

---

## Secretariat of the Commission for Environmental Cooperation

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

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

**Represented by:** Gillian McEachern, Campaigns Director, Environmental  
Defence Canada

**Party:** Canada

**Date received:** 13 April 2010

**Date of the determination:** 11 December 2013

**Submission I.D.:** SEM-10-002 (*Alberta Tailings Ponds*)

---

#### I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement")<sup>1</sup> 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 considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC*<sup>2</sup> (the "Guidelines"). When the Secretariat has determined 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

---

<sup>1</sup> *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](http://www.cec.org/NAAEC)>.

<sup>2</sup> Commission for Environmental Cooperation, *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Montreal: CEC, 2000). The CEC Council adopted changes to the Guidelines that took effect 11 July 2012: see *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Montreal: CEC, 2012) online: CEC <[www.cec.org/guidelines](http://www.cec.org/guidelines)>. The present Determination was made in accordance with the Guidelines in effect at the time of the Submission and except where indicated in this Determination, reference to the "Guidelines" is to the Guidelines published in 2000.

the contrary, or where certain circumstances prevail, it proceeds no further with the submission.<sup>3</sup>

2. On 14 April 2010, Environmental Defence Canada and the Natural Resources Defense Council (U.S.), together with Canadian residents John Rigney, Don Deranger, and Daniel T'seleie (the "Submitters") filed SEM-10-002 (*Alberta Tailings Ponds*) (hereinafter the "original Submission")<sup>4</sup> with the Secretariat pursuant to Article 14. The Submitters assert that the Government of Canada ("Canada"), specifically Environment Canada, is failing to enforce subsection 36(3) of the federal *Fisheries Act*,<sup>5</sup> 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."<sup>6</sup>
3. On 3 September 2010, the Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") determined that the Submission did not meet all the admissibility requirements in Article 14(1), and in particular Article 14(1)(c).<sup>7</sup> In accordance with Guideline 6.2, the Submitters were notified that they had thirty days from the date of that Determination to provide a Submission conforming to all of the criteria for admissibility of Article 14(1), failing which, pursuant to Guideline 6.3, the Secretariat would terminate the process with respect to the Submission.
4. On 1 October 2010, the Secretariat received a revised Submission from the Submitters.<sup>8</sup> The Secretariat has determined that, for the reasons set out below, the revised Submission meets all the criteria for admissibility contained in Article 14(1) and pursuant to the criteria set out in Article 14(2), the Secretariat finds that the Submission warrants requesting a response from the Government of Canada. The Secretariat presents the reasons for this Determination below, summarizing the relevant parts of the revised submission.

---

<sup>3</sup> Information regarding the various stages of the process, as well as previous Secretariat Determinations and Factual Records, can be found on the CEC's website at: <<http://www.cec.org/submissions>>. Reference to an "Article" throughout the present Determination, unless otherwise stated, is to an article of the NAAEC.

<sup>4</sup> Submission SEM-10-002 (13 April 2010) [the "original Submission"].

<sup>5</sup> RSC 1985, c F-14.

<sup>6</sup> Original Submission, *supra* note 4 at 2.

<sup>7</sup> SEM-10-002 (*Alberta Tailings Ponds*), Secretariat Determination under Article 14(1) (3 September 2010) [the "Determination"]. The original Submission was summarized at paragraphs 3 to 21 of the Determination.

<sup>8</sup> SEM-10-002 (*Alberta Tailings Ponds*) (1 October 2010) [the "revised Submission"].

## II. ANALYSIS

5. In the Determination, the Secretariat invited the Submitters to provide further information on documented cases of contaminated water from tailings ponds reaching surface water, including information about the nature, quantity and location of alleged leaks.<sup>9</sup> The Secretariat also invited the Submitters to produce further information supporting the assertion concerning indirect deposits of deleterious substances, as set out in the second part of subsection 36(3) of the *Fisheries Act*.<sup>10</sup>
6. The revised Submission includes both general and specific information on tailings water reaching surface water, as discussed below.

### **General information supporting the assertion**

7. The revised Submission states how the construction of tailings ponds allows for the leakage of deleterious substances, contained therein, into waters frequented by fish: their construction involves permeable earthen materials,<sup>11</sup> and their contents include such deleterious substances.<sup>12</sup>
8. On the subject of the construction of tailings ponds, the Expert Panel report on Groundwater, included in the revised Submission as Appendix 9, notes that “tailings-pond dams may be constructed out of [excavated] ... sand. There is a concern that this has resulted in more-permeable zones in the dams that may leak and act as migration pathways for the contaminants in the tailings water.”<sup>13</sup>
9. On the subject of the nature of the substances contained in tailings pond waters, the submission in Appendix 15 notes that:

Oil sand tailings are waste streams that contain dispersions of bitumen, sand, clay, water and some contaminants of concern. Naphthenic acids are the primary source of toxicity. Tailings are contained in settling ponds which serve [as] ... a place to contain contaminants. ... Many of these contaminants will be reduced over time by natural bioremediation processes.<sup>14</sup>

---

<sup>9</sup> Determination, *supra* note 7 at para 39.

<sup>10</sup> *Ibid.*

<sup>11</sup> Revised Submission, *supra* note 8 at 1-2; Appendix 9: Expert Panel on Groundwater, *The Sustainable Management of Groundwater in Canada* (Ottawa: Council of Canadian Academies, 2009) at 146 [“Appendix 9”].

<sup>12</sup> Revised Submission, *supra* note 8 at 1-2; Appendix 3: Matt Price, *The Tar Sands’ Leaking Legacy* (Toronto: Environmental Defence, 2008) [“Appendix 3”] at 10-11 (Appendix 3 was also included in the original Submission as Appendix 1).

<sup>13</sup> Appendix 9, *supra* note 11 at 146. See also the descriptions of geological settings with respect to tailings pond sites, *infra* n 24.

<sup>14</sup> Appendix 15: House of Commons, Standing Committee on the Environment and Sustainable Development, *Follow Up on Committee Hearings* (2009) at 68 [“Appendix 15”]. The portion quoted is from a section titled “Detailed explanation on the design of tailings ponds” and was “Provided by

10. The revised Submission alleges that “[t]he toxic effects of oil sands process water on aquatic biota have been documented since the early stages of oil sands development.”<sup>15</sup> “Process water,” which results from the hot water separation of bitumen from sand and clay, “is alkaline, slightly brackish, and acutely toxic to aquatic biota due to high concentrations of organic acids leached from the bitumen during extraction.”<sup>16</sup>
11. The revised Submission notes that among the chemicals of environmental concern in oil sands process waters, naphthenic acids (“NAs”) are considered the “main contributors of acute toxicity to aquatic biota;”<sup>17</sup> they are “acutely toxic to a range of organisms.”<sup>18</sup> One scientific paper provided by the Submitters concludes by noting that oil sands companies are “exploring new methods to remove the toxicity of these compounds.”<sup>19</sup> Another suggests that reducing concentrations of NAs to “background levels” in tailings ponds would require a water treatment objective of removing 90%-99% of NAs from tailings pond water.<sup>20</sup>
12. The revised Submission lists the variety of deleterious substances in tailings ponds as including “naphthenic acids, ammonia, benzene, cyanide, oil and grease, phenols, toluene, polycyclic aromatic hydrocarbons, arsenic, copper and iron.”<sup>21</sup>
13. The description of tailings ponds design, written by officials at Alberta Environment, states:

No impacts of seepage have been detected in the Athabasca River despite intensive investigations ... and no ecological impacts have been found. *All tailings ponds seep and there are no current feasible options to seal these structures completely (due to size, lack of clay, cost).* The solution to the seepage is that tailings ponds must have seepage recapture systems. The effectiveness of these systems is ensured through a corresponding network of monitoring wells.<sup>22</sup>

---

Alberta [Ministry of the] Environment” (now called Alberta Environment and Sustainable Resource Development, online: <esrd.alberta.ca>) (“Alberta Environment”).

<sup>15</sup> Appendix 10: Erik W Allen, “Process water treatment in Canada’s oil sands industry: I. Target pollutants and treatment objectives” (2008) 7 *Journal of Environmental Engineering and Science* 123 at 127 [“Appendix 10”].

<sup>16</sup> *Ibid* at 123.

<sup>17</sup> *Ibid* at 135.

<sup>18</sup> Appendix 11: Angela C Scott, Michael D Mackinnon & Phillip M Fedorak, “Naphthenic Acids in Athabaska Oil Sands Tailings Waters are Less Biodegradable than Commercial Naphthenic Acids” (2005) 39:21 *Environmental Science & Technology* 8388 at 8388.

<sup>19</sup> *Ibid* at 8393.

<sup>20</sup> Appendix 10, *supra* note 15 at 134.

<sup>21</sup> Revised Submission, *supra* note 8 at 2; see also Appendix 10, *supra* note 15 (listing other chemicals of environmental concern in process water as including bitumen, ammonia, sulphate, chloride, aromatic hydrocarbons, and trace metals).

<sup>22</sup> “Detailed explanation on the design of tailings ponds” in Appendix 15, *supra* note 14 at 69 [emphasis added].

14. Various environmental hazards of tailings ponds were described as early as 1981, “including toxicity to aquatic biota ..., poor water quality, ... and the risk of infiltration of [tailings ponds water] into groundwater.”<sup>23</sup>
15. The Submitters allege that leakage can occur in spite of attempts to “recapture” leakage using various methods and technologies.<sup>24</sup>

### **Specific information in support of the assertion**

16. The additional information provided in the revised Submission includes information on “documented cases of contaminated tailings water reaching or projected to reach surface water,”<sup>25</sup> which the Submitters identify as instances of Canada’s alleged failure to enforce subsection 36(3) of the *Fisheries Act*.
17. The revised Submission includes additional information on Shell Canada’s Jackpine Project in the form of the federal-Alberta environmental assessment Joint Review Panel Report<sup>26</sup> on the application for the project (which is mentioned in, but not appended to, the original Submission).<sup>27</sup> According to this report, in the section addressing surface water quality, Environment Canada expressed concern to the Panel that tailings ponds “contained tailings materials that would discharge to fish-bearing waters,” and the Department of Fisheries and Oceans Canada “noted tailings seepage into the [aquifer] as a concern.”<sup>28</sup> The report notes that Alberta Environment “stated that tailings disposal area seepage could require additional monitoring ... of [Environmental Impact Assessment] predictions. It believed that tailings ... seepage effects would be reduced by subsurface permeability conditions, collection ditches, and other mitigations.”<sup>29</sup> The submission includes information stating that the Panel found based on the above, “that the project has potential to increase the [potential

---

<sup>23</sup> Appendix 10, *supra* note 15 at 127-128.

<sup>24</sup> Appendix 3, *supra* note 12 at 10-11. See also Appendix 5: Jim Barker et al, “Attenuation of Contaminants in Groundwater Impacted by Surface Mining of Oil Sands, Alberta, Canada” (2007) at 13-15 (graphic representations of how leakage or seepage may occur) [“Appendix 5”]; Appendix 8: Brett Stephens, Chris Langton & Mike Bowron, “Design of Tailings Dams on Large Pleistocene Channel Deposits: A Case Study—Suncor’s South Tailings Pond” (2006) [unpublished] [“Appendix 8”]; Appendix 9, *supra* note 11 at 145 (Figure 6.9: “Schematic diagram of key groundwater issues in the Athabasca oil sands region”) and 146 (“...more-permeable zones in [tailings-pond] dams ... may leak and act as migration pathways for the contaminants in the tailings water” in Part 6.4, “Athabasca Oil Sands: Challenges for Sustainable Groundwater Management of Mega-Developments”).

<sup>25</sup> Revised Submission, *supra* note 8 at 2, 5.

<sup>26</sup> 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” (2004) [“Appendix 4”].

<sup>27</sup> Original Submission, *supra* note 4 at 2, 5, 8-9 and notes 11 and 28.

<sup>28</sup> Appendix 4, *supra* note 26 at 34.

<sup>29</sup> *Ibid* at 35.

acid input], both locally and to a lesser extent regionally, with possible effects on critical load exceedances of water bodies.”<sup>30</sup>

18. In relation to consideration of the project’s effects on groundwater, Shell “indicated that tailings pore water would seep downwards through the tailings disposal area and into the shallow Quaternary deposits” and predicted that seepage would degrade groundwater quality, within a limited area of the pond.<sup>31</sup> Despite the use of a ditch to intercept seepage, Shell states that “some seepage would discharge to the ground surface between the tailings area and Jackpine Creek and that *half of this seepage would enter the creek.*”<sup>32</sup> It predicts “slightly higher concentrations of naphthenic acids in Jackpine Creek until 2040, at which time the peak and median concentration would increase more substantially.”<sup>33</sup> With respect to “Aquatic Resources,” Environment Canada highlights that the Fisheries Act specifically prohibits “the *deposit of deleterious substances into fish-bearing waters*” independent of the effects of those deposits.<sup>34</sup> Finally, the submission includes information stating that the Panel recognizes that “tailings seepage will change water quality within the Quaternary aquifers in the Shell lease area.”<sup>35</sup>
19. Both the original and revised Submission cite a study from the University of Waterloo that, the Submitter asserts, “estimates that Suncor Energy’s Tar Island pond had been leaking [*sic*] almost 6 million litres a day into the Athabasca River.”<sup>36</sup> The study also compares concentrations of NAs and ammonium, recorded under the Tar Island dyke and in the Athabasca River adjacent to it, including in water sampling wells, which together suggest that seepage increases concentrations of the two substances.<sup>37</sup>
20. The revised Submission also includes additional information in Appendices 6 and 7 to support the assertion (made in both the original and revised Submissions) that seepage from Syncrude’s Mildred Lake Settling Basin (“MLSB”) is reaching Beaver Creek. Appendix 6 contains the “Final Report” of the “Beaver Creek Profiling Program 2008 Field Study,” an assessment commissioned from Golder Associates by Syncrude.<sup>38</sup> The report states that:

---

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid* at 43.

<sup>32</sup> Revised Submission, *supra* note 8 at 5; Appendix 4, *supra* note 26 at 43 [emphasis added].

<sup>33</sup> *Ibid* at 40.

<sup>34</sup> *Ibid* [emphasis added].

<sup>35</sup> *Ibid* at 46.

<sup>36</sup> Revised Submission, *supra* note 8 at 5; see also Appendix 5, *supra* note 24 at 15 (“seepage of dyke construction water = 65L/s” and “Pond seepage through foundation = 2 L/s”). The Secretariat notes that the sum of these alleged sources of seepage from the Tar Island dyke into the Athabasca River over twenty-four hours is 5,788,800 litres.

<sup>37</sup> *Ibid* at 16.

<sup>38</sup> Appendix 6: Golder Associates, “Final Report: Beaver Creek Profiling Program 2008 Field Study” (Submitted to Syncrude Canada Ltd., February 2009) [“Appendix 6”].

Process water potentially seeping from the Mildred Lake oil sands lease is collected by a series of ditches and returned (by pump) to the MLSB via the seepage control pond. Two dams were constructed in 1999-2000 to retain water and prevent release of process-affected seepage water into Beaver Creek. ... However, there have been contributions of process-affected water detected in Beaver Creek below the dam.<sup>39</sup>

21. Appendix 7 is the “2007 Groundwater Monitoring Report – Syncrude Mildred Lake Site,” evidently submitted to Alberta Environment in compliance with an approval issued under authority of the Alberta *Environmental Protection and Enhancement Act*.<sup>40</sup> With respect to the monitoring network, the report both predicts a “decline” and a “*reduced* actual volume of seepage water into Beaver Creek.”<sup>41</sup> The latter case refers to elevated levels of sodium and chloride at a sample well, “downstream of the Lower Seepage Dam (TBC-1B).”<sup>42</sup>
22. Both Appendix 6 and 7 thus suggest that there is, or has been, seepage from the MLSB into Beaver Creek.
23. The revised Submission also includes documented assertions of seepage of tailings pond water from a tailings pond towards surface waters, in relation to the Syncrude Aurora mine.<sup>43</sup>
24. A further specific instance of tailings seepage alleged by the Submitter is in respect of Suncor’s South Tailings Pond (“STP”) and its impact on McLean Creek. Supporting information is included as Appendix 8 to the revised Submission.<sup>44</sup> The Submitters allege that Suncor “admits that the leakage into the creek will not be stopped, but rather than [*sic*] the company would try to manage the concentrations of deleterious substances in the creek.”<sup>45</sup> Appendix 8 states that the geology around the STP provides “potential direct recharge pathways for the migration of [process affected water] seepage from the STP into the underlying [Wood Creek Sand Channel or “WCSC”] and the regional groundwater system.”<sup>46</sup> From there, migration pathways from the WCSC include an “exit point” at McLean Creek.<sup>47</sup> Appendix 8 continues:

---

<sup>39</sup> *Ibid* at 2.

<sup>40</sup> RSA 2000, c E-12.

<sup>41</sup> Appendix 7: Femi Baiyewun, “2007 Groundwater Monitoring Report: Syncrude Canada Ltd. Mildred Lake Site” (2008) at 31, 39 [“Appendix 7”] [emphasis added].

<sup>42</sup> *Ibid*.

<sup>43</sup> Revised Submission, *supra* note 8 at 11; Appendix 19: Correspondence between Environmental Defence Canada and Environment Canada (2009-2010) at 13-15 (at pages 8-10 of letter from Environmental Defence Canada to Environmental Enforcement Division, Environment Canada (8 May 2009)); and Appendix 20: Dallas Heisler, “2007 Groundwater Monitoring Report: Syncrude Canada Ltd. Aurora” (2008) at 27.

<sup>44</sup> Appendix 8, *supra* note 24.

<sup>45</sup> Revised Submission, *supra* note 8 at 5.

<sup>46</sup> Appendix 8, *supra* note 24 at 7.

<sup>47</sup> *Ibid*.

The framework for seepage management is a commitment to the environment protection of McLean Creek and to the preservation of regional groundwater resources. For McLean Creek this is a commitment to manage seepage flows from the STP, such that concentrations of contaminants (particularly naphthenic acids) do not reach concentrations that cause an adverse environmental impact. The commitment in terms of seepage migration in groundwater is that there is to be no movement of contaminants across lease boundaries; and no uncontrolled passage of contaminated groundwater to the surface water bodies.<sup>48</sup>

25. Among the report's conclusions: "The STP seepage management system is large and requires a long term commitment to operation and maintenance."<sup>49</sup>
26. The Secretariat now considers whether the revised Submission meets the requirements of Article 14(1). If the requirements are met, the Secretariat examines, pursuant to Article 14(2), whether the Submission merits a response from the Government of Canada.
27. As the Secretariat has found in previous NAAEC Article 14(1) determinations,<sup>50</sup> Article 14(1) is not intended to be an "insurmountable screening device", which means that the Secretariat will interpret every submission in accordance with the Agreement and the Guidelines, yet without an unreasonably narrow interpretation and application of the Article 14(1) criteria.

#### ***Article 14(1) Opening Paragraph***

28. The opening paragraph of NAAEC Article 14(1) provides: "[t]he Secretariat may consider a submission from any non-governmental organization ("NGO") or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission" meets the criteria in Article 14(1)(a) to (f).
29. The only matter not addressed concerning this paragraph in the Determination<sup>51</sup> regards the environmental law in question; specifically, the Secretariat invited the submitters to provide more information on the legal status of the "Administrative Agreement for the Control of Deposits of Deleterious Substances under the Fisheries Act" (the "Agreement").<sup>52</sup>

---

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* at 8.

<sup>50</sup> See SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); and SEM-98-003 (*Great Lakes*), Article 14(1)(2) Determination (8 September 1999).

<sup>51</sup> See the Determination, *supra* note 7 at 10-15.

<sup>52</sup> Revised Submission, Appendix 14, "Canada-Alberta Administrative Agreement for the Control of Deposits of Deleterious Substances under the Fisheries Act," (1994) ["Appendix 14" or the "Agreement"]. The full text of the Agreement was not provided with the original Submission.



30. The Agreement provides a framework for arrangements between the governments of Alberta and Canada “for a variety of activities *related to the administration of their respective legislation.*”<sup>53</sup>

31. The Submitters assert that

the 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*.<sup>54</sup>

The Submitters point to three provisions of Annex 3 (titled “Inspection, