

**SUBMISSION
TO THE COMMISSION FOR
ENVIRONMENTAL COOPERATION**

Pursuant to Article 14,
North American Agreement on Environmental Cooperation

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Submitted on behalf of:	By:	To:
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TABLE OF CONTENTS

I.	SUMMARY	2
II.	INTRODUCTION.....	2
III.	THE SKEENA RIVER FISHERY AND THE SUMMER OF 2006.....	3
	A. THE FISH – SALMON & STEELHEAD	3
	B. THE SKEENA RIVER FISHERY	3
	C. THE SUMMER OF 2006.....	4
	D. HOW THE SKEENA RIVER FISHERY IS REGULATED.....	5
IV.	FISHERIES ACT RULES & DFO POLICY.....	5
	A. CONSTITUTION.....	5
	B. STATUTORY AND REGULATORY FRAMEWORK.....	5
	C. FISHING LICENCES	7
	D. FISHERY NOTICES	7
	E. DFO POLICY ON BY-CATCH	9
V.	FAILURE TO COMPLY	10
VI.	FAILURE TO ENFORCE.....	12
VII.	ARTICLE 14.1 - THIS IS A SUBMISSION THE SECRETARIAT MAY CONSIDER.....	13
VIII.	ARTICLE 14.2 – A RESPONSE FROM CANADA IS MERITED	14

APPENDICES: VOLUME II

I. Summary

The North Coast Steelhead Alliance submits that Canada is failing to effectively enforce the *Fisheries Act* (R.S.C. 1985 c. F-14), in violation of its obligations under Article 5(1) of the North American Agreement on Environmental Cooperation (the “NAAEC”), 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,” that is, during fisheries aimed at catching other kinds of fish, mainly sockeye salmon.

II. Introduction

This submission is made pursuant to Article 14 of the NAAEC by the North Coast Steelhead Alliance (the “Submitter”). The Submitter is a non-profit entity dedicated to working with all levels of government, industry, community and stakeholder groups to preserve and enhance Skeena wild steelhead.¹ Threats facing the steelhead and other salmonids are several: the mixed-stock coastal fishery, climate change, fish farms, oil and gas developments, mining projects and logging. At issue in this submission is the by-catch of steelhead in the coastal fishery.

The federal Department of Fisheries and Oceans (“DFO”) is required to regulate salmon fishers so that by-catch mortality for steelhead is both minimized and kept below agreed levels.² Fishers are required to comply with their licence conditions and if they do not, they face summary conviction or indictment and are liable to a fine, imprisonment or both.³ DFO’s annual *Integrated Fisheries Management Plan, Salmon, Northern B.C.*⁴ sets the limit on steelhead by-catch on the Skeena River Fishery.

The Submitter became concerned with DFO enforcement of licence conditions when it reviewed the results of three access to information requests⁵ and read two reports - *Report of the Skeena Independent Science Review Panel*⁶ and *Economic Dimensions of*

¹ Steelhead (*Oncorhynchus mykiss*) are ocean-going (anadromous) trout. There is also a completely freshwater resident variety of the species, which are known as rainbow trout. Steelhead and salmon are collectively known as salmonids.

² In 1996, DFO, the BC Ministry of Environment and stakeholder groups under the auspices of the Skeena Watershed Committee agreed to minimise the marine commercial fishery by-catch of returning steelhead and, in any event, to keep the proportion of the total steelhead run caught in commercial nets (the exploitation rate) to less than 24 percent. This agreement was implemented in 1997 and subsequent years.

³ *Fisheries Act* s. 78.

⁴ Integrated Fisheries Management Plans (“IFMPs”) are signed off each year by the Minister of Fisheries and Oceans and set the policies for all west coast fisheries. Here, we are concerned with the IFMP, *Salmon, Northern B.C.*, June 1, 2006 – May 31, 2007 (the “2006 IFMP”) attached at Appendix A.

⁵ Three sets of internal records were obtained by Freedom of Information requests by Bruce Hill to the BC Ministry of Environment (January 15, 2007), Keith Douglas to the federal DFO (May 14, 2007) and Chad Black to the federal DFO (October 9, 2007). They will be respectively referenced in this submission as BH, KD or CB followed by the page number assigned by the agency’s FOI official. The Bruce Hill FOI records are at Appendix B and the Keith Douglas records are at Appendix C. The Chad Black records repeat much of the material of the others and, because they comprise some 1800 pages, are not appended to this submission, but copies would be sent on request of the CEC and any Respondent.

⁶ 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. 144p. at Appendix D.

*Skeena Watershed Salmonid Fisheries.*⁷ The federal government of Canada is legally required to protect steelhead from the effects of by-catch. DFO is failing to meet that requirement by not enforcing the conditions of the licences it issues to marine commercial fishers of Skeena River bound salmon.

