

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 15(1) that Development of a Factual Record is not Warranted

Submitter: North Coast Steelhead Alliance
Represented by: Richard Overstall
Concerned Party: Canada
Date received: 15 October 2009
Date of this determination: 12 August 2011
Submission I.D: SEM-09-005 (*Skeena River Fishery*)

I. EXECUTIVE SUMMARY

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 *Fisheries (General) Regulations* (“FGR”) sections 22(1) (a), (h), and (s), and 22(2), primarily in relation to fishing license conditions for

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> [last visited 12 August 2011].

commercial fishers of salmon in the Skeena River, an inland marine fishery located on the north coast of British Columbia, Canada (“BC”).³

3. On 18 May 2010, the Secretariat determined that the Submission met all the criteria set out in Article 14(1) of the NAAEC and, in light of the factors contained in Article 14(2), requested a response from Canada.⁴ Canada responded in accordance with Article 14(3) on 30 July 2010 (the “Response”).⁵
4. The Secretariat has determined that the Response does not leave open central questions raised in the Submission regarding effective enforcement of the laws cited by the Submitter. In accordance with NAAEC Article 15(1) and Guideline 9.6, the Secretariat hereby informs the Council that the Submission, in light of the Party’s Response, does not warrant developing a factual record and provides its reasons below.

II. SUMMARY OF THE SUBMISSION

5. The Submission was originally summarized at pages 2-7 of the Secretariat’s Determination of 18 May 2010.⁶

III. SUMMARY OF THE RESPONSE

6. The Government of Canada’s Response in accordance with NAAEC Article 14(3) was prepared jointly by Department of Fisheries and Oceans (“DFO”) and Environment Canada (“EC”).⁷ Canada states that, in addressing matters raised in the Secretariat’s 18 May 2010 Determination, the Response will:
 - 1) identify the 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) provide information concerning the allocation of enforcement resources and the submitter’s assertions of disproportionate targeting of non-commercial, i.e., recreational fisheries, allegedly causing negative impacts on the conservation and protection of fish.⁸
7. The Response opens with a discussion of government roles and responsibilities. Canada notes that the Constitution Act, 1867, provides that the federal government

³ Submission, p. 14.

⁴ SEM-09-005 (*Skeena River Fishery*), Secretariat Determination under Article 14 (1) and 14 (2) (18 May 2010), available online at: http://www.cec.org/Storage/88/8490_09-5-DET_14_1_2_en.pdf [last visited 12 August 2011].

⁵ Government of Canada Response to Submission SEM-09-005 (30 July 2010) (hereinafter the “Response”).

⁶ Secretariat Determination of 18 May 2010, *supra* note 4.

⁷ Response, p. 2.

⁸ *Ibid.*

is responsible for “protecting and conserving the nation’s fisheries resources.”⁹ DFO is the federal department that manages fisheries in accordance with the roles and responsibilities outlined in the Fisheries Act, using “credible, science-based, affordable and effective practices”.¹⁰ Canada indicates DFO “has responsibility for managing salmon in both tidal and non-tidal waters including First Nation fisheries, commercial and recreational fisheries in tidal waters, salmon fisheries in non-tidal waters and has primary responsibility for fish habitat protection.”¹¹ Canada notes that BC’s provincial officials are responsible “for aspects of non-salmon freshwater fisheries”, such as “determining stock status, and [managing] fisheries that are directed towards steelhead [...]”.¹² According to the Party, Canada and BC have developed a Fisheries Management Protocol¹³ “to guide the federal and provincial governments in cooperative management of steelhead populations”¹⁴.

