper management and control of sea coast and inland fisheries, and the conservation and protection of fish.²² The Submitter thus considers the laws at issue “environmental laws” in accordance with NAAEC Article 45(2).²³

11. The Submitter notes that fishers are required to comply with license conditions or face summary conviction or indictment punishable under s. 78 of the Fisheries Act by fine, imprisonment, or both.²⁴ The Submitter also maintains that the “federal Department of Fisheries and Oceans is required to regulate salmon fishers so that by-catch mortality for steelhead is both minimized and kept below agreed levels,” pursuant to a 1996 agreement (implemented in 1997 and in subsequent years) among the BC Ministry of Environment, the DFO, and stakeholder groups represented by the Skeena Watershed Committee.²⁵ The Submitter states that the Skeena River fishery is further guided by policy set out in annual Integrated Fisheries Management Plans (“IFMPs”) and DFO’s Conservation and Protection operations policy.²⁶ According to the Submitter, although there is no commercial steelhead fishery, a maximum steelhead exploitation rate of 24 percent has been incorporated into each IFMP since 1997.²⁷

12. The Submitter cites the 2006 IFMP, and notes that the “objective for Skeena steelhead, as well as all North Coast steelhead, is to release to the water with the least possible harm all steelhead caught incidentally in fisheries targeting other species.”²⁸ This objective, the Submitter notes, requires that fishers follow conditions set out in fishing

¹⁶ Submission, p. 7.

¹⁷ Submission, p. 7.

¹⁸ Fisheries Act, R.S.C. 1985, c. F-14.

¹⁹ Fishery (General) Regulations, SOR/93-53.

²⁰ Pacific Fishery Regulations, 1993, SOR/93-54.

²¹ Submission, p. 5.

²² Submission, pp. 13 & 14.

²³ Submission, p. 14.

²⁴ Submission, pp. 2 & 6.

²⁵ Submission, pp. 2 & 6.

²⁶ Submission, p. 9.

²⁷ Submission, p. 9.

²⁸ Submission, p. 9.

licenses, such as using fishing techniques to reduce prohibited by-catch, and reviving and releasing steelhead which are incidentally caught.²⁹

13. The Submitter notes that in 2006, the sockeye return in the Skeena Fishery “exceeded all predictions with a run of approximately three million fish.”³⁰ In that connection, according to the Submitter, there was, conversely, a “weak steelhead return.”³¹ The Submission notes DFO decided at the time to allow commercial fishing to operate an extra eleven consecutive days, to take advantage of the abundant sockeye.³²

14. The Submitter asserts that during the summer of 2006, DFO failed to enforce license conditions and amendments issued to commercial fishers operating in the Pacific North Coast fishery and authorized by the Minister under s. 22(1) and (2) of the FGR. The license conditions at issue for the Submitter are:³³

- having operating revival tanks on board while fishing;
- sorting, reviving and releasing non-target species with the least possible harm;
- not taking steelhead prohibited at any time; [and]
- the taking and possession of chum, coho and chinook salmon only at certain specified times.

15. The Submitter asserts that during the summer of 2006 voluntary compliance for by-catch was minimal, the by-catch rules were systematically violated, and the license conditions mentioned above were ignored, all by commercial fishers. In that connection, the Submitter cites government correspondence indicating that licensed commercial fishers were simply throwing by-catch back as soon as it hit the boat, “dead or alive.”³⁴ Thus, the Submitter asserts, “[DFO], in the face of the observed absence of voluntary compliance, did not enforce those license conditions or amendments.”³⁵ The Submitter also states:

The low enforcement effort on the marine commercial fishery since 2006 does not reflect increased compliance by fishers. DFO continues to record in 2008 that it has a significant problem with gill-net vessels failing to have operational revival boxes operating during the gill-net fishery.³⁶

²⁹ Submission, p. 9.

³⁰ Submission, p. 4.

³¹ Submission, p. 4.

³² Submission, p. 4.

³³ Submission, pp. 7, 9 and 14.

³⁴ Submission, p. 10.

³⁵ Submission, p. 10.

³⁶ Submission, p. 13. See Appendix M at p. 77.