III. The Skeena River Fishery and the Summer of 2006

The Skeena River salmon fishery is important to British Columbia, both economically and culturally. Like the cod fishery on the Atlantic coast once was, the salmon fishery on the Pacific coast and inland rivers is a way of life. The importance of sound management of the Skeena River fishery cannot be overstated.

A. The Fish – Salmon & Steelhead

The five northeast Pacific Ocean salmon species are chinook, chum, coho, pink, and sockeye. All are anadromous – they begin their life in freshwater, and spend a rearing period there before migrating as smolts or fry to the ocean where they remain for a number of years before returning to spawn and die in the same freshwater where they were hatched.⁸ Steelhead are anadromous trout that have a very similar life cycle to salmon, except that they can spawn and return to the ocean multiple times prior to death.

B. The Skeena River Fishery

The Skeena River in northern British Columbia boasts the second largest run of sockeye salmon in Canada. Sockeye and other species of salmon such as pink, chinook and coho have been fished there commercially since the 19th century. In the early 1970s, DFO built two large artificial spawning channels at Babine Lake in the Skeena watershed that began producing enhanced runs of sockeye specifically for the commercial fishery. One result of this enhancement was the intensification of the non-selective, mixed-stock marine fishery⁹ that has had a significant impact on many Skeena steelhead and salmon populations.

A mixed-stock fishery makes it more likely that there will be by-catch – incidental capture of non-target species and stocks. To reduce by-catch, fishing can be made more selective in three main ways: timing, location, and method. First, “temporal differentiation” – opening the target species fisheries when reduced numbers of non target species are present – can make fishing more selective. However, temporal differentiation “is not an effective tool for the Skeena because overlaps in run timing are simply too large.”¹⁰ The other timing solution is simply to close the marine fishery on all salmonids when catches of non-target stocks begin to exceed sustainable levels. Second,

⁷ Counterpoint Consulting. 2008. Economic Dimensions of Skeena Watershed Salmonid Fisheries. October, 2008. 112 p. at Appendix E.

⁸ Canada. Fisheries and Oceans. 2005. Canadian Waters. Salmon life cycle. Accessed 17 August 2009. Available at http://www.dfo-mpo.gc.ca/canwaters-eauxcan/bbb-lgb/creatures-animaux/fish-poissons/salmon-saumon_e.asp

⁹ Marine commercial fisheries are conducted at the mouth and ocean approaches of the Skeena River. Two fishing gear types are generally used there. Purse seines surround schools of fish in a net bag, which is then closed. Gill nets set out a net wall across a school’s path in which the fish become entangled. Because non-targeted stocks migrate and are caught along with targeted stocks, both gear types are inherently non-selective and the fishery is termed a mixed-stock fishery.

¹⁰ *Supra* note 6 at 6.

fisheries can be relocated. In the Skeena this would mean moving the commercial fishery from coastal waters into the river – closer to upstream spawning grounds where each stock separates into its own tributary. Finally, marine fishing techniques can reduce by-catch mortality: adjusting net size, mesh size and mesh type as well as selecting, reviving and returning prohibited species to the ocean. In the Skeena fishery, where temporal differentiation is ineffective and the fishery is conducted in coastal waters, it is critical that alternative marine techniques to select, revive and return prohibited species be enforced to reduce high mortality rates of non-target species, of which steelhead is one. Key to these efforts is the enforcement of fishing licence conditions requiring the sorting of non-target species, their resuscitation in revival boxes, and their immediate release back to the ocean.

C. The Summer of 2006

In 2006, the Skeena sockeye return exceeded all predictions with a run of approximately three million fish. At the same time, the Tyee test fishery¹¹ “indicated a relatively weak steelhead return.”¹² The result was a management conundrum for DFO: in a mixed-stock fishery the exploitation rate¹³ of the non-target species can be the limiting factor. In other words, an unacceptably high by-catch rate can require closing the target species fishery. According to the 2006 IFMP, the steelhead exploitation rate was not to exceed 24 percent.¹⁴

An unexpected mid- to late-August run of sockeye caused commercial fishery interests to pressure DFO for more openings.¹⁵ Meanwhile, recreational fishers expressed concern for steelhead survival and demanded DFO keep the commercial fishery closed.¹⁶ In response to these pressures, DFO allowed “a commercial fishery for 11 consecutive days (August 16-26, 2006)” to take advantage of the abundant sockeye.¹⁷

According to Walters et al. (2008), three things went wrong in August 2006:

First, enforcement of the short sets and use of revival boxes was weak to non-existent. Such weak enforcement and poor compliance undermined confidence in DFO’s commitment to selective fisheries. Second, openings in August and September were widely publicized as a major violation of the pre-season fishing plan, with a potentially large impact on steelhead runs. Third and more generally, the 2006 situation revealed a

¹¹ The Tyee test fishery is a daily, data-gathering fishery conducted by DFO at the mouth of the Skeena River upstream of, and, therefore after, the marine commercial fishery. Prescribed fishing methods, location, times and duration produce catch numbers for each salmonid species that can be used to estimate the total numbers of each entering the river.