8. Canada states that its fisheries enforcement efforts “cannot be discussed in isolation from DFO’s overall approach to management”.¹⁵ Canada also notes that DFO uses the Integrated Fisheries Management Plan (“IFMPs”) as a tool “to guide the conservation and sustainable use of marine resources and to manage the fishery of a particular species in a given region”.¹⁶
9. Canada considers that the “primary” goal of an IFMP is “to provide a planning framework for 1) the conservation and sustainable use of fisheries resources and 2) the process by which a given fishery will be managed for a set period of time.”¹⁷ Canada moreover states that for the BC north and south coast, IFMPs are prepared annually for salmon.¹⁸
10. Canada notes that the IFMP process brings together information necessary for management and promoting compliance, and is inclusive and involves “considerable consultation” with those interested in salmon management, such as First Nations, recreational and commercial fishers.¹⁹
11. Canada states that “if incoming information suggests that fish stocks are returning in greater or lesser numbers than forecasted, actions not already contemplated in

⁹ Response, p.3

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Response, Annex 1, “Canada-British Columbia Agreement on the Management of Pacific Salmon Fishery Issues” (1999).

¹⁴ Response, p.4.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Response, p. 6. *See also* Annex 2, Pacific Region, Integrated Fisheries Management Plan, Salmon, Northern B.C., June 1, 2007 – May 31, 2008, at 13.

the IFMP may be implemented.”²⁰ Canada also notes that the IFMP can guide in-season management decisions “to attempt to address various contingencies such as runs that are in variance with predictions”.²¹

12. Canada explains the relationship between the IFMP process and specific enforcement measures as follows:

The inclusive nature of the process used in the development of IFMPs and during in-season management of the fisheries forms the foundation for the enforcement activities that are undertaken by DFO. For example, IFMPs may specify management measures that include certain gear restrictions or closed areas or times and it is the role of enforcement staff to monitor the fishery for compliance with these measures.²²

13. Canada notes that Conservation and Protection (“C&P”) “is the branch of DFO responsible for the enforcement of the *Fisheries Act* and regulations.”²³ Fishery Officers are according to Canada, “the designated agents of fisheries enforcement activities, which are carried out across Canada”.²⁴ Canada states that the relevant C&P unit for the Skeena River Fishery is the Prince Rupert Detachment Office, (“PRDO”) which covers Statistical Areas 3, 4 and 5; the lower reaches of the Skeena River and the approaches to the river.²⁵ Canada states that the PRDO is “responsible for compliance monitoring and enforcement of all fisheries (i.e., marine and freshwater including salmon, herring, ground-fish, shellfish and other species) and habitat provisions of the *Fisheries Act*, in the area which is the subject of the Submission.”²⁶
14. According to Canada, the C&P Branch follows three “pillars” of compliance management in carrying out its responsibility for the enforcement of the *Fisheries Act* and regulations:

1. Education and Shared stewardship, involving the encouragement of voluntary compliance through formal (e.g., advertisements and promotional campaigns) and informal (e.g., presentations, meetings) educational initiatives as well as participation in planning processes, the building of relationships with stakeholder groups, and the provision of recommendations and advice on regulatory requirements.
2. Monitoring, control and surveillance, including observation

²⁰ Response, p.5.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Response, p. 7.

²⁶ *Ibid.* See also Response, Annex 3, “Map of Conservation and Protection Detatachments 2007”, and Response, Annex 4, “North Coast Statistical Area Map”.

of fishing activities, inspection of gear, vessels and facilities, verification of compliance with regulations and license conditions, and, when required, the initiation of judicial or other proceedings in response to non-compliance.

3. Major case investigation, the long-term in-depth investigation of egregious cases of non-compliance and/or widespread collusion in unlawful activity related to the harvest and sale of fish.²⁷

15. Canada also notes that DFO is “very active in other areas”, such as appointing and training Fishery Officers, the IFMP process, the issuance of licenses, and the regular issuance of bulletins on enforcement procedures. Canada considers the latter all government enforcement actions pursuant to NAAEC Article 5.²⁸
16. Canada points out a management and enforcement challenge concerning the Skeena River Fishery,²⁹ stating that target fish runs (such as various salmon species) overlap with non-target fish runs (such as steelhead) “in terms of timing and availability for harvest”.³⁰ Canada also points out that:

Steelhead is a highly valued sport-fish and their retention throughout BC is prohibited in commercial fisheries. All steelhead captured must be released to the water with the least possible harm.³¹

17. Canada explains that it has been taking measures to reduce “incidental catch”, i.e. the catching of non-target fish such as steelhead, during the commercial salmon fishery.³² Canada notes, “A high level of incidental catch can have detrimental impacts on non-target fish including steelhead and other stocks, because it could prevent fish from reaching their spawning grounds.”³³ Canada states that measures have been taken to reduce fishery impacts on the Skeena River, such as:

[N]on-retention of some species, gear and fishing modification, and specific timing closures or sockeye harvest rate reductions when weak stocks are present.³⁴

²⁷ Response, p. 7. Emphasis in original.

²⁸ *Ibid.* See also Response, Annex 2, where the North Coast compliance and enforcement operations are said to be generally applied to “Monitoring of mandatory selective fishing measures such as provisions for revival tanks, brailing, catch reporting requirements (i.e. hail-ins and log books), short sets, barbless hooks (recreational and troll) and non-retention of prohibited species”, *supra* note 19 at 24.

²⁹ Response, pp. 7-8.

³⁰ Response, p. 8.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ Response, pp. 8-9.

18. Canada lists other management measures that may be implemented through license conditions, pursuant to the FGR (s. 22(1) and (2)), such as:

[T]he species of fish and quantities thereof that are permitted to be taken or transported (FGR s. 22(1)(a)); 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 (FGR s. 22(1)(h)); and the segregation of fish by species on board the vessel (FGR s. 22(1)(s)).³⁵

19. Canada notes the incidental catch rate as an “important variable” in conserving and protecting steelhead, and discusses how it contributes to sustainability of the stock without causing harm, as long as the catch is at or below the agreed-upon rate:

Therefore, incidental catch resulting from commercial fishing at or below the agreed-upon rate would not be considered harmful for the conservation of non-target species.³⁶

20. Canada notes that stakeholders in the North Coast Salmon IFMP process³⁷ have

“consistently established an incidental catch limit of 24% for steelhead as the acceptable level that would permit steelhead to reach spawning grounds in numbers sufficient to conserve and maintain the health and viability of the species, while still providing economic opportunities for salmon harvesters.”³⁸

21. Canada notes that the effects of various gillnet fishing patterns on the catch and escapement of sockeye, steelhead (including sub-stocks), and early run coho, chinook, and pink salmon migrating through four sub areas of Area 4 (Skeena), are all inputs for a model used to quantify the incidental catch rate, known as the “Skeena Management Model” (“SMM”) ³⁹:

This model was developed jointly in 1992 between BC and DFO scientists. Since its first use in 1994, the Skeena Management Model has undergone significant change and can now account for various fishing methods that have been brought into the fishery since 1994 to reduce incidental catch. These methods include the use of gillnet weedlines, brailing by seines, short

³⁵ Response, p. 9.

³⁶ *Ibid.* Emphasis in original.

³⁷ Response, p. 9. The concerned stakeholders include government officials, First Nations representatives, commercial harvesters, recreational fishers, and conservation groups.

³⁸ Response, p.9.

³⁹ See generally, Response, Annex 5, Cox-Rogers, S. Description of a daily simulation model for Area 4 (Skeena) commercial gillnet fishery. Can. Man. Rept. Of Fish and Aquat. Science No. 2256. [“Skeena Management Model”]

gillnet sets, half-length gillnets, and other practices and factors, including revival boxes, catch-and-release, harvesters' compliance rates, sub-area closures, etc.⁴⁰

The SMM, according to documentation provided by Canada, gives managers a framework for pre-season planning, but in-season evaluation is also needed to confirm pre-season estimates.⁴¹

22. In the 2007 North Coast IFMP provided by Canada, C&P salmon compliance and enforcement priorities included:

- the laundering of FSC fish into the Area 3 and 4 commercial salmon fisheries as well as other illegal sales projects,
- increased patrols and monitoring of the commercial gill net and seine fisheries,
- increased patrols and monitoring of the tidal and non tidal recreational fisheries,
- dedicated pre-season inspections and in-season patrols of the recreational sport lodge fisheries,
- continued compliance and enforcement of the Skeena Inland Demonstration fishery.⁴²

23. Canada states that 2006 “was an anomalous year with respect to the level of available Fishery Officers”, and that due to budget, prioritization, and staff allocation decisions made in 2004 and 2005, the Prince Rupert detachment experienced Fishery officer shortages:⁴³

In essence, the 2006 anomaly resulted in fewer Fishery Officers at the Prince Rupert detachment, which is responsible for compliance monitoring and enforcement of all fisheries in the area of concern to the submitters in the Skeena River. The reduced capacity of the Prince Rupert detachment in 2006 is reflected in the total fisheries patrol hours conducted that year [...]⁴⁴

24. Canada notes that the number of total fisheries patrol hours in 2006:

[...] was lower than in the subsequent years of 2007-2009. This lower level in total patrol hours was seen across the board for

⁴⁰ Response, pp. 9-10.

⁴¹ *Idem*, at 13.

⁴² Response, Annex 2, 2007-2008 North Coast Salmon IFMP, *supra* note 19 at 25.

⁴³ Response, pp. 14, 21.

⁴⁴ Response, p. 10.

salmon fisheries in 2006, both for commercial (20.5 h in 2006 v. 187.5 h in 2007) and recreational (182.25 h in 2006 v. 442.75 h in 2007).⁴⁵

25. Canada maintains “that a direct comparison of [fisheries patrol] hours between commercial and recreational fisheries does not provide an accurate reflection of the enforcement effort, given that the two fisheries differ significantly in their timing”.⁴⁶ Canada then proceeds to compare enforcement coverage between the commercial and recreational fisheries using the number of hours fished, patrol hours, and percentage of coverage from 2006 to 2009 for the Prince Rupert detachment.⁴⁷ Canada notes that this study shows enforcement effort increased for commercial and recreational fisheries subsequent to 2006, and demonstrates that, contrary to the submitters’ assertions, there has not been a disproportionate targeting of recreational fisheries.⁴⁸
26. Canada goes on to address the results of enforcement in 2006, noting that resource challenges affected the number of detected violations in both the commercial and recreational fisheries.⁴⁹
27. Canada notes that the number of violations detected is not the only factor in analyzing the effectiveness of enforcement actions.⁵⁰ Canada also points out that being within the agreed incidental catch rate for steelhead of 24% would meet agreed-upon conservation objectives.⁵¹ Canada provides a table showing steelhead incidental catch rates in Areas 3/4/5 from 1994 to 2006, whereby from 1998 until 2006, the rate of incidental catch did not exceed 24%.⁵² Canada notes that in 2006 although there was some uncertainty in estimating the incidental catch rate, with values ranging from 18.4% to 29.7%, the post-season review of the 2006 fishery contained in the 2007-2008 IFMP, estimated the most probable rate as being 24%.⁵³
28. Canada discusses the lack of available Fishery Officers in 2006.⁵⁴ Canada notes that in 2006, Fishery Officers were rotated from the North Coast area (which includes the Skeena) to the lower Fraser River in order to bolster enforcement in

⁴⁵ *Ibid.*

⁴⁶ Response, p.11.

⁴⁷ *Ibid.* See Table 2, Comparison of enforcement coverage by Prince Rupert Detachment in Commercial and Recreational Salmon Fisheries from 2006-2009.

⁴⁸ *Ibid.*

⁴⁹ Response, p. 12.

⁵⁰ Response, p. 13.

⁵¹ *Ibid.*

⁵² *Ibid.* Table 3, Rates of incidental catch of Steelhead on the Skeena River from 1994 to 2006. Note “a” of Table 3 states that the rate of incidental catch is that determined by the Skeena Watershed Committee, and which is included in annual IFMPs.

⁵³ *Ibid.*

⁵⁴ Response, p. 14.

the lower Fraser for Regional prioritization decisions.⁵⁵ Canada states that of the normal complement of nine Fishery Officers for the Prince Rupert detachment, there were only 4 in 2006, and two of those were deployed to the Fraser River to address the Regional priorities, leaving only two officers.⁵⁶ Canada points out that having only two officers also meant reduced time for patrolling, inspecting, etc, and because the National Directive on Fishery Officers Working Alone states that boarding at sea cannot take place with fewer than two officers, if one officer were unavailable, commercial at-sea patrols and inspections were not possible.⁵⁷

