
Secretariat of the Commission for Environmental Cooperation

**Article 15(1) Notification to Council that Development
of a Factual Record is Warranted**

Submitters: Environmental Defence Canada
Natural Resources Defense Council (U.S.)
John Rigney
Don Deranger
Daniel T'seleie

Represented by: Hannah McKinnon, Environmental Defence Canada

Party: Canada

Original submission: 13 April 2010

Date of the notification: 29 July 2014

Submission no.: SEM-10-002 (*Alberta Tailings Ponds*)

I. EXECUTIVE SUMMARY

1. On 13 April 2010, the Submitters listed above (the “Submitters”) filed SEM-10-002 (*Alberta Tailings Ponds*) (hereinafter the “original Submission”)¹ with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”), pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or the “Agreement”)².
2. Articles 14 and 15 of the NAAEC 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 initially reviews submissions to determine whether they meet the criteria set out in NAAEC Article 14(1) and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the [NAAEC]* (the “Guidelines”).³ If 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

¹ Submission SEM-10-002 (13 April 2010) [the “original Submission”]. Although dated 14 April, the original Submission was received a day earlier, on 13 April 2010.

² *North American Agreement on Environmental Cooperation*, United States, Canada and Mexico, 14-15 September, 1993, Can TS 1994 No 3, 32 ILM 1480 (entered into force 1 January 1994) [NAAEC], online: CEC <www.cec.org/NAAEC>. References to the word “Article” throughout this Notification, unless otherwise stated, refer to an article of the NAAEC.

³ Commission for Environmental Cooperation, *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Montreal: CEC, 2012) [Guidelines], online: CEC <www.cec.org/guidelines>.

the NAAEC, the Secretariat may notify the CEC Council that the matter warrants the development of a factual record and provide its reasons for such recommendation in accordance with Article 15(1). If the Secretariat determines the contrary, or under certain circumstances, it proceeds no further with its consideration of the submission.⁴

3. In Submission SEM-10-002,⁵ the Submitters assert that the Government of Canada (“Canada”), specifically Environment Canada, is failing to enforce subsection 36(3) of the federal *Fisheries Act*,⁶ in relation to alleged leakage of deleterious substances into surface waters frequented by fish, or through groundwater and the surrounding soil into surface waters frequented by fish. They assert that Canada has neither “prosecuted any company” for any such incident of leakage, “nor has it pursued regulation governing tailings pond leakage.”⁷
4. Following the Secretariat’s Article 14(1) and (2) Determination that the Submission merits a response,⁸ Canada responded to the submission on 31 January 2014, alleging the existence of a “pending proceeding” requiring, according to Canada, that the Secretariat proceed no further with the Submission.⁹ In a notification to the Submitters and to Council issued on 14 April 2014, the Secretariat assessed Canada’s notification of a pending judicial or administrative proceeding and concluded that it neither meets the definition of “judicial or administrative proceeding” in NAAEC Article 45(3), nor can it be considered “pending” under NAAEC Article 14(3).¹⁰
5. Canada sent a letter to the Secretariat on 14 May 2014,¹¹ “register[ing] Canada’s objection with [sic] the Secretariat’s interpretation of the [NAAEC] with regard to [the Secretariat’s] mandate” in the SEM process. Based on its stated position that the Secretariat lacks the authority to proceed with its consideration of the Submission in accordance with Article 15(1), Canada requests in its letter that the Secretariat “cease” the Article 15(1) analysis.¹² In its Response, Canada does not exercise its discretion, as provided in Guideline 9.3, to include information on “whether environmental policies have been defined or actions have been taken in connection with the matter in question” in the Submission.

⁴ Previous Secretariat Determinations and Factual Records can be found on the CEC’s website at:

<www.cec.org/SEMregistry>.

⁵ Following the Secretariat’s Determination (3 September 2010) that the original Submission did not meet all Article 14(1) criteria, the Secretariat received a “revised Submission” on 1 October 2010 and issued its Article 14(1) and (2) Determination on 11 December, 2013. See the SEM Registry for information and developments regarding the Submission, online: CEC <<http://goo.gl/yJKIy8>>.

⁶ RSC 1985, c F-14.

⁷ Revised Submission, *supra* note 5 at 2.

⁸ SEM-10-002 (*Alberta Tailings Ponds*) Determination in accordance with Articles 14(1) and (2) (11 December 2013) [the “Article 14(1) and (2) Determination”].

⁹ SEM-10-002 (*Alberta Tailings Ponds*) Government of Canada Response in accordance with Article 14(3) (31 January 2014) [“Response”]. Article 14(3) provides that within 30 days of the Secretariat’s request for a response, the concerned Party shall advise the Secretariat whether the matter raised in the submission is the subject of a pending judicial or administrative proceeding. See paras 25-31, *infra*, for discussion on “pending proceedings.”

¹⁰ SEM-10-002 (*Alberta Tailings Ponds*), Notification to the Submitters and to Council regarding a proceeding notified by Canada (14 April 2014) [“Secretariat Notification re pending proceeding”].

¹¹ Government of Canada letter to CEC Secretariat (14 May 2014) [the “May 2014 letter”].

¹² *Ibid* at 2.

6. In the present Article 15(1) Notification, the Secretariat finds that having considered the Submission in light of the Response, central questions remain open concerning the Submitters' assertions that Canada is failing to effectively enforce subsection 36(3) of the federal *Fisheries Act*. In accordance with Article 15(1), the Secretariat thus recommends the development of a factual record.
7. A factual record would provide the public with a better understanding of Environment Canada's section 36 enforcement strategy and actions as they pertain to oil sands tailings ponds in northern Alberta.

II. ANALYSIS

A. Section 36 of the federal Fisheries Act

8. The *Constitution Act* confers on the Parliament of Canada exclusive legislative power regarding "Sea Coast and Inland Fisheries."¹³ Parliament first enacted the *Fisheries Act* in 1868, one year after Confederation.¹⁴
9. Section 36 of the *Fisheries Act* is administered by Environment Canada (the rest of the *Act* is the responsibility of the federal Minister of Fisheries and Oceans)¹⁵ and is contained in a part of the *Act* entitled "Fish Habitat Protection and Pollution Prevention." Subsection 36(3) provides as follows:

Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

Provisions similar to the current prohibition, quoted above, have been included in the *Fisheries Act* since its enactment in 1868.¹⁶ At the time of the Submission the prohibition also applied everywhere in Canada, on public and private land and to all types of activity, whether carried out by individuals, businesses, provinces, municipalities or the federal government.¹⁷

10. Subsections 36(4), (5), (5.1) and (5.2) of the *Fisheries Act* empower the federal government to adopt regulations prescribing when, where, under which circumstances and in which

¹³ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91(12).

¹⁴ 31 Vict, 1868, c 60.

¹⁵ See Environment Canada, "Fisheries Act" (2012), online:

< <http://www.ec.gc.ca/pollution/default.asp?lang=En&n=072416B9-1> > (last visited 2 July, 2014).

¹⁶ 31 Vict, 1868, c 60, s 14; replaced by SC 1969-1970, c 63, s 3.

¹⁷ See CEC Factual Records regarding Submission SEM-03-005 (*Montreal Technoparc*) (2008) at 34, Submission SEM-98-004 (*BC Mining*) (2003) at 23, and Submission SEM-00-004 (*BC Logging*) (2003) at 31–33. See also Submission SEM-12-001 (*BC Salmon Farms*) Article 15(1) Notification (12 May, 2014) at paras 6–11.

concentrations the deposit of specified deleterious substances, waste or pollutants is authorized. No such regulations are in force for oil sands tailings ponds, such as those at issue in the *Alberta Tailings Ponds* submission.

B. Assertions involving section 36 of the *Fisheries Act*, and Canada’s Response

11. In the revised Submission, the Submitters present alleged evidence of leakages of deleterious substances from tailings ponds related to oil sands developments, into water frequented by fish.¹⁸ This alleged evidence describes projected tailings pond leakage in the Athabasca River and its watershed¹⁹ including Beaver Creek,²⁰ McLean Creek,²¹ and surface waters in relation to the Syncrude Aurora Mine.²² This alleged evidence also includes projected leakage generally²³ and at specific locations, into water bodies including Jackpine Creek²⁴ and the Athabasca River.²⁵