¹² *Supra* note 6 at 4.

¹³ The exploitation rate on a stock or species is the percentage of the run of that stock or species that is killed in the fishery.

¹⁴ See *supra* note 2.

¹⁵ For example in Appendix C, see the August 24, 2006, letter to the Minister of Fisheries & Oceans from Joy Thorkelson, United Fishermen and Allied Workers Union, the August 25, 2006 (KD 4), letter to the Minister from Herb Pond, Mayor of Prince Rupert (KD 31), the August 30, 2006, article in the Prince Rupert Daily News headlined “Bureaucrats Blamed as Fish Go Uncaught” (KD 39), and a September 1, 2006, internal DFO e-mail, reporting that the mayor of Prince Rupert was outside DFO’s Vancouver headquarters protesting the department’s management of the Skeena sockeye fishery (KD 45).

¹⁶ *Supra* note 6 at 4.

¹⁷ *Supra* note 6 at 4.

fundamental flaw in the structure of decision rules. Specifically, there were inadequate provisions for how the fishery should be managed under various combinations of abundances of species such as sockeye and steelhead (and other species).¹⁸

Of these problems, this submission is concerned solely with DFO's failure to enforce the requirement for fishers to sort, revive and release non-target species.

D. How the Skeena River Fishery is Regulated

Two regulations adopted under the federal *Fisheries Act* apply to the Skeena River salmon fishery – the *Pacific Fishery Regulations, 1993*¹⁹ (the “PFR”) and the *Fishery (General) Regulations*²⁰ (the “FGR”). In addition, the fishery is regulated by policy and agreements between DFO and the Province of British Columbia (Ministry of Environment). The regulatory regime is further described in the next section.

IV. Fisheries Act Rules & DFO Policy

A. Constitution

The Canadian Constitution gives the federal parliament exclusive authority to make laws concerning “sea coast and inland fisheries.”²¹ This authority is exercised principally through the *Fisheries Act* and its regulations. While the Act no longer sets out its purposes, it does give the power to make regulations for, among other things, “the proper management and control of sea coast and inland fisheries” and “the conservation and protection of fish.”²² DFO has delegated responsibility for steelhead management in their freshwater environment to the BC government, although it remains accountable to Parliament for such management. DFO maintains direct management responsibility for steelhead in the marine environment.

B. Statutory and Regulatory Framework

Fishing Licences: The Minister of Fisheries and Oceans (the “Minister”) has the general discretion under the Act to issue a fishing licence.²³ The PFR give the Minister specific discretion to issue a commercial salmon fishing licence on Canada's Pacific coast.²⁴ The FGR give the Minister the additional power to place conditions on a fishing licence for two general purposes:²⁵

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:

...

¹⁸ *Supra* note 6 at 4.

¹⁹ *Pacific Fishery Regulations, 1993*, (SOR/93-54).

²⁰ *Fishery (General) Regulations*, (SOR/93-53).

²¹ *Constitution Act, 1982*, s. 91(12), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²² *Fisheries Act*, s. 43(a) and s. 43(b).

²³ *Fisheries Act*, s. 7(1).

²⁴ *PFR* s. 19(1) and Schedule II.

²⁵ *FGR* s. 22(1).

The twenty-seven subsections of s. 22(1) set out some of the matters about which the Minister may specify conditions. Some of these matters relate more to the management and control of fisheries, some more to conservation and protection of fish, and many that could relate to either purpose depending on the circumstances. The Minister has an additional power to amend fishing licence conditions, but solely for the purpose 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.”²⁶

Section 22(7) of the FGR provides that “[n]o person carrying out any activity under the authority of a licence shall contravene or fail to comply with any condition of the licence.” No person may fish for a fish species unless that person holds a commercial fishing licence issued under s. 19(1) of the FGR.²⁷

Anyone who contravenes the *Fisheries Act* or its regulations is guilty of a summary conviction or an indictable offence and is liable to a fine, imprisonment or both.²⁸ In addition, a court may order cancellation of a fishing licence²⁹ and impose other prohibitions or issue directions or requirements.³⁰ If the Minister finds that the operations under a fishing licence were not conducted in compliance with licence provisions and if no court proceedings have been commenced, he or she may cancel the licence.³¹

Variation Orders: In addition to putting or amending conditions in a fishing licence, DFO can close specified areas to fishing for specified periods. The close times are established under s. 53(1) of the PFR and may be varied for a fishing area by order of a Regional Director General under the FGR s. 6(1), or a fishery officer under s. 6(2). Schedule VI under s. 53 of the PFR establishes a January 1 to December 31 close time for all salmon species in all salmon fishing areas. In other words, the Skeena salmon fishery is closed unless and until DFO opens it. Therefore, effective regulation of salmon fishery openings is at the discretion of DFO officials through variation orders. Notice of a variation order shall be given by one or more of the methods listed in the FGR s. 7. Further, s. 54 of the PFR requires that any such notice must specify the net sizes and other criteria for the gill nets and seine nets to be used. Net sizes and other net criteria are alternative marine techniques that may be used to select for target species and reduce by-catch of non-target species.

Variation orders under the FGR s. 6 are not the subject of this submission. They are described here, however, so that their subject matter, fishery openings and closures, can be distinguished in the fishery notices (described in section D, below) from the FGR s. 22(2) licence condition amendments, which are the subject of this submission. While variation orders may or may not be concerned with conservation and protection of fish, licence condition amendments are always concerned with conservation and protection of fish.

²⁶ *FGR*, s. 22(2).

²⁷ *FGR*, s. 26(1).

²⁸ *Fisheries Act*, s. 78.

²⁹ *Fisheries Act*, s. 79.1.

³⁰ *Fisheries Act*, s. 79.2.

³¹ *Fisheries Act*, s. 9.

C. Fishing Licences

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 s. 19 of the PFR to each fisher for a specific licensed vessel. Those fishing licences gave the fisher the authority to fish subject to the Act, its regulations and such conditions under s. 22(1) of the FGR as were written into the licence document.³²

The conditions in the sample 2006 gill net fishing licence comprise some thirty-nine pages divided into numbered parts and sections. Part 1 applies to fishing for salmon and to those species of fish permitted as by-catch while fishing for salmon. Section 1 of Part 1 specifies that only sockeye, coho, pink, chum and chinook salmon are permitted to be taken subject to variation of regulatory closed times. Notably, steelhead are not included in this list or, for that matter, in the non-salmon species listed in Part 2. Section 2 of Part 1 sets out the fishing areas where fishing is permitted, which are essentially the coastal waters of the North Coast of British Columbia, approaching the Skeena River. Section 3 deals with the use of permitted fishing gear and equipment. Of particular relevance to this submission is subsection 3(4), which states that the vessel must be equipped with an operating revival tank.³³ A further condition is that the revival tank must be used to hold, revive and release with the least harm those lethargic or apparently dead fish that the vessel is prohibited from retaining.³⁴ Part 1 does not permit any species of fish as a by-catch while fishing for salmon.

The remaining sections of Part 1 of the fishing licence conditions deal with the reporting, logging, monitoring and recording of fish catches and are not relevant to this submission. The remaining two parts of the licence conditions relate to non-salmon fish species and to transportation of fish, and also are not relevant to this submission.

A salmon seine fishing licence has similar mandatory conditions to a gill net licence with the additional requirement that fishers brail and sort their catch.³⁵

D. Fishery Notices

From time to time during the salmon fishing season, DFO issues fishery notices that affect Skeena fishers. The first parts of these notices typically are variation orders establishing fishery opening times under the authority of s. 6(2) of the FGR and are

³² See sample 2006/2007 Salmon Area C Licence (Gill Net – North Coast) at Appendix F.

³³ Revival tanks, also known as revival boxes, blue boxes, or resuscitation boxes, are large plastic fish totes through which oxygenated sea water is pumped. By-catch species that are lethargic or appear dead when recovered from the net must be placed in the revival tank for at least one hour or until they are vigorous. See sample licence in Appendix F, Part 1, s. 3(4) at pages 3 and 4.

³⁴ The licence conditions giving details on the permitted types of revival tanks, their mandatory operating condition, and their mandatory use appear to add specificity to s. 33 of the FGR, which requires the release of live, incidental catch “in a manner that causes the least harm.”

³⁵ A seine boat catches salmon in a circular net, the purse seine, that is closed into a bag. Brailing is a technique that allows seine fishers to more selectively sort non-target species, revive them and return them alive to the ocean. To brail, the closed seine is hauled to the side of the boat and smaller numbers of fish are taken onto the deck by a power-operated dip net, the brail, which allows better survival and sorting of by-catch species. Alternatively, the closed seine may be hauled by a drum over a ramp at the stern of the boat and on to its deck. This technique is called ramping and deposits up to several tens of thousands of fish onto the deck at one time resulting in significant fish mortality and difficulty in sorting by-catch species.

identified by a variation order number. For example, in a fishery notice issued to commercial salmon gill net fishers for August 19, 2006, variation orders V.O.# 2006-NCSAL-143 and V.O.# 2006-NCSAL-144 allowed a fishery opening for 15 hours in sub-areas of Fishery Areas 4 and 5, which are the Skeena approaches.³⁶ These variation orders also specified the size and type of nets to be used under authority of s. 54 of the PFR.