29. Canada discusses the Integrated Risk Management (“IRM”) process introduced by C&P as a pilot project in 2005 (and refined in subsequent years), and which “forms a cornerstone of priority-setting at the National, Regional and Area level.”⁵⁸ In terms of 2006 priorities, Canada notes that a decision was made at the Area and detachment level to target illegal sales and recreational non-compliance, in response to reported high-levels of non-compliance, and that although such non-compliance had been reported in the commercial fishery, fewer resources were available for the commercial enforcement efforts.⁵⁹ Canada notes that in any event, resource allocation was done in good faith, and “does not represent a failure to effectively enforce the provisions of the *Fisheries Act*”.⁶⁰
30. Canada proceeds to describe the post-2006 increase in staffing of Fishery Officers, whereby the Prince Rupert detachment currently has a full complement.⁶¹ In light of subsequent IFMPs and IRM processes, Canada also notes that patrols and compliance programs for commercial, recreational, and First Nations fisheries have increased, and that re-prioritization of enforcement efforts has led to increased detection of violations in the commercial gillnet and seine fisheries, and charges being laid which address the problem of operational revival boxes in the gillnet Fishery.⁶² Moreover, Canada states that it issued a Fishery Notice in 2008 concerning the need for functioning revival boxes and even closed a planned commercial fishery opening in order to emphasize this point.⁶³ Canada describes other increased enforcement efforts, such as education of the commercial fishing fleet pre-season, and increased patrols in-season.⁶⁴

⁵⁵ *Ibid.*

⁵⁶ Response, p. 15.

⁵⁷ *Ibid.* Annex 8, National Guidelines with respect to Fishery Officers Working Alone, was designated by the Party as confidential, and the Secretariat maintains its confidentiality in accordance with Guideline 17.

⁵⁸ Response, p. 15.

⁵⁹ Response, p. 16.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Response, pp. 16-17. *See also* Annex 9, North Coast C & P Compliance and Enforcement Mid-Season Summary, April 1 to November 1 2008, at 77.

⁶³ Response, pp. 17-18. *See also* Annex 10, Fishery Notice FN 0501 – July 24, 2008. Commercial – Salmon: Gillnet Area C – 3, 4 & 5 – Poor Compliance.

⁶⁴ Response, p. 18.

31. Canada notes that according to the C&P Supervisor for the Prince Rupert detachment, in 2009 “revival box compliance in the commercial salmon fisheries improved drastically from last year”.⁶⁵ Canada points to a provincial/federal commissioned expert panel Report of the *Skeena Independent Science Review Panel*, which stated it “is not true that steelhead escapement is higher on average when the Area 3-5 commercial fisheries are substantially reduced”.⁶⁶
32. Canada concludes the Response noting that the year 2006 was an “anomaly”⁶⁷ and did “not represent an ongoing failure to effectively enforce environmental laws with respect to the Skeena River salmon fishery”.⁶⁸ Canada notes “[t]he allocation of patrol hours in 2006 reflected the application of very limited resources in disparate fisheries in response to identified compliance concerns.”⁶⁹ Canada also notes that despite limited resources and a limited enforcement presence, the steelhead incidental catch rate was at the agreed-upon 24% in 2006, and that there is no validity in the Submitter’s assertion that minimal enforcement in 2006 reduced viability of fish, and harmed the ecosystem and people’s livelihoods.⁷⁰ Canada notes moreover that there are “no indications steelhead has been overharvested” during the commercial fishery in Areas 3/4/5.⁷¹ Canada repeats that there is no merit in the Submitter’s assertion of disproportionate enforcement targeting recreational fishers more than commercial fishers, and notes that for 2006, the coverage rate for the recreational fishery was only marginally higher than that of the commercial fishery.⁷² Canada states that in subsequent years the coverage rates for commercial fisheries exceeded those for recreational fisheries.⁷³
33. Canada states finally, that there is no “ongoing failure to effectively enforce environmental laws with respect to the Skeena River salmon fishery”.⁷⁴

IV. ANALYSIS

34. Article 15(1) of NAAEC now requires the Secretariat to consider whether the submission, in light of Canada’s response, warrants developing a factual record. Article 15(1) also requires that if the Secretariat determines that a factual record is warranted, it must so inform the Council and provide reasons for its determination.

⁶⁵ *Ibid.* See also Annex 11, 2009 Post Season Review – Salmon.

⁶⁶ *Ibid.* Emphasis in original. See also Response, Annex 12, Walters, C.J., Lichatowich, J.A., Peterman, R.M. and Reynolds, J.D. 2008. Report of the Skeena Independent Science Review Panel. A report to the Canadian Department of Fisheries and Oceans and the British Columbia Ministry of the Environment, May 15, 2008. Part I.

⁶⁷ Response, p. 21

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Response, p. 19.

⁷¹ *Ibid.*

⁷² Response, p. 20.

⁷³ *Ibid.*

⁷⁴ Response, p. 21.

As the Secretariat has noted in a previous determination, “Under NAAEC 15(1), the Secretariat has broad discretion to determine whether or not a submission warrants the development of a factual record.”⁷⁵ One factor motivating the Secretariat to recommend a factual record in previous NAAEC Article 15(1) determinations is whether, after considering the Response in light of the Submission, there are any “central open questions” which a factual record could shed light on.⁷⁶

35. The Secretariat in its Determination dated 18 May 2010⁷⁷ requested that the Government of Canada 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). The Secretariat in its 18 May 2010 Determination also asked the Party in its Response to focus on:

- (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 assertions of disproportionate targeting of non-commercial fishers, allegedly causing negative impacts on the conservation and protection of fish.⁷⁸

36. Regarding point 1 of the Secretariat’s above request for more information on enforcement efforts in the area concerned in the Submission and the effectiveness of those efforts in conserving and protecting fish, the Party first provides information on the IFMP and its role in the planning framework for the conservation and management process in a given fishery considering the pre-season, in-season, and post-season stages.⁷⁹ Moreover, the Party provides information on how the IFMP is part of the overall enforcement effort in the area in question, including IFMP specifications such as gear restrictions or closed areas and times (which can figure into license conditions) that enforcement staff monitor a particular fishery for.⁸⁰ The Submitter acknowledged the importance of the IFMP for enforcement as well, noting “Actually trying to achieve such a plan [section

⁷⁵ See SEM 01-001 (*Cytrar II*), Secretariat Determination Pursuant to Article 14(3), dated 13 June 2001, at 5, available online at: http://www.cec.org/Storage/70/6436_01-1-DET14_3-E.pdf [last visited 12 August 2011].

⁷⁶ See, for example: “The Secretariat has concluded that the response leaves open central questions that the submission raises [...]”, in SEM 03-005 (Montreal Technopark), Article 15(1) Notification to Council that a Factual Record is Warranted, dated 19 April 2004, at 2, available online at - http://www.cec.org/Storage/74/6772_03-5-ADV_en.pdf [last visited 12 August 2011]; and, “The response and submission leave open several central questions of fact relating to whether the Party is effectively enforcing the environmental laws at issue”, in SEM 97-006 (*Oldman River*), Article 15(1) Notification to Council that a Factual Record is Warranted, dated 19 July 1999, at 3, available online at: http://www.cec.org/Storage/68/6235_97-6-ADV-E.pdf [last visited 12 August 2011].

⁷⁷ *Supra* note 4, at 18.

⁷⁸ *Ibid.*

⁷⁹ Response, pp. 4-7, 9, 13, 17, 19, 20-21, and Annex 2, *supra* note 19.

⁸⁰ Response, p. 6.

3.1.6 of the 2006 IFMP] demonstrates a commitment to conservation, part of the mandate of DFO”.⁸¹

37. As stated above, in light of IFMPs and IRM processes, post-2006 Canada increased patrols and compliance programs for commercial, recreational, and First Nations fisheries, and re-prioritized enforcement efforts, which has led to increased detection of violations in the commercial gillnet and seine fisheries, and charges being laid.⁸² It therefore appears that the Party is indeed “actually trying to achieve” the goals set out in the IFMP.