16. In a letter to the Minister of Fisheries and Oceans dated 25 January 2007, the Submitter notes that in 2007 “we are no closer to a satisfactory management plan that recognizes conservation requirements of Skeena salmon while providing a fair allocation of those same fish than we were in 1975.”³⁷

17. The Submitter further alleges that in 2006 enforcement was overwhelmingly targeted at recreational and aboriginal fishers, and states that “[t]he failure to revive and release prohibited species by the marine commercial fleet affects returns of vulnerable salmon and steelhead populations by an order of magnitude more than do violations by recreational [and] aboriginal fishers.”³⁸

18. The Submitter asserts that in summer 2006, the Prince Rupert DFO Detachment patrolled the marine commercial salmon fleet for a mere 167.5 hours, just over half as much as in 2005, and this without any warnings having been issued nor any charges having been laid under the environmental laws at issue.³⁹ The Submitter also asserts that effective enforcement of the commercial gill-net licenses and seine-net licenses is necessary, to protect the health and biodiversity of the species these environmental laws are intended to protect,⁴⁰ and draws the conclusion that reduced fish stocks are a result of non-enforcement of license conditions. The Submitter further asserts that this non-enforcement harms “the entire ecosystem, including people, other species of fish and their habitat.”⁴¹ Moreover, the Submitter alleges that “the low enforcement effort [by DFO] on the marine commercial fishery since 2006 does not reflect increased compliance.”⁴²

19. The Submitter also asserts that the matter has been communicated to the Government of Canada, in both written and oral form, by “individuals representing various environmental and recreational interests.”⁴³ The Submitter asserts that “no realistic alternative private remedies [are] available,” to redress the alleged failures to effectively enforce the laws at issue, citing its limited financial capacity. The Submitter also states that, “[w]hile Canadian citizens do have the right to commence private

³⁷ Submission, p. 13. See Appendix N, Letter to the Minister of DFO dated 25 January 2007.

³⁸ Submission, p. 13.

³⁹ Submission, p. 12.

⁴⁰ In that connection, the Submitter asserts: “The failure to revive and release prohibited species by the marine commercial fleet affects returns of vulnerable steelhead populations by an order of magnitude more than do violations by recreational and aboriginal fishers. To choose to direct limited enforcement hours to recreational and aboriginal fishers does not represent a reasonable exercise of discretion in allocation of resources.” Submission, pp. 9 and 13.

⁴¹ Submission, p. 14.

⁴² Submission, p. 13.

⁴³ Submission, p. 13. The Secretariat has found in previous Determinations that the Article 14(1)(e) communication with relevant authorities does not have to emanate directly from the Submitter, but such communication must concern the matter raised in the Submission, along with the other requirements of Article 14(1)(e). See, for example, SEM-01-002 *AAA Packaging*, at p. 4, “nothing in the Submission indicates that the specific matter addressed in the Submission...has been communicated in writing by the Submitters *or others* to the relevant Canadian authorities” (emphasis added).

prosecutions of offences under the *Fisheries Act* and its regulations where the government refuses to enforce the law, such proceedings are usually stayed by the Attorney General and, in any event, do not address the systemic problem of persistent non-enforcement by the Canadian government.”⁴⁴

III. ANALYSIS

20. NAAEC Article 14 authorizes the Secretariat to “consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law...”⁴⁵ The Secretariat finds that the submission meets the criteria set out in Article 14(1) (a–f). As the Secretariat has found in previous Article 14(1) Determinations,⁴⁶ Article 14(1) is not intended to be an insurmountable screening device. This means that the Secretariat will interpret every Submission in accordance with NAAEC and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria. The Secretariat analyzed Submission SEM-09-001 from this perspective.

A. Opening Paragraph of Article 14(1)

21. The Secretariat will now treat each component of NAAEC Article 14(1) in turn. Article 45(1) defines “non-governmental organization.”⁴⁷ The Submitter, the North Coast Steelhead Alliance, represents itself as a non-profit organization: “The Submitter is a non-profit entity dedicated to working with all levels of government, industry, and community and stakeholder groups to preserve and enhance Skeena wild steelhead.”⁴⁸ The Submitter also represents itself as a non-governmental organization.⁴⁹ The Submitter thus appears to meet the definition of “non-governmental” set out in Article 45(1) of NAAEC: its organization is a non-profit and a non-governmental organization and it does not appear to be affiliated with, nor is it under the direction of, any government.⁵⁰

22. Having held that this requirement is met, the Secretariat now considers whether the assertions relate to an “ongoing” alleged failure to effectively enforce environmental

⁴⁴ Submission, p. 15.

⁴⁵ NAAEC, Article 14(1).

⁴⁶ See, for example, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998), and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

⁴⁷ NAAEC, Article 45(1): “any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government.”

⁴⁸ Submission, p. 2.

⁴⁹ Submission, pp. 13 & 14. The Submission includes a description of their organization: “The Submitter is a non-governmental organization whose members include individuals and other organizations that have a shared interest in the conservation and protection of the Skeena salmonids, especially Skeena steelhead. The members of the Submitter make use of these fisheries....”