The remaining parts of a fishery notice are either reminders of courtesies, relevant regulations and previously notified fishing licence conditions or are amendments to those conditions under the FGR s. 22(2). These parts of a fishery notice are not identified by a variation order number. Fishery notices typically amend the condition specifying which salmon species can be retained. For example, the August 19, 2006, notice amended the fishing licence conditions to prohibit retention and possession of chum and coho salmon, as well as a reminder that steelhead should also not be retained or possessed.³⁷

The correlation of the relevant provisions of the FGR, the fishing licence conditions and the condition amendments are summarised in the following table:

<i>Fisheries (General) Regulation</i> provision authorising licence condition	S. 22(1) Condition in Sample 2006 Salmon Gill net Licence	S. 22(2) Licence Condition Amendment in Sample 2006 Gill Net Fishery Notice
s. 22(1)(a) species of fish or quantities thereof that are permitted to be taken or transported	Part 1, s. 1 Species of fish that are permitted to be taken: sockeye salmon, coho salmon, pink salmon, chum salmon and chinook salmon... (note that steelhead are not included)	Non-retention and non- possession of chum and coho. (reminder of licence condition of non-retention and non- possession of steelhead)
s. 22(1)(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	Part 1, s. 3(1) (specifies cork colours, net type and minimum hang ratio for a specific type)	(not amended)
	Part 1, s. 3(2) (for specific fishing areas, certain net set times, net soak times and maximum net length are specified)	(not amended)
s. 22(1)(h) (as above) and s. 22(1)(s) the segregation of fish by species on board the vessel	Part 1, s. 3(4) (specifies the types of tank that must be used to revive steelhead and prohibited salmon species and specifies how the fish must be treated and released)	(reminder of licence condition that operating revival boxes are mandatory)

Seine licence conditions that identify the salmon species prohibited from being retained and possessed are also amended by fishery notices, similar to those issued to gill net fishers.³⁸

³⁶ See sample gill net Fisheries Notice of August 19, 2006 at Appendix G (CB 1192).

³⁷ *Supra* note 36.

³⁸ See sample seine Fisheries Notice of August 20, 2006 at Appendix H (CB 1195).

E. DFO Policy on By-catch

In addition to fisheries law comprised of the *Fisheries Act*, its regulations and the fishing licences issued under them, the Skeena fishery is governed by policy set out in the annual Integrated Fisheries Management Plans and DFO's Conservation and Protection operations policy.

There is no commercial steelhead fishery³⁹ but steelhead are frequently the by-catch of other fisheries, particularly sockeye and pink.⁴⁰ The maximum exploitation rate on steelhead of 24 percent has been incorporated into each IFMP since 1997. The policy regarding steelhead in the Skeena Fishery is set out in the 2006 IFMP at section 3.1.6:

Skeena Steelhead: 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.⁴¹

According to Steve Cox-Rogers, a member of the Stock Assessment Division, Science Branch of Fisheries and Oceans Canada, the intention of s. 3.1.6 of the 2006 IFMP is “to minimize the capture experience suggesting we (DFO) are committed to using fishing techniques which do this. Simply fishing to a ceiling exploitation rate is independent of actually trying to achieve this objective.”⁴²

Indeed, conservation and protection of steelhead is the purpose of s. 3.1.6 of the 2006 IFMP. The objective is to release “with least possible harm” those steelhead that are by-catch. The IFMP recognizes that steelhead will be caught incidentally in other fisheries. The intention of s. 3.1.6 is to minimize the capture rate of steelhead by following a conservation and protection plan. Actually trying to achieve such a plan demonstrates a commitment to conservation, part of the mandate of DFO.⁴³ Conservation and protection of steelhead within the current mixed coastal fishery uses a two-pronged approach. First, fishers must actively employ alternative marine techniques, mainly gear types and closures, to reduce steelhead by-catch – these are set out by DFO in fishing licences, variances, and notices. Second, those steelhead that are incidentally caught must be revived in a revival tank on board the fishing vessel and released, which is also a licence condition. Since compliance has been observed as minimal, enforcement is necessary to ensure that both of these conservation and protection activities are implemented.

According to the DFO Conservation and Protection – Pacific Region website, the second enforcement policy priority is “Enforcement of measures (including closures and selective fishing measures) designed to protect stocks of concern, (e.g. upper Skeena coho, Rivers/Smith Inlet sockeye, WCVI chinook [sic], Thompson coho).”⁴⁴ Among the most common enforcement issues in the commercial fishery, DFO Conservation and

³⁹ Steelhead are not listed as a species of fish permitted to be taken in any Pacific Coast fishing licence.

⁴⁰ *Supra* note 7 at 14.

⁴¹ 2006 IFMP attached as Appendix A at page 20.