38. The Secretariat in its 18 May 2010 Determination noted:

“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”.⁸³

39. The Response provides information that was not available at the time of the Submission, including certain enforcement data for 2008 and 2009.⁸⁴ The Secretariat notes that the IFMP and IRM process, in light of what the Party calls the “anomalous” year 2006, show increased enforcement efforts in both the commercial and recreational fisheries in the area in question, and one concrete result of these efforts appears to be increased compliance with license conditions concerning revival boxes; a central issue in the submitters’ assertions.⁸⁵

40. The Submitter’s assertions focus on the year 2006 as being allegedly exemplary of a pattern of mismanagement and ineffective enforcement.⁸⁶ The Party in its Response addresses the fact that there were indeed fewer Fishery Officers and fewer total patrol hours in 2006, and notes that the enforcement with regard to recreational fishers “marginally exceeded” that for commercial fishers.⁸⁷ As noted above, the Party states that, “a direct comparison of hours between the commercial and recreational fisheries does not provide an accurate reflection of the enforcement effort given that the two fisheries differ significantly in their timing”.⁸⁸

⁸¹ Submission, p. 9.

⁸² *Supra* para. 30.

⁸³ Secretariat 14(1)(2) Determination of 18 May 2010, *supra* note 4, para. 23.

⁸⁴ Response: Annex 9, *supra* note 62; Annex 11, *supra* note 65; Annex 12, *supra* note 66.

⁸⁵ “Of particular relevance to this submission is subsection 3(4), which states that the vessel must be equipped with an operating revival tank”, Submission, p. 7. *See also* Response, pp. 10-14, 17-18.

⁸⁶ Submission, p. 13, and Appendix N, Letter to the Minister of DFO dated 25 January 2007. *See also* Secretariat 14(1)(2) Determination of 18 May 2010, *supra* note 4, paras. 12-18.

⁸⁷ *Supra* para. 33.

⁸⁸ Response, p. 11. *Supra* para. 25.

41. At the time of the Submission it seemed assertions regarding effective enforcement of license conditions and total patrol hours may concern an ongoing situation, yet in light of information provided by the Party in its Response⁸⁹ summarized above, it is clear that such assertions do not appear to support there being an ongoing situation, despite the Prince Rupert C&P detachment statement in the 2009 Post-season Review noting that improvements can still be made.⁹⁰ The Secretariat has noted previously that for a situation to be ongoing in the sense of the opening paragraph of Article 14(1), that situation should continue to produce effects in the present.⁹¹ The Party provides information in the Response that demonstrates it is not “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’”, which is a central assertion in the Submission.⁹²
42. Regarding the Submitter’s assertions on “by-catch”, the Secretariat considered the Response’s information on the incidental catch rate for Steelhead, and notes that the rate of 24% has not been exceeded since 1998, despite 2006 being the highest level of incidental catch in that date range.⁹³ The Submitter implies that the alleged lack of effective enforcement of the laws at issue has reduced viability of fish stocks and caused harm to the environment and the Submitter.⁹⁴ The Response provides information on the process used to arrive at the incidental catch rate by the Skeena Watershed Committee and which is incorporated in the annual IFMPs.⁹⁵ Moreover, the Party provides information on the effectiveness of the Skeena Management Model, and none of this information appears to support the assertion that lack of effective enforcement of the laws at issue is causing harm to the environment, fish stocks, or the submitter.⁹⁶
43. The Secretariat has reviewed the information provided in the Submission and Response, and considers that the Party is actively engaged in enforcement of the laws at issue, and that it has implemented a robust multi-stakeholder process for management of the Skeena River Fishery. Besides the enforcement activities

⁸⁹ Response, pp. 10-18.

⁹⁰ The Party states that the Prince Rupert detachment is currently at its full complement of nine officers. The Secretariat notes however that the Prince Rupert C&P report for 2009 states, “The current detachment strength is a 20-percent reduction from the previous 10-officer organization. The management of most of the detachment’s fisheries has become increasingly more complex in recent years. This has resulted in an inability to address many issues/fisheries, i.e. proper auditing and enforcement actions regarding logbook/fish slip compliance in salmon gillnet fisheries”, Annex 11, *supra* note 65, at 70.

⁹¹ See SEM-09-004 (Quebec Mining), Article 14(1) Determination dated 20 October 2009, at 6, available online at: http://www.cec.org/Storage/96/9339_09-4-DETN_14_1_en.pdf [last visited 12 August 2011].

⁹² Submission, p. 2.

⁹³ Response, p. 13.

⁹⁴ Response, p. 14.

⁹⁵ Response, pp. 12-13, 18-19.

⁹⁶ Response, Annex 12, *supra* note 66.

already mentioned, the Party is engaged in a number of other activities that can be considered enforcement in accordance with NAAEC Article 5(1), including appointing and training Fishery Officers, the issuance of licenses, the regular issuance of bulletins on enforcement procedures, and pre-season education of fishers.⁹⁷

44. The Secretariat now turns to the second part of its request to the Party in its 18 May 2010 determination, namely for information on allocation of enforcement resources, and the Submitter's assertions of disproportionate targeting of non-commercial fishers, allegedly causing negative impacts on the conservation and protection of fish.⁹⁸
45. The Secretariat considers that the Party provides information in its Response, which demonstrates increased enforcement in commercial fisheries in terms of percentage of coverage from only 3% in 2006, to over 50% in each following year.⁹⁹ Moreover, the Party provides information that shows there is no great disparity in the average number of violations from 2002 – 2009 between the commercial and recreational fisheries, and that the average number of violations detected in the commercial fishery exceeds that of the recreational fishery.¹⁰⁰ The Secretariat notes however, that a lack of enforcement resources does not obviate the need for enforcement of the laws at issue. In 2006, the Party notes that a number of factors including recruitment problems, the Fraser River priority, and internal enforcement guidelines and priorities, all made the C&P enforcement efforts, especially those concerning commercial fishers, more difficult.¹⁰¹ Despite the fact that the Party made good faith efforts in 2006 to enforce the laws at issue, by its own admission, such efforts resulted in "detection of fewer violations that year" in the commercial salmon fishery.¹⁰²
46. The Secretariat notes the Party's statements with regard to its "good faith efforts".¹⁰³ The Secretariat, without opining on whether such efforts fall under the definition of effective enforcement of environmental law in NAAEC Article 45(1), considers that the Party has provided information addressing the Submitter's assertion that alleged disproportionate targeting of non-commercial fishers causes negative impacts on the conservation and protection of fish.¹⁰⁴

⁹⁷ *Supra* paras. 15, 30.

⁹⁸ *Supra* para. 35.

⁹⁹ *Ibid.* Table 2.

¹⁰⁰ Response, p. 12, Figure 2. *Supra* paras. 27, 30-31.

¹⁰¹ Response, pp. 10-20. In this connection, the Secretariat notes that the problem the C&P officers faced being unable to board boats at sea with less than 2 officers, and the two priorities for the Region, "illegal sales/laundering of fish into the commercial fishery" and the "recreational charter fishery", created a difficult enforcement situation, whereby pursuit of enforcement activities for one priority, could have meant lack of enforcement for the other.

¹⁰² Response, p. 16.

¹⁰³ Response, p. 20.

¹⁰⁴ *Supra* paras. 25-26, 33.

47. The Secretariat, having considered the Submission in light of the Party's Response, does not identify any central open questions that development of a factual record would shed light on.

V. DETERMINATION

48. The Secretariat, having considered both the Submission and Response, does not consider a factual record to be warranted with respect to the assertions in submission SEM-09-005 (*Skeena River Fishery*) concerning Canada's alleged failures to effectively enforce FGR sections 22(1) (a), (h), and (s), and 22(2).
49. In accordance with NAAEC Article 15(1), and pursuant to section 9.6 of the Guidelines, the Secretariat hereby notifies the Submitter and the Council that the process is terminated with respect to Submission SEM 09-005 (*Skeena River Fishery*).

Respectfully, submitted for your consideration on this 12th day of August, 2011.

Secretariat of the Commission for Environmental Cooperation

(original signed)
per: Evan Lloyd
Executive Director

cc: Mr. Dan McDougall, Canada Alternate Representative
Mr. Enrique Lendo, Mexico Alternate Representative
Ms. Michelle DePass, US Alternate Representative
Submitter