12. The revised Submission alleges that notwithstanding Environment Canada’s knowledge of tailings ponds leakages in violation of subsection 36(3) of the *Fisheries Act*, Canada is failing to effectively enforce this subsection. The Submitters allege that “[i]n practice, Environment Canada has relied on Alberta Environment to monitor, report and investigate releases from tailings ponds that may contravene subsection 36(3).”²⁶ The Submitters further allege that “it is the practice of Environment Canada (EC) to wait for a referral from Alberta Environment should the latter suspect a *Fisheries Act* violation,” “despite the fact that ‘Alberta Environment inspectors are not designated as Fisheries Inspectors under the *Fisheries Act*.’”²⁷ The Submitters allege that “no referrals from Environment Alberta have

¹⁸ Revised Submission, *supra* note 5 at 4–6. The revised Submission was summarized at paragraphs 7–25 of the Secretariat’s Article 14(1) and (2) Determination.

¹⁹ Various water bodies in the Mackenzie River Basin (revised Submission, *supra* note 5 at 4–6 and 9; and Appendices 2, 3 and 18).

²⁰ See the Article 14(1) and (2) Determination, *supra* note 8 at paras 20–22.

²¹ *Ibid* at paras 24–25.

²² *Ibid* at para 23.

²³ Various water bodies in the Mackenzie River Basin (see revised Submission, *supra* note 5 at 4; see revised Submission Appendices 2: Jeremy Moorhouse, “Appendix 1—Methodology and Sample Calculations” (Pembina Institute, 2008) and 3: Matt Price, “11 Million Litres a Day: The Tar Sands’ Leaking Legacy” (Environmental Defence, 2008)).

²⁴ Article 14(1) and (2) Determination, *supra* note 8 at paras 17–18.

²⁵ Revised Submission, *supra* note 5 at 8; see revised Submission Appendix 17: Alberta Energy and Utilities Board and Canadian Environmental Assessment Agency, “Report of the Joint Review Panel ... Decision 2004–005: Canadian Natural Resources Limited, Application for an Oil Sands Mine, Bitumen Extraction Plant, and Bitumen Upgrading Plant in the Fort McMurray Area” (EUB/CEAA, 2004) [“Appendix 17”].

²⁶ Revised Submission, *supra* note 5 at 7, and Appendix 15: “Follow-up on Committee Hearings,” (20 March 2009) [comprising responses by Alberta Environment and Environment Canada to questions posed by the Chair of the House of Commons Standing Committee on the Environment and Sustainable Development] [“Appendix 15”].

²⁷ Revised Submission, *supra* note 5 at 9; quoting revised Submission, Appendix 15 [incorrectly cited by the Submitters as Appendix 17], *supra* note 26 at 7 or 000072. Appendix 15’s pages are numbered 000065–000072, inclusive, although page 000070 was not provided by the Submitters to the Secretariat.

been forthcoming,”²⁸ despite the documented instances of contaminated tailings pond leakage reaching surface waters outlined above.

13. In support of its allegations that Environment Canada has “abdicated its responsibility” to enforce subsection 36(3), the Submitters provide the *Canada-Alberta Administrative Agreement for the Control of Deposits of Deleterious Substances under the Fisheries Act* (the “Canada-Alberta Agreement”).²⁹ The Submitters state that the Canada-Alberta Agreement “provides for a sharing of responsibility for responding to and investigating releases that may contravene subsection 36(3) of the *Fisheries Act*,” and that it “designates Alberta Environment as the lead agency in responding to and investigating releases within Alberta.”³⁰ However, according to the Submitters, Annex 3 of the Canada-Alberta Agreement “confirms that the federal government will continue to have the responsibility to conduct inspections, investigations, and prosecutions under the *Fisheries Act* and that Environment Canada has a positive obligation to investigate alleged contraventions of the *Fisheries Act*.”³¹ The Submitters state that Alberta Environment has, in turn, relied on “industry self-reporting of tailings leakage,” and that both Canada and Alberta have delegated monitoring to the Regional Aquatic Monitoring Program (RAMP).³²
14. In support of the assertion that Environment Canada has failed to act, despite knowledge “for several years about the problem of contaminated tailings pond leakage,”³³ the Submitters refer to:
 - a) a 2004 National Energy Board report acknowledging the issue of tailings ponds leakage;³⁴
 - b) two 2004 Joint Review Panel decisions describing projected seepage and water quality impacts from oil sands mining and related projects into Jackpine Creek and the Athabasca River, respectively;³⁵
 - c) a 2009 memorandum to Canada’s Environment Minister from his deputy minister acknowledging the likelihood of short- and long-term leakage or seepage into groundwater and surface water, and the “fact that the agency is alerted to [this leakage] by oil sands companies;”³⁶

²⁸ Revised Submission, *supra* note 5 at 9.

²⁹ Revised Submission, *supra* note 5 at 6; revised Submission, Appendix 14: *Canada-Alberta Administrative Agreement for the Control of Deposits of Deleterious Substances under the Fisheries Act* (1994) [the “Canada-Alberta Agreement”]. Appendix 14 suggests that this agreement was signed by the Governments of Alberta and Canada in 1994. The revised Submission does not indicate whether it is still in effect.

³⁰ Revised Submission, *supra* note 5 at 7.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid* at 8.

³⁴ *Ibid.*

³⁵ *Ibid* at 8–9; see revised Submission Appendix 4: Alberta Energy and Utilities Board and Canadian Environmental Assessment Agency, “Report of the Joint Review Panel ... Decision 2004–009: Shell Canada Limited, Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant, and Water Pipeline in the Fort McMurray Area” (EUB/CEAA, 2004) [“Appendix 4”] and Appendix 17, *supra* note 25.

³⁶ Revised Submission, *supra* note 5 at 9; see revised Submission Appendix 18: “Memorandum to the Minister: Oil Sands Tailings Ponds” (Environment Canada, 19 January 2009).

- d) 2009 communications between Environment Canada and the House of Commons Standing Committee on the Environment and Sustainable Development, “where the specific question regarding how Environment Canada enforces the Fisheries Act with regards to tailings leakage was taken up;”³⁷ and
- e) 1999 and 2009 reports by Canada’s Commissioner of the Environment and Sustainable Development, which “found several shortcomings in the approach of Environment Canada” – including the lack of an Environment Canada *Fisheries Act* compliance strategy, and in terms of Environment Canada’s “administrative agreement with Alberta.”³⁸ The Submitters quote the Commissioner’s statement that “the Agreement’s Management Committee has not provided its oversight role in over two years and Environment Canada has not formally assessed the extent that the arrangements with Alberta fulfill the Department’s *Fisheries Act* responsibilities.”³⁹

15. The relevant portion of the federal Commissioner of the Environment and Sustainable Development report cited in the Submission is as follows:

1.95 Environment Canada has a compliance strategy, environmental effects monitoring, and an enforcement plan in place for each of the two regulations it actively administers and enforces—the *Pulp and Paper Effluent Regulations* and the *Metal Mining Effluent Regulations*.

1.96 However, Environment Canada does not have a *Fisheries Act* compliance strategy for the industries and activities that must comply with the Act’s prohibition requirement against the deposit of harmful substances in water frequented by fish. The Department informed us that the number of parties potentially subject to the Act’s prohibition requirement numbers in the hundreds of thousands. The size of this population represents a challenge in developing a compliance strategy and setting priorities for the use of compliance promotion and enforcement resources.

1.97 Environment Canada has not instituted an overall risk-based approach to the *Fisheries Act* to identify, assess, and address risks of non-compliance with the Act that could result in significant harm to fish habitat. The use of risk-based methodologies would allow the Department to focus its resources on those areas where significant risks to fish habitat are highest and ensure that they are adequately addressed in a consistent manner.

³⁷ Revised Submission, *supra* note 5 at 9; see revised Submission Appendix 15 [incorrectly cited by the Submitters as Appendix 17], *supra* note 26.

³⁸ Revised Submission, *supra* note 5 at 10.

³⁹ *Ibid*, quoting Commissioner of the Environment and Sustainable Development, Chapter 1: “Protecting Fish Habitat” (Spring 2009) online: < http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_200905_01_e.pdf > [the “Commissioner’s report”] at 39. The Commissioner reports annually to Parliament on behalf of Canada’s federal Auditor General, “concerning anything that the Commissioner considers should be brought to the attention of Parliament in relation to environmental and other aspects of sustainable development:” *Auditor General Act*, RSC 1985, c A-17, s 23(2).