⁴² Appendix B at BH 64.

⁴³ The vision, mission and mandate of DFO can be found at its website <http://www.dfo-mpo.gc.ca/us-nous/vision-eng.htm>. Reports from DFO's Conservation and Protection Directorate are made on letterhead emblazoned with the logo ‘to conserve and protect’ (see Appendix L).

⁴⁴ Conservation and Protection - Pacific Region. 2005. Conservation and Protection – Main Program Activities. http://www.pac.dfo-mpo.gc.ca/ops/cp/programs_e.htm

Protection – Pacific Region lists the following failures to comply with fishery regulations:

to release prohibited species; to have operating resuscitation tank; to operate and fish gill net in specified time (short sets); to fish with specified, designated gear; to provide assistance to observers; to permit observers to carry out duties.⁴⁵

In other words, enforcement is essential to protect and conserve non-target species (including steelhead). The first four failures all contribute to a large by-catch of prohibited species. The last two failures indicate that not only do fishers not voluntarily comply with the conditions of their fishing licences, but also do not cooperate with DFO personnel.

None of the DFO fishing licence conditions permit harvesting of steelhead. If steelhead are caught they must be sorted, placed in revival boxes, and released. In August 2006, DFO issued notices which included variation orders and licence condition amendments regarding conservation and protection. At issue in this submission is the fact that DFO, in the face of the observed absence of voluntary compliance, did not enforce those licence conditions or amendments. There is ample evidence to support the allegations of failure to comply and failure to enforce.

V. Failure to Comply

The 2008 report of the Skeena Independent Science Review Panel documents systematic violations of by-catch rules by Skeena River salmon fishers during 2006.⁴⁶ Failure to comply with a licence condition is an offence under the *Fisheries Act*.

As noted above, DFO Conservation and Protection – Pacific Region knows that voluntary compliance is minimal. The evidence shows that in 2006, voluntary compliance was near zero. In an email to David Einarson, North Coast Area Chief, regarding post-season estimated harvest rates on August 8, 2006, Steve Cox-Rogers noted the following:

The first [issue] is the apparent lack of compliance this year with regard to steelhead/coho catch and release requirements for the GN [gill net] fleet. On a tour I did last Thursday to collect DNA/scales, none of the boats we sampled had functioning blue boxes on board...in fact, all of the fishermen I spoke to expressed little desire to participate in reviving steelhead or coho and were just throwing them back dead or alive as soon as they hit the boat. Ian Bergsma (our sample coordinator) tells me this has been the case all year in both Area 3 and 4.⁴⁷

This evidence is corroborated more graphically by a recreational fishing guide who told Einarson at about the same time that he had observed commercial fishing boats north of Prince Rupert deal with the steelhead and salmon by-catch by:

...either helicoptering the fish (with two hands) from a height of twenty feet, or the more impressive method of throwing them on an aluminum slide where each time a loud “thunk” sound of the fishes [sic] head against the metal could be heard before it crashed

⁴⁵ Conservation and Protection - Pacific Region. 2005. Enforcement Issues and Strategies.

http://www.pac.dfo-mpo.gc.ca/ops/Cp/issues_e.htm

⁴⁶ *Supra* note 6 at 38 and 40.

⁴⁷ Appendix B at KD 19.

back into the water. This gentle release is of course after the fish has laid on the deck for nearly a half hour.⁴⁸

In a same day e-mail response to Cox-Rogers, Einarson did not disagree with the scientist's assessment of the lack of compliance and added:

I will alert C&P [Conservation and Protection] by copy of this note to the apparent lack of compliance with the revival boxes. The lack of patrols due to vacancies coupled with different priorities have probably contributed to the present situation. We have finished fishing for this year, but we may want to put a "blutz" [sic] type enforcement of revival boxes on the burner for next year.⁴⁹

In a later message to Siegi Kriegl, DFO North Coast Area Director, Cox-Rogers listed various selective fishing requirements that had been relaxed in 2006, including "low effective compliance for attempting to revive fish." He went on to say:

I doubt there will be anything technical I can provide that will show that we (DFO) implemented any of the selective fishery objectives for steelhead as outlined in section 3.1.6 of the 2006 IFMP.⁵⁰

After the 2006 fishing season was over, Cox-Rogers sent a summary of how it unfolded to a provincial MOE official "just in case someone knifes me in the future." He noted the following in respect to compliance:

[M]any in the [gill net] fleet started to [not] give a shit about coho/steelhead catch and release requirements (revival boxes, etc) and so compliance rates for being as selective as possible basically fell by the wayside.⁵¹

Later, in a November 27, 2006 joint DFO/MOE(BC) official assessment of impacts of the 2006 commercial fishery on the Skeena steelhead,⁵² Cox-Rogers and his provincial colleague, Dana Atagi,⁵³ were a little more circumspect:

Catch and release compliance rates for [gill net boats] in 2006 were likely low for a variety of reasons, while catch and release compliance rates for [seine net boats] were probably near the values used for in-season evaluations (80%).⁵⁴

Their report goes on to say that Dan Wagner, DFO Resource Manager, Areas 3, 4 and 5, agreed there had been lower compliance rates for gill net fishers and higher compliance rates for seine net fishers in 2006. Wagner noted that many local fishermen at the mouth of the Skeena River "simply refuse to release steelhead while fishermen from the south are often very compliant."⁵⁵

⁴⁸ Copy of e-mail message from Wally Faetz, Spey/Boundary Lodge, Terrace, BC, to David Einarson, August, 2006 at Appendix I.

⁴⁹ *Supra* note 47.

⁵⁰ Appendix B at BH 62.

⁵¹ Appendix B at BH 32.

⁵² Cox-Rogers, Steven, and Dana Atagi, "Assessment of steelhead harvest impacts for the 2006 Area 3/4/5 commercial fishery (Skeena Approach Waters)" (Memorandum to File, November 27, 2006) in Appendix B at BH 247 to BH 261.

⁵³ Head, Fish and Wildlife Section, BC Ministry of Environment, Skeena Region.

⁵⁴ Appendix B at BH 250 and 251.

⁵⁵ Appendix B at BH 251.

VI. Failure to Enforce

Cox-Rogers and Atagi record that for release of steelhead by-catch by gill net fishers “[t]here was no enforcement of compliance for the 2006 fishery.”⁵⁶

The Einarson/Cox-Rogers email exchange of August 8, 2006 highlights the failure to enforce in the face of acknowledged non-compliance. Einarson attributes the “present situation” or lack of enforcement to “vacancies coupled with different priorities” but stated that since the fishing season was over for that year, lack of enforcement could be addressed the following year (2007). But Einarson was wrong: the fishing season was not over on August 8. Despite the ample evidence of non-compliance and insufficient enforcement, DFO opened the commercial sockeye fishery for a further 15 days in late August and early September.⁵⁷ Notably, these openings were not accompanied by increased enforcement.

In fact, the lack of enforcement in 2006 was significant. In that year, the DFO Prince Rupert Detachment patrolled the marine commercial salmon fleet for 167.5 hours, just over half as many hours as were patrolled in 2005.⁵⁸ Additionally, the detachment gave no warnings and laid no charges regarding marine commercial salmon enforcement in the summer of 2006.

On the other hand, the enforcement that did occur in 2006 was overwhelmingly targeted at recreational and aboriginal fishers. In the 2006 fishing season, DFO devoted 2042 patrol hours out of a total of 5861 on the North Coast to the salmon fishery. 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:⁵⁹

DFO North Coast Compliance and Enforcement Effort: 2006 - 2008

Year ⁶⁰	Compliance and Enforcement Patrol Hours				
	Total	Total Salmon Fisheries	Recreational Salmon	Aboriginal Salmon	Commercial Salmon
2006	5861	2042	1339	494	209
2007	7184	3504	2812	229	463
2008	7136	3935	2905	612	418

⁵⁶ Appendix B at BH 250.

⁵⁷ Appendix B, Figures 1 and 2, at BH 253.

⁵⁸ The marine commercial fishery targeting Skeena-bound salmon is largely patrolled by DFO’s Prince Rupert Detachment, which is one of four North Coast Compliance and Enforcement detachments. Data on the detachment’s activities from 2000 to 2007 are summarised in a table, “Fisheries & Oceans Canada Conservation & Protection Prince Rupert Detachment Compliance and Enforcement Summaries: Marine Salmon Harvest” at Appendix J, which is based on information provided to NCSA by DFO by email at Appendix K.

⁵⁹ The 2006-2008 enforcement data are contained in the 2007 and 2008 North Coast Compliance & Enforcement Summaries presented as part of the DFO Post-season Reviews at Appendices L & M.

⁶⁰ The year indicated is the fishing season from April 1 to November 1.

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 gillnet vessels failing to have operational revival boxes operating during the salmon gillnet fishery.”⁶¹

We submit that the 2006 enforcement priorities by DFO in the Skeena were not reasonable. 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. To choose to direct limited enforcement hours to recreational and aboriginal fishers does not represent a reasonable exercise of discretion in allocation of resources.

VII. Article 14.1 - This is a Submission the Secretariat May Consider

This submission meets the threshold requirements established under Article 14.1 of the NAAEC. Specifically, the Submission is made in English by a Submitter that is clearly identified as a non-governmental organization residing and established in Canada. The information provided in this document and appendices is sufficient for the purposes of the Secretariat’s review. The submission promotes enforcement of Canadian environmental laws aimed at protecting the health and biodiversity of Skeena salmonids. The Submitter presents this Submission with the aim of promoting enforcement. This matter has been communicated to the Government of Canada in written and oral form by individuals representing various environmental and recreational interests.⁶²

We submit that the particular regulatory provisions and the fishing licence conditions and amendments they authorise that are at issue in this submission are “environmental law” under Articles 14(1) and 45(2) of the NAAEC.

Article 45(2) states that for the purposes of Article 14(1):

- (a) “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 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 areas in the Party’s territory, but does not include any statute or regulation or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term “environmental law” does not include any statute or regulation, or provisions thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for the purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

The Canadian *Fisheries Act* and its regulations have a dual primary purpose; namely “the proper management and control of sea coast and inland fisheries” and “the conservation

⁶¹ 2008 North Coast Compliance & Enforcement Summary in Appendix M at 77.

⁶² See, for example, the communications from NCSA to the Minister and DFO at Appendix N.

and protection of fish.” That dual purpose extends to s. 22(1) of the FGR, the provision that authorises the Minister to place conditions on a fishing licence. Section 22(2) of the FGR authorises the Minister to amend a fishing licence condition, but only for the purpose of conserving and protecting fish. The conservation and protection of fish is the primary purpose of s. 22(2) and, we submit, the primary purpose of the relevant subparagraphs of s. 22(1) of the FGR. Further, we submit that the statutory and regulatory provisions under the *Fisheries Act* that have “the conservation and protection of fish” as a primary purpose are “environmental law” for the purposes of Article 14(1).

In this submission, we allege that the following licence conditions authorised under s. 22(1) of the FGR are environmental law and were not enforced on the Pacific North Coast in 2006:

1. a licensed commercial fishing vessel must have an operating revival tank on board when fishing;⁶³
2. fish species prohibited as by-catch must be sorted, revived in the revival tank and released with the least harm;⁶⁴
3. taking of steelhead prohibited at all times.⁶⁵

In addition, we allege the following licence condition amendments authorised under s. 22(2) of the FGR are environmental law and also were not enforced in 2006:

4. prohibition of the taking and possession of chum, coho and chinook salmon at certain specified times.⁶⁶

We submit that the above licence conditions fall under those sub-sections of s. 22(1) of the FGR that have as their primary purpose the conservation and protection of fish; namely s. 22(1)(a), the fish species permitted to be taken, s. 22(1)(h), the permitted fishing gear and equipment to be used, and s. 22(1)(s), the segregation of fish by species. We further submit that the above licence condition amendments, specifying the salmon species prohibited to be taken, fall under s. 22(2), which has as its sole primary purpose the conservation and protection of fish. The law relating to this submission can be distinguished from that of the Seal Hunting submission (SEM-07-003) because this submission relies on legislation that has as its primary purpose of the conservation and protection of fish and is therefore environmental law under article 45(2).

VIII. Article 14.2 – A Response from Canada is Merited

The Submitter respectfully submits that it has met the criteria set out in Article 14.1, and asks that the Secretariat request a response from the Government of Canada. The Submitter is a non-governmental environmental 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 and reduced viability of fish stocks harms (Article 14.2(a)) the entire ecosystem, including people, other species of fish and their habitat.

⁶³ *Supra* note 32 at Part 1, s. 3(4).

⁶⁴ *Ibid.*

⁶⁵ *Supra* note 32 at Part 1, s. 1.

⁶⁶ See, for example, Fishery Notices at Appendices G and H.

Notably, the commercial fishery operates at a net loss of \$3 million annually, while the sport fishery of Skeena salmonids has a net \$100,000 economic value.⁶⁷ This Submission raises matters whose further study in this process would advance the goals of the NAAEC (Article 14.2(b)) including: foster the protection and improvement of the environment for present and future generations (Preamble par.1, Article 1(a)); promote sustainable development based on cooperation and mutually supportive environmental and economic policies (Article 1(b)); strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices (Article 1(f)); enhance compliance with, and enforcement of, environmental laws and regulations (Articles 1(g), and 10(2)(p)); and promote economically efficient and effective environmental measures (Article 1(i)).

There are no realistic alternative private remedies available (Article 14.2(c)). The Submitter either does not have status for civil remedies or would find them impractical to pursue. While Canadian citizens 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, in any event, do not address the systemic problem of persistent non-enforcement by the Canadian government. Private prosecutions are beyond the financial capacity of most citizens, and are not a viable option for effective enforcement where there are numerous ongoing violations of federal law. The Government of Canada has the resources and the obligation to effectively enforce these domestic environmental laws. Finally, this Submission is based primarily upon information obtained from the federal and provincial governments, industry, and research resources, and not simply mass media reports (Article 14.2(d)).

All of which is respectfully submitted,

October 13, 2009

Richard J. Overstall

⁶⁷ *Supra* note 7 at 106.