⁵⁰ Submission, p. 14.

law.⁵¹ The Secretariat notes that the asserted failures to effectively enforce are best documented with regard to commercial gill-net and seine-net licenses issued in 2006,⁵² but these assertions of failures to effectively enforce the laws at issue also appear to extend from at least 2005 to the time of the Submission.⁵³ The Submitter also provides 2000–2007 commercial harvest data and the Party’s own compliance and enforcement (“C&E”) summaries for the latter years, as well as C&E sections of DFO’s 2007 and 2008 post-season reviews.⁵⁴

23. It appears from the latter information, and from other information provided in the Appendices to the Submission, that the Party increased enforcement efforts in 2007 and 2008 as compared to 2006: it raised patrol hours and issued warnings and laid charges for violations of license conditions.⁵⁵ C&E data for 2009 were not included in the Submission and does not appear to have been available at the time of the Submission. However, it is not entirely clear from the data provided how this evidence of increased enforcement efforts directly concerns the area in which the Submitter asserts that the laws at issue are not being effectively enforced.⁵⁶ It also appears that the assertions alleging violations of license conditions with regard to vessels having operating revival boxes on board, and non-target fish being released with the least harm, cover a period prior to 2006 as well, and such assertions also appear to concern an ongoing situation in 2008,⁵⁷ despite

⁵¹ The Secretariat has often discussed the need for assertions regarding failures to effectively enforce to meet the temporal requirement of concerning an apparently “ongoing” situation at the time of Submission. These occasions include: SEM-97-03 *Quebec Hog Farms*, p. 8, “the Submission meets the temporal requirement in Article 14(1) because...the Submission asserts that many of the alleged violations are ongoing”; and SEM-99-02 *Migratory Birds*, p. 4, “the Submission focuses on asserted failures to enforce that are ongoing. It thereby meets the jurisdictional requirement in the first sentence of Article 14(1).” See also *Quebec Mining*, SEM-09-004 Determination, at note 31.

⁵² Submission, p. 7. The Submitter refers to the licenses relevant to this submission: “The fishing licences relevant to this submission are commercial gill-net and seine-net licences for North Coast Pacific ocean salmon fisheries issued by the Minister in 2006 under the Act and section 19 of the PFR to each fisher for a specified licenced vessel.”

⁵³ Submission, pp. 13 & 15 and Appendix M at p. 77. The Submitter refers to private prosecution proceedings, but states that these “do not address the systemic problem of persistent non-enforcement by the Canadian government,” and the Submitter characterizes the problem as ongoing: “Private prosecutions...are not a viable option for effective enforcement where there are numerous ongoing violations of federal law.” The Submitter includes an email exchange of August 8, 2006 about the alleged failure to effectively enforce the laws at issue: “[S]ince the fishing season [2006] was over for that year, lack of enforcement could be addressed the following year,” at Submission, p. 12. Further in the Submission, the Submitter claims that “the low enforcement effort on the marine commercial fishery since 2006 does not reflect increased compliance by fishers.” The Submitter further notes that “DFO continues to record in 2008 that it ‘has a significant problem with gill-net vessels failing to have operational revival boxes operating during the salmon gill-net fishery’”: Submission, p. 13.

⁵⁴ See Submission, p. 2, Appendix E (Counterpoint Consulting Data for 2004-2007 Table 11) and Appendix J (DFO Compliance and Enforcement Summaries 2000-2007).

⁵⁵ See Submission, Appendices J-N, and in particular with regard to 2007 and 2008, Appendices L & M.

⁵⁶ The enforcement and compliance data provided concern a large area including, but extending beyond, the Skeena Fishery.

⁵⁷ See Submission, Appendix A at p. 83, which alleges that as of 2005 there were apparent compliance problems with revival boxes and release of by-catch in a manner that causes the fish the least harm.

the increased enforcement efforts.⁵⁸ Moreover, assertions of harmful effects of enforcement efforts which disproportionately target aboriginal and recreational fishers, rather than commercial fishers, concern an ongoing situation at the time of the Submission.⁵⁹ For these reasons, the Secretariat considers that the assertions in the Submission meet the temporal requirement in the opening paragraph of Article 14(1).

24. The opening paragraph of NAAEC Article 14(1) allows the Secretariat to consider a Submission from any non-governmental organization or person “asserting that a Party is failing to effectively enforce its environmental law.”⁶⁰ The Secretariat now examines whether, first, the laws at issue in the Submission constitute “environmental law” and, secondly, whether the assertions allege a failure to “effectively enforce” such environmental law.

The environmental laws at issue

25. The Submitter alleges that the Party has failed to effectively enforce three subsections in section 22(1) as well as 22(2) FGR. The Secretariat examined assertions regarding license conditions found in s. 22(1) (a), (h) and (s) FGR and amendments to license conditions in section 22(2) FGR, to determine whether these are environmental laws in accordance with NAAEC Articles 14 and 45(2). The Submitter also asserts that “the Party is in violation of its obligations under Article 5(1) of the [NAAEC].”⁶¹ NAAEC Article 45(2) (a) states in relevant part that, for the purposes of Article 14(1) and Part Five,

“environmental law” means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:...(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas

⁵⁸ See Submission, Appendix M, where the “North Coast C&P Compliance and Enforcement Mid-season Summary April 1st to November 1st 2008” states at p. 68:

“This season saw a focused effort by Prince Rupert C&P staff on assessing and reacting to early concerns in the Area 3-4 commercial gill-net fisheries where early non-compliance with revival box use was very high. As a result of this unacceptable practice, DFO engaged industry in a firm manner to assist in raising compliance of this important management tool.”

⁵⁹ Submission, pp. 12-13, where the Submitter states: “Of this salmon fishery patrol time, only 10 percent (209 hours) was spent on the commercial fleet[;] the remaining 90 percent was spent on the recreational and aboriginal fisheries. The proportions of this effort have not significantly changed in subsequent years.The failure to revive and release prohibited species by the marine commercial fleet affects returns of vulnerable salmon and steelhead populations by an order of magnitude more than do violations by recreational or aboriginal fishers.”

⁶⁰ NAAEC, Article 14(1).

⁶¹ Submission, p. 2.

in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.⁶²

26. Section 22(1) FGR provides for the authority of the Minister to set conditions on fishing licenses for the purpose of the conservation and protection of fish:

22. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify conditions respecting any of the following matters:

(a) the species of fish and quantities thereof that are permitted to be taken or transported;

...

(h) the type, size and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is permitted to be used;

...

(s) the segregation of fish by species on board the vessel[.]

27. Section 22(2) FGR provides for the authority of the Minister to amend a license for the purposes of conservation and protection of fish:

The Minister may, for the purposes of the conservation and protection of fish, amend the conditions of a licence.

28. The Secretariat considers that, pursuant to Article 45(2), FGR sections 22(1)(a), (h), and (s), and 22(2), cited in the Submission, are environmental laws the objects and purposes of which are the protection of the environment through the protection of species of fish, i.e., "wild...fauna," in the Party's territory.⁶³ The laws at issue may in some

⁶² NAAEC, Article 45(2) (a)(iii).

⁶³ The Secretariat recalls SEM-97-001, *BC Hydro*, concerning the federal-state nature of fisheries management in the Province of British Columbia, and notes that the effective enforcement of the laws that are the subject of the Submission appears to be a matter for the federal government, as was the case in *BC Hydro*, albeit this Submission involves a different part of the Fisheries Act:

"Canada highlights the importance of a cooperative relationship between provincial and federal authorities in protecting fish habitat and promoting compliance with relevant legal requirements, stating: 'In B.C., anadromous and marine species and their habitats are managed by Canada, while B.C. exercises responsibility for managing freshwater species. B.C. also undertakes certain activities with respect to management of freshwater habitats, although Canada retains responsibility for administering the habitat protection provisions of the Fisheries Act. The result is a complex administrative environment where cooperation, common goals, and good faith are

enforcement circumstances englobe the purpose of managing the commercial harvest or exploitation, or of subsistence fishing, or of aboriginal harvesting of natural resources, but these do not appear to be the respective primary purposes of the laws at issue. Moreover, the assertions in the Submission relate directly to the effective enforcement of license conditions “aimed at protecting and conserving certain kinds of fish...”⁶⁴ The Secretariat does not, however, consider further any assertions relating to alleged failures to effectively enforce the conditions of fishing licenses held by aboriginal fishers, as these appear to be covered by laws other than the laws at issue, and the Submitter has not adequately demonstrated how the laws that are at issue apply to those assertions.⁶⁵

29. The Secretariat also does not consider further the Submitter’s assertion that the Party is “in violation of its obligations under Article 5(1) of the [NAAEC]” because, as the Secretariat has noted in previous determinations, NAAEC is not considered an “environmental law” in accordance with Article 45(2) and for the purposes of Articles 14 and 15—save to the extent that a Party has incorporated NAAEC or provisions thereof into its domestic legal regime.⁶⁶ The latter is not the case in Canada.

essential.’ (Canada’s July 1997 Response, p. 7). Canada indicates that while there is a partnership between the Province and the federal government, Canada remains ultimately responsible for administering the habitat protection provisions of the Fisheries Act.” (*BC Hydro Factual Record*, p. 34, 2000).

Further, DFO states on its website that: “The management and protection of fish stocks in the Skeena River system is shared by Fisheries and Oceans Canada (DFO) and the Province of British Columbia (B.C.) DFO is responsible for the conservation of salmon populations in the river, and for managing the fisheries that target these stocks. B.C. is responsible for the conservation of the river’s steelhead populations, and for managing the recreational fisheries that target them.” See <http://www.dfo-mpo.gc.ca/media/back-fiche/2008/pr08-eng.htm> (last visited 3/05/2010).

⁶⁴ Submission, p. 2.

⁶⁵ The Pacific Region IFMP for Salmon in 2006-2007, Submission Appendix A, p. 59, states that: “First Nations access to salmon for FSC purposes is managed through communal licences. These licences set out the specifics and target harvest levels by First Nations groups.”

⁶⁶ See SEM 98-001-03, *Guadalajara*, Article 14(1) Determination (2003), which states in relevant part:

“The Submitters also cite Articles 5 (1)(j)(I), 6 and 7 of the NAAEC, related respectively to government action for the enforcement of environmental laws and regulations, private access to remedies, and procedural guarantees. The Secretariat’s view is that, as a general matter, to the extent that these Articles create obligations on the part of the Parties (Canada, Mexico and the United States) the remedy provided under the Agreement for a Party’s purported failure to fulfill its obligations lies with the other Parties. Article 14 of the NAAEC provides the exclusive process for non-governmental organizations and individuals relating to allegations that a Party is not effectively enforcing its environmental laws. Only if an individual or non-governmental organization could seek enforcement of Articles 5(1)(j)(I), 6 and 7 of the NAAEC under the domestic legal regime of a Party would these provisions be potentially susceptible to a submission under Article 14 of the Agreement. Because the Submitters do not indicate that they have sought enforcement of Articles 5(1)(j)(I), 6 and 7 of the NAAEC under the domestic legal regime of the Party or communicated that matter to the Party, we cannot conclude that the allegations that those provisions are not being enforced effectively satisfy the criteria under Article 14(1) of the Agreement. In short, the Secretariat considers that the allegations that Articles 5(1)(j)(I), 6 and 7 of the NAAEC have not been enforced effectively do not satisfy the criteria under Article 14(1) of the Agreement.”

Assertions on the failure to effectively enforce

30. The Secretariat now analyzes whether the assertions in Submission SEM-09-005 concern alleged failures of the “effective enforcement” of environmental laws, in accordance with the opening paragraph of NAAEC Article 14(1). The Secretariat has consistently interpreted Article 14(1) to exclude any assertions alleging a deficiency in the law itself. The Secretariat considers that the Submission as a whole does assert failures of effective enforcement of the Party’s environmental laws, rather than deficiencies in the laws themselves.

31. The Secretariat will now treat each requirement of NAAEC Article 14(1) (a–f) in turn.

(a) the Submission must be: “in writing in a language designated by that Party in a notification to the Secretariat...”

32. The Secretariat finds the Submission meets the criterion of NAAEC Article 14(1) (a) as the Submission is in English, an official language designated by the Parties for the filing of a Submission.⁶⁷

(b) the Submission “clearly identifies the person or organization making the Submission...”

33. The Submission provided the name and mailing address of the Submitter and the person filing it. The statement of the name and address of the person or organization filing the Submission is sufficient for the Secretariat clearly to identify the Submitter, the North Coast Steelhead Alliance. The Secretariat considers that the Submitter and the organization are clearly identified and thus the Submission meets the criterion of Article 14(1) (b).⁶⁸

(c) the Submission “provides sufficient information to allow the Secretariat to review the Submission, including any documentary evidence on which the Submission may be based...”

⁶⁷ NAAEC Article 19 provides that the official languages of the CEC are Spanish, French, and English. Likewise, section 3.2 of the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of NAAEC (the “Guidelines”) provides: “Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for Submissions.”

⁶⁸ In this regard, see SEM-07-005 (*Drilling Waste in Cunduacán*), Determination under Article 14(3) (8 April 2009), § 25(a).

34. The Submitter provides several reports, documents and communications with DFO, some of which were obtained through the Party's information-access legislation.⁶⁹ The Submission's supporting documentation is from varied sources, such as DFO notices,⁷⁰ fishing licenses,⁷¹ and consultants' reports,⁷² all related to the assertions in the Submission.⁷³ In particular, the reports and documents in the Appendices relate to the Skeena River Fishery and the North Pacific Coast Fishery Region, and cover the relevant time-periods set out in the assertions.⁷⁴ The Secretariat, in light of the foregoing, finds that the Submission provides sufficient information to allow the Secretariat to review it, and therefore meets the requirement of Article 14(1)(c).

(d) the Submission: "appears to be aimed at promoting enforcement rather than at harassing industry..."

35. The Secretariat, on the basis of the information currently before it, considers that the Submission satisfies the requirements of Article 14(1)(d), as the Submission appears to be aimed at promoting enforcement of the laws at issue rather than at harassing industry.⁷⁵ In making this determination, the Secretariat notes that the Submission is in part concerned with what the Submitter alleges is a disproportionate enforcement effort targeting recreational fishers. However, the Submitter also analyzes comparative data on enforcement efforts by DFO officials concerning commercial, recreational and aboriginal fishing licenses alike for 2006, 2007 and 2008.⁷⁶ The Submitter asserts that these data show DFO's enforcement priorities negatively impact returns of "vulnerable salmon and steelhead populations." It is not evident from the information before the Secretariat that the Submitter is in a competitive relationship with commercial licensees mentioned in the

⁶⁹ Submission, Appendix C. The Access to Information documents include 38 emails by Fisheries and Oceans officials on Skeena River Fishery to various provincial officials and DFO authorities, from 25 August 2006 to 7 September 2006.

⁷⁰ Submission, Appendices G and H. Fishery Notice for a Variation was dated 19 August 2006, for Area C; Gillnet and Fishery Notice was dated 29 August 2006, for Management Areas 4 and 5.

⁷¹ Submission, Appendix F: sample Salmon Gillnet License for period 02 June 2006 to 37 March 2007.

⁷² Submission, Appendices D and E: Report of Walters, C.J., Lichatowich, J.A., Peterman, R.M. and Reynolds, J.D., *Report of the Skeena Independent Science Review Panel*, submitted to the Department of Fisheries and Oceans and the British Columbia Ministry of the Environment, 15 May 2008, 140 pages; and Counterpoint Consulting, *Economic Dimensions of Skeena Watershed Salmonid Fisheries*, October 2006, 111 pages.

⁷³ The Submission contains several website sources in Appendix A, Department of Fisheries and Oceans, *Pacific Region, Integrated Fisheries Management Plan, IFMP, Salmon Northern B.C. 1 June 2006 to 31 May 2007*, 86 pages. Pages 3–8 note several websites.

⁷⁴ Submission, Appendix A, *IFMP* 1 June 2006 to 31 May 2007.

⁷⁵ The Secretariat was guided by Section 5.4 of the Guidelines, which provides that to determine whether the Submission is aimed at promoting effective enforcement and not at harassing industry, the Secretariat will consider whether: "(a) the Submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the Submission," and "(b) the Submission appears frivolous."

⁷⁶ Submission, p. 12.

Submission, or that the Submitter is a competitor who could stand to benefit economically from the Submission.

36. The Secretariat also considers that the submission appears to be focussed on the alleged acts and omissions of the Party in accordance with Guideline 5.1, rather than on compliance by a particular company or business operating in the Skeena River Fishery. For the foregoing reasons, the Secretariat finds the Submission meets the requirement of NAAEC Article 14(1) (d).

(e) the Submission: “indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response...”

37. The Submitter states that issues raised in the Submission have been communicated to the Party, in writing and orally, by individuals representing various environmental and recreational interests.⁷⁷ The Submitter provides information indicating that their concerns about the enforcement of license conditions have been communicated in writing in 2006, 2007 and 2008 to the relevant Fisheries and Oceans Ministry and its authorities responsible for enforcing the laws at issue.⁷⁸ The Submitter included copies of emails that were sent in 2008 to DFO Prince Rupert Detachment for enforcement,⁷⁹ and the Submitter’s letters to the relevant authority.⁸⁰ The Submitter included Appendices with additional communications between B.C. government officials and the relevant authority concerning enforcement issues on the Skeena Fishery.⁸¹ For all these reasons, the Secretariat considers that the Submission satisfies the requirements of NAAEC Article 14(1)(e).

(f) the Submission: “...is filed by a person or organization residing or established in the territory of a Party.”

38. Finally, the Secretariat considers whether the Submission was filed by a person or organization residing in or established in the territory of a Party. The Submitter reports its address as being in Hazelton, British Columbia, Canada. The Secretariat accordingly finds that the Submission meets the requirement of Article 14(1)(f).

⁷⁷ Submission, p. 13. See Appendix N, Letter to the Minister of DFO dated 25 January 2007.

⁷⁸ Some communications were media reports, describing protests led by the Mayor of Prince Rupert in 2006.

⁷⁹ Submission, Exhibit K: Copies of 3 emails from the Chairperson of North Coast Steelhead Alliance on Compliance and Enforcement Summaries to C & P Detachment Supervisor, dated 16 January 2008, 11 February 2008 and 22 & 23 July 2008.

⁸⁰ Submission, p. 13. See Appendix N, Letters to the Minister of Fisheries and Oceans Canada, including one of 25 January 2007. Other letters in Appendix N were to US Scientific Certification Systems (5 February 2007) and to Minister of the Environment, Government of British Columbia (4 February 2007). These last two letters were copied to the Minister of Fisheries and Oceans, which is the relevant authority.

⁸¹ Submission, Appendix B: Emails from DFO officials to the B.C. Ministry of the Environment, pp. 23–26.

B. Article 14(2) Factors

39. The Secretariat reviews a Submission under Article 14(2) when it finds that the Submission meets the criteria in NAAEC Article 14(1). Having determined in the preceding section that the Submission indeed meets the requirements of NAAEC Article 14(1), the Secretariat will now review the Submission under NAAEC Article 14(2), in order to determine whether the Secretariat should request a response to the Submission from the Party.

40. NAAEC Article 14(2) provides that:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the Submission alleges harm to the person or organization making the Submission;
- (b) the Submission, alone or in combination with other Submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the Submission is drawn exclusively from mass media reports.⁸²

(a) *“the Submission alleges harm to the person or organization making the Submission”*

41. First, the Secretariat examines whether the Submission alleges harm to the person or organization making the Submission under Article 14(2)(a). Following Guideline 7.4(a) and (b), the Secretariat further considers whether the alleged harm, according to the Submitter, is due to the asserted failure to effectively enforce the law, and whether the alleged harm relates to the protection of the environment.⁸³ The Submitter states that it is “a non-governmental environmental organization whose members include individuals and other organizations that have a shared interest in the conservation and protection of Skeena salmonids, especially Skeena steelhead.”⁸⁴ The Submitter claims that its members make use of these fisheries, and it alleges that any “reduced viability of fish stocks harms (Article 14.2(a)) the entire ecosystem, including people, other species of fish and their

⁸² NAAEC, Article 14(2).

⁸³ NAAEC, Article 14(2) (a), and NAAEC Guideline, 7.4(a) and (b).

⁸⁴ Submission, p. 14.

habitat.”⁸⁵ The Submitter also asserts that Canada is failing to effectively enforce the Fisheries Act “by allowing marine commercial salmon fishers on the North Coast of British Columbia, Canada, to ignore licence conditions aimed at protecting and conserving certain kinds of fish, mainly steelhead trout, that are caught as ‘by-catch.’”⁸⁶ The Secretariat concludes that the Submission alleges harm to the organization making the Submission in accordance with Article 14(2) (a), and that this allegation relates to the protection of the environment.

(b) “the Submission, alone or in combination with other Submissions, raises matters whose further study in this process would advance the goals of this Agreement”

42. The Secretariat considered Article 14(2)(b) and whether the Submission raises matters whose further study in this process would advance the goals of the Agreement. In this connection, the Submission includes detailed information on fish preservation and conservation best practises, as well as information on fisheries law-enforcement practises. Further study of the matters raised in the Submission could thus advance NAAEC objectives found in Article 1 (a), (f), (g), and (h).⁸⁷

(c) “private remedies available under the Party's law have been pursued”

43. In accordance with Article 14(2)(c), the Secretariat has examined whether private remedies available under the Party’s law have been pursued. The Secretariat was also guided in this connection by Guideline 7.5(b).⁸⁸ The Submitter claims that “there are no realistic alternative private remedies available (Article 14(2)(c)).”⁸⁹ According to the Submission, “[t]he Submitter either does not have status for civil remedies or would find them impractical to pursue.”⁹⁰ Moreover, the Submitter states, “[w]hile Canadian citizens

⁸⁵ Submission, p. 14.

⁸⁶ Submission, p. 2.

⁸⁷ NAAEC Article 1 objectives (a), (f), (g), and (h) are for the Agreement to:

(a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; ...

(f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;

(g) enhance compliance with, and enforcement of, environmental laws and regulations;

(h) promote transparency and public participation in the development of environmental laws, regulations and policies[.]

⁸⁸ Guideline 7.5 requires that “[i]n considering whether private remedies available under the Party’s law have been pursued, the Secretariat will be guided by whether: ... (b) reasonable actions have been taken to pursue such remedies prior to making a Submission, bearing in mind that the barriers to the pursuit of such remedies may exist in some cases.”

⁸⁹ Submission, p. 15.

⁹⁰ Submission, p. 15.

do have the right to commence private prosecutions of offences under the *Fisheries Act* and its regulations where the government refuses to enforce the law, such proceedings are usually stayed by the Attorney General and ... do not address the systemic problem of persistent non-enforcement by the Canadian government.”⁹¹ The Submitter alleges that “[p]rivate prosecutions are ... not a viable option for effective enforcement where there are numerous ongoing violations of federal law.”⁹²

44. In light of the foregoing, the Secretariat finds that the Submitter apparently does have access to private remedies under the Party’s law, although the Submitter may not, by its own admission, be in a financial position to pursue them. The Secretariat notes that Article 14(2)(c) does not define what the term “private remedies” means, although it assumes that the words are to be interpreted in the context of the domestic court system of the Party concerned. In this case, the Submitter obtained independent legal advice.⁹³ The Secretariat considers that obtaining legal advice regarding the pursuit of private remedies may be considered an “action” in accordance with Guideline 5.6. The Secretariat also notes that the words “including private remedies” in Guideline 5.6 appear subsequent to the word “action.” In that connection, the Submitter has stated that it did not consider, after obtaining legal advice, that private remedies would be practical to pursue. Guideline 7.5(b) can be read as contemplating this situation. It does appear that the Submitter has not pursued private remedies in the sense of going to the courts with its assertions. But the Submitter has engaged in other “actions,” including participating in discussions on the government’s integrated fishery-management plans,⁹⁴ undertaking efforts to obtain government information through access-to-information legislation, and communicating about the matters at issue with the Party.⁹⁵ Further, the Submitter attaches a witness-complaint report made by a private citizen to the DFO Area Chief regional resource management office in Prince Rupert, providing an eye-witness account and the Area Chief’s email response.⁹⁶ In accordance with Guideline 7.5(a) the Secretariat considers that it does not appear there would be duplication or interference if a Factual Record were prepared, and in accordance with Guideline 7.5(b), the Submitter appears to have taken reasonable actions to pursue private remedies, and as noted above it alleges that it faces barriers to the pursuit of such remedies. In light of the foregoing, the Secretariat finds that the Submission meets the requirements of Article 14(2)(c).

(d) “the Submission is drawn exclusively from mass media reports”

⁹¹ Submission, p. 15.

⁹² Submission, p. 15.

⁹³ Submission, p. 15, paragraph 2.

⁹⁴ Submission, p. 2. The Skeena Watershed Committee and the 2006 Integrated Fisheries Management Plan are referred to in footnotes 2 and 4 by the Submitter.

⁹⁵ Submission, p. 2.

⁹⁶ Submission, pp. 10-11. Citizen complaint and report to DFO at Appendix I. Email from DFO dated 8 August 2006 at Appendix C at p. 19.

45. With respect to Article 14(2)(d) and guided by Guideline 7.6,⁹⁷ the Secretariat examines whether the the Submission is based exclusively on mass media reports. In reviewing the Submission along with its Appendices, the Submitter notes that the Submission is based primarily on information obtained from the federal and provincial governments, industry, and research resources⁹⁸, as well as the Submitter's direct involvement with the Skeena River Fishery and the North Coast Fishery of British Columbia.

46. The Secretariat considers that the Submission is not based solely on mass media reports. Guided by Guideline 7.6, other sources of information (predominantly government documents) were reasonably available, and the Submitter does rely on these in making its assertions.

IV. DETERMINATION

47. For the above reasons, the Secretariat, guided by the Guidelines, determines that Submission SEM-09-005 (*Skeena River Fishery*) meets the requirements of Article 14(1) of the Agreement. The Secretariat, having also considered the criteria in Article 14(2) and its corresponding Guidelines, further determines that the Submission warrants requesting a response from the Government of Canada.

48. In any response, the Party may wish to include information regarding the Submitter's assertions that Canada is failing to effectively enforce FGR sections 22(1) (a), (h), and (s), and 22(2). In so doing, the Government of Canada may, as far as practicable, wish to include information on its efforts to effectively enforce the environmental laws at issue from the year 2000 to date.⁹⁹ In particular, the Party may in any response wish to provide information on two points. These are: (1) enforcement efforts relating to the area concerned in the Submission, and the effectiveness of such efforts in conserving and protecting fish in accordance with the laws at issue; and (2) information concerning allocation of enforcement resources, and the Submitter's

⁹⁷ NAAEC Guideline 7.6 reads:

"In considering whether a response from the Party concerned should be requested when the submission is drawn exclusively from mass media reports, the Secretariat will determine if other sources of information relevant to the assertion in the submission were reasonably available to the Submitter."

⁹⁸ Submission, p. 15.

⁹⁹ The year 2000 was chosen as a possible reference year because apparently it was when selective fishing using the current ceiling cap of 24% began. Using this date as a reference year could shed light on the matters raised in the Submission. See Submission, Appendix B, p. 29.

assertions of disproportionate targeting of non-commercial fishers, allegedly causing negative impacts on the conservation and protection of fish.¹⁰⁰

49. The Secretariat requests a response from the Government of Canada to the Submission in accordance with Article 14(3) of the Agreement, and notes that any response should normally be received within 30 days of this Determination. A copy of the Submission and its Appendices has been forwarded to the Party under separate cover.

50. Recognizing that a response from the Government of Canada may contain confidential information and that the Secretariat will make public its reasons for deciding whether to recommend a Factual Record, the Secretariat recalls that paragraph 17.3 of the NAAEC Guidelines encourages the Party to provide its own summary, for public disclosure, of confidential information.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)
per: Marcelle Marion
Legal Officer, Submissions on Enforcement Matters Unit

(original signed)
per: Dane Ratliff
Director, Submissions on Enforcement Matters Unit

cc: Mr. David McGovern, Canada Alternate Representative, Environment Canada
Ms. Michelle DePass, US Alternate Representative, EPA
Mr. Enrique Lendo, Mexico Alternate Representative, Semarnat
Mr. Evan Lloyd, Executive Director, CEC
Submitters

¹⁰⁰ The Secretariat notes in that connection that any response may also wish to include information on “reasonable exercises of discretion” and “bona fide decisions to allocate resources to enforcement” in accordance with NAAEC Article 45(1).