1.98 The absence of a risk-based approach to the *Fisheries Act*'s prohibition requirement also hampers the ability of the Department's Enforcement Branch to plan its enforcement activities based on significant risks to fish habitat identified by the Department. The 2008–2009 National Enforcement Plan reflects a largely reactive approach, based on complaints, to the Act's prohibition requirement. However, the Plan does include planned inspections for some cruise ships, fish plants, and abandoned mines.⁴⁰

16. In the context of sectors not specifically covered by section 36 regulations, such as oil sands tailings ponds, the Commissioner recommended as follows:

1.112 **Recommendation.** Environment Canada should develop a risk-based approach to the *Fisheries Act* pollution prevention provisions to identify, assess and address significant risks associated with non-compliance with the Act. As part of this approach, Environment Canada should determine whether there are significant risks to fish habitat associated with non-compliance with the *Fisheries Act* that are not being addressed by the combination of its own administration and enforcement of the Act, and the administration of other federal and provincial legislation.⁴¹

17. Environment Canada responded to the Commissioner's recommendation as follows:

Environment Canada's response. The Department accepts this recommendation and has assigned responsibility to the Public and Resources Sectors Directorate of the Environmental Stewardship Branch to coordinate risk management and compliance promotion priorities for subsection 36(3) of the *Fisheries Act* and associated regulations.

In 2009–2010, Environment Canada will develop a work plan to identify current risks and risk management activities in non-regulated sectors, including *Fisheries Act* compliance promotion activities and other federal and provincial legislation. In 2010–11, the Department will complete the review of risk and risk management activities and will adjust departmental work plans as required.⁴²

18. The revised Submission documents several requests between 26 January 2009 and 25 March 2010 by one of the Submitters, Environmental Defence (Canada), for enforcement by Environment Canada of alleged leakage from oil sands tailings ponds, as well as Environment Canada's responses.⁴³

⁴⁰ Revised Submission, *supra* note 5 at 10, quoting the Commissioner's report, *supra* note 39 at paras 1.95–1.98.

⁴¹ *Ibid* at para 1.112.

⁴² *Ibid* at 40.

⁴³ Revised Submission, *supra* note 5 at 10–11; see revised Submission Appendix 19 [series of correspondence between the Submitter Environmental Defence and Environment Canada] [“Appendix 19”].

19. Canada’s Response, dated 31 January 2014,⁴⁴ notified the Secretariat of the existence of a “pending judicial proceeding” that, according to Canada, required the Secretariat to proceed no further with the Submission.
20. Canada in its Response informed the Secretariat that a private citizen, Mr. Anthony Neil Boschmann,

swore ‘an information,’ [i.e. a sworn allegation of crime] in accordance with section 504 of the *Criminal Code*, before the Alberta Provincial Court alleging that Suncor Energy Inc., a company operating in the Alberta oil sands region, permitted the deposit of deleterious substances into the Athabasca River, in violation of subsection 36(3) of the *Fisheries Act*. The Court is set to hold a process hearing on the matter on February 27, 2014, in which Government of Canada prosecutors will participate.⁴⁵

In the Response, Canada stated that, in accordance with Article 14(3), the subject-matter of the submission “is currently the subject of a pending judicial proceeding,” and because “the allegations made by Mr. Boschmann relate directly to the assertions” in the submission, Canada demanded that the Secretariat proceed no further with the submission, and promptly notify the submitter and Council that the submission is terminated.⁴⁶

21. Canada thus concluded that the case for termination of *the Alberta Tailings Ponds* Submission had been made due to the existence of the proceeding (the “Boschmann Information”).
22. The Secretariat assessed Canada’s notification of the Boschmann Information and issued a Notification to Council and the Submitters on 14 April 2014. In the Notification, the Secretariat explains its assessment that, in accordance with its longstanding approach to the assessment of pending proceeding notifications by Parties, the proceeding is neither pending, nor does it meet the definition of “judicial or administrative proceeding” as defined in Article 45(3). Briefly put, the Secretariat came to these conclusions because in the case of the Boschmann Information, no summons or warrant was issued following the February 2014 process hearing. Guided by Article 45(3)(a), the Secretariat determined that, in accordance with the Party’s law, until a summons or warrant is issued following a process hearing in a Canadian court, no “criminal prosecution” can be said to exist.⁴⁷
23. The Secretariat explains in its assessment that it “has always assessed notifications by a Party of pending judicial or administrative proceedings,” and provides the list of submissions in which the Secretariat has done so.⁴⁸

⁴⁴ Response, *supra* note 9.

⁴⁵ *Ibid* at 1.

⁴⁶ *Ibid*.

⁴⁷ Secretariat Notification re pending proceeding, *supra* note 10 at paras 12–27; see especially paras 20–22.

⁴⁸ *Ibid* at para 9 and notes 7–9.

24. Canada sent a letter on 14 May 2014 stating its position that “the NAAEC does not give the Secretariat the authority to interpret a notice given by a Party that a matter is the subject of a pending proceeding,” that on receipt of such a notice the Secretariat should promptly notify Council and the Submitters that the Submission is terminated and, consequently, requests that the Secretariat cease its Article 15(1) analysis as to whether the Submission, in light of the Response, warrants the development of a factual record.⁴⁹

C. Discussion

i. Re Pending Proceedings

25. The May 2014 letter suggests a lack of agreement on the Secretariat’s authority to assess a Party’s claim of a “pending judicial or administrative proceeding.”⁵⁰
26. In cases where the Party in question has claimed in its Response the existence of a pending proceeding, the Secretariat has always undertaken such assessments, which are a necessary prerequisite to its Article 15(1) analysis as to whether the development of a factual record is warranted.⁵¹
27. The plain language of the NAAEC makes necessary the Secretariat’s independent assessment of a pending proceeding notification under Article 14(3). Article 14(3)(a) requires the Secretariat to consider any pending proceedings identified by the Party and to proceed no further with submissions where an identified pending proceeding meets the relevant criteria. If a proceeding does not meet the criteria for proceeding no further, the Secretariat must then evaluate whether the underlying submission, in light of any Response provided by the Party, warrants the development of a factual record under Article 15(1).
28. Upon receipt of a claim by a Party of a pending proceeding pursuant to Article 14(3), the Secretariat takes steps to verify whether the identified proceeding satisfies the NAAEC’s definition of “judicial or administrative proceeding” and whether it is “pending,” reflecting the obligation in Article 14(3)(a) that the Secretariat proceed no further, “in which case” the Secretariat takes the appropriate steps to terminate the submission.
29. This facial language reflects broader reasons for the NAAEC’s vesting the Secretariat with

⁴⁹ May 2014 letter, *supra* note 11.

⁵⁰ *Ibid.*

⁵¹ See SEM-96-003 (*Oldman River I*); SEM-97-001 (*BC Hydro*); SEM-99-001 (*Methanex*); SEM-00-002 (*Neste Canada*); SEM-98-004 (*BC Mining*); SEM-00-004 (*BC Logging*); SEM-00-006 (*Tarahumara*); SEM-01-001 (*Cytrar II*); SEM-02-003 (*Pulp and Paper*); SEM-03-003 (*Lake Chapala II*); SEM-04-002 (*Environmental Pollution in Hermosillo*); SEM-04-005 (*Coal-Fired Power Plants*); SEM-05-002 (*Coronado Islands*); SEM-05-003 (*Environmental Pollution in Hermosillo II*); Consolidated Submissions SEM-06-003 and SEM-06-004 (*Ex Hacienda El Hospital II* and *Ex Hacienda El Hospital III*); SEM-06-005 (*Species at Risk*); SEM-06-006 (*Los Remedios National Park*); SEM-07-005 (*Drilling Waste in Cunduacán*); SEM-07-001 (*Minera San Xavier*); SEM-08-001 (*La Ciudadela Project*); SEM-09-003 (*Los Remedios National Park II*); SEM-09-002 (*Wetlands in Manzanillo*); SEM-10-004 (*Bicentennial Bridge*); SEM-11-002 (*Sumidero Canyon II*); SEM-12-001 (*BC Salmon Farms*); and SEM-13-001 (*Tourism Development in the Gulf of California*).

such limited power. As reflected in past assessments of pending proceedings, any interpretation of the NAAEC's terms must help ensure that the Agreement meets its objectives and satisfies the intention and expectations of the Parties at the time that they entered into it.⁵² The Secretariat has noted this bestowal of express and latent authority in its numerous prior Article 15(1) assessments of pending proceedings.

30. In order to ensure that the Article 14 process meets the objective of providing information on environmental law enforcement matters, the Secretariat must possess sufficient authority to assess, independently of the Parties in accordance with Article 11(4), the adequacy of an Article 14(3) notification. An alternative approach, allowing a Party to suspend or terminate a submission on a facial allegation of a pending proceeding, could create a unilateral veto authority by that Party, without any means of weighing the validity of that allegation. Such an approach would allow an Article 14(3) notification to suspend or terminate a submission without any further opportunity for input or review by the other NAAEC Parties (e.g. at the Article 15(2) stage), or by the submitter.⁵³
31. The NAAEC does not provide a procedural step whereby a Party can object to the Secretariat's determination on whether a claimed pending proceeding satisfies the requirements of Article 14(3)(a).⁵⁴ If the Secretariat finds that the pending proceeding notification does not meet the criteria of Articles 14(3) or 45(3) ("judicial or administrative proceeding"), the submission process next moves directly to the Article 15(1) consideration of whether to recommend a factual record, and if the Secretariat recommends a factual record, the Parties may then vote on whether to instruct it to develop a factual record pursuant to Article 15(2).

⁵² As explained in the Secretariat Notification re pending proceeding, *supra* note 10 at para 9, the Secretariat has implied powers under customary international law and the terms of the NAAEC to establish practices that will ensure its effective implementation.

⁵³ See the Secretariat's Article 14(3)(a) Determination in SEM-01-001 (*Cytrar II*) (June 13 2001) at 5: "In view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination whether it has before it a situation contemplated by Article 14(3)(a), and that it should proceed no further with a submission, on the mere assertion of a Party to the effect." By contrast, the May 2014 letter from Canada, *supra* note 11 at 1–2, reads: "I can confirm that the matter at issue in the Boschmann case is the same as the *Alberta Tailings Ponds* submission and that the Boschmann case will remain active in the Alberta court system until August 27, 2014. Up to that date, Mr. Boschmann may request a new process hearing in respect of the information sworn on 12 September 2013, on the basis of newly obtained evidence. He may also appeal the Court's decision not to issue process." The Secretariat maintains, having interpreted the NAAEC in the context of the Boschmann Information and having considered Canadian law in accordance with Article 45(3)(a), that the Boschmann Information does not currently constitute a pending proceeding (see note 47, *supra*). Should Mr. Boschmann take one of the steps outlined in Canada's letter, and a court issue a summons or warrant on or before August 27 2014, Guideline 9.6 would then allow the Party to so inform the Secretariat of that fact, and the Secretariat would conduct a new assessment of a claimed pending proceeding.

⁵⁴ See however the May 2014 letter, *supra* note 11, in which Canada objects to the Secretariat's Article 14(3)(a) determination.

ii. Consideration of the Submitters' assertions in light of Canada's response

32. Canada's Response does not substantively address the assertions in the revised Submission. It consists of a four-paragraph letter, accompanied by Mr. Boschmann's sworn Information, alleging that the Boschmann Information constitutes a "pending proceeding." The Response describes neither "environmental policies" nor "actions [...] taken in connection with the matter in question,"⁵⁵ beyond the then-anticipated participation of Government of Canada prosecutors in the Boschmann Information process hearing in February, 2014.⁵⁶
33. The Submission provides information about deposits or leakage of deleterious substances from oil sands tailings ponds into water frequented by fish in northern Alberta, which the Submission alleges are contrary to subsection 36(3) and not otherwise authorized by regulations. Canada's Response discusses only Canada's claim of a pending proceeding, and does not otherwise discuss the assertions in the Submission.
34. After consideration of the submission in light of Canada's Response, the Secretariat thus determines that the Response leaves open central questions raised in the submission, concerning Environment Canada's enforcement of subsection 36(3) of the *Fisheries Act* in relation to deposits of deleterious substances from oil sands tailings ponds into waters frequented by fish.
35. The Submitters allege that Environment Canada failed to act despite knowledge of tailings ponds leakages that contravene subsection 36(3) of the *Fisheries Act*. The Submitters present alleged evidence of Environment Canada's knowledge of such leakage spanning several years,⁵⁷ and of Environment Canada's stated commitment to address concerns about "significant risks to fish habitat associated with non-compliance."⁵⁸
36. Advancing the transparency goals of the NAAEC, a factual record would shed light on the Submitters' assertions that Environment Canada is failing to effectively enforce subsection 36(3) of the *Fisheries Act*, despite alleged knowledge and acknowledgement of leakage of deleterious substances⁵⁹ from oil sands tailings ponds in northern Alberta. It would also shed light on Environment Canada's section 36 enforcement strategy and actions, including monitoring, inspections, investigations and prosecutions in relation to oil sands tailings ponds; on Canada's and Alberta's sharing of enforcement responsibility in light of the Canada-Alberta Agreement;⁶⁰ on how Environment Canada's involvement in joint federal-provincial assessment processes may relate to its enforcement of subsection 36(3) of the

⁵⁵ Guideline 9.3, *supra* note 3.

⁵⁶ Response, *supra* note 9. The Secretariat notes that the alleged existence of a pending proceeding does not prevent a Party from providing, in its Response, relevant information on the enforcement of the environmental law(s) raised in the Submission. Moreover, the Parties have more often than not provided such information together with any response alleging pending proceedings.

⁵⁷ See paras 11–14 and 18, *supra*.

⁵⁸ See paras 16–17, *supra*.

⁵⁹ See the Article 14(1) and (2) Determination, *supra* note 8 at paras 9–12 for information in the Submission about the nature of the substances contained in tailings ponds waters.

⁶⁰ Canada-Alberta Agreement, *supra* note 29.

Fisheries Act, given that Environment Canada has expressed concern during such processes about potential discharges into fish-bearing waters;⁶¹ and on other information pertaining to the enforcement of subsection 36(3) of the *Fisheries Act* in relation to oil sands tailings ponds.

37. For the above reasons, the Secretariat considers that a factual record is warranted to address the Submitters' assertions regarding Environment Canada's alleged failure to enforce subsection 36(3), and that a factual record addressing these assertions would advance the transparency goals of the NAAEC.

III. RECOMMENDATION

38. For the reasons contained in this Determination, the Secretariat finds that, having considered the Submission and the Response, central questions remain open regarding Canada's enforcement of subsection 36(3) of the *Fisheries Act* in the Alberta oil sands region as set out in the Submission, in relation to both direct and indirect deposits of deleterious substances from tailings ponds into water frequented by fish. A factual record would shed light on the Submitters' assertions and promote the objectives of the NAAEC by, *inter alia*, fostering environmental protection for the well-being of present and future generations, enhancing compliance with environmental law, and promoting transparency and public participation.⁶²
39. The development of a factual record is thus warranted in order to gather additional information concerning the matters raised in Submission SEM-10-002 (*Alberta Tailings Ponds*), and is necessary for a thorough consideration of the assertions that Canada is failing to effectively enforce subsection 36(3) of the federal *Fisheries Act*. The Secretariat considers that the objectives of the NAAEC would be best served if any Council Resolution authorizing the development of a factual record pursuant to Article 15(2) is consistent with what is recommended herein.
40. In accordance with Article 15(2) and Guideline 19.4, the Council has 60 working days, that is until 27 October 2014, to vote on whether to instruct the Secretariat to prepare a factual record.

⁶¹ Revised Submission, Appendix 4, *supra* note 35 at 34 ("EC provided advice to the Panel concerning the water quality of tailings release and EPL [end-pit lake] waters. EC was concerned that EPLs contained tailings materials that would discharge to fish-bearing waters.") and 40 ("EC noted that the Fisheries Act prohibited the deposit of deleterious substances into fish-bearing waters. It expressed concern regarding the potential of oil sands development to cause the tainting of fish tissue, which was prohibited under the Act"); and Appendix 17, *supra* note 25 at 51 ("EC was concerned that the potential release of process-affected waters into fish-bearing watercourses and water bodies could cause fish tainting."). Also in Appendix 17 at 47, the Joint Review Panel stated that it is "reassured by EC's evidence that there is adequate legislation in place to prohibit the release of poor quality water into fish-bearing waters."

⁶² Article 1 (a), (g), and (h).

Respectfully submitted for your consideration on this 29th day of July 2014.

Secretariat of the Commission for Environmental Cooperation



Per: Irasema Coronado, Ph.D.
Executive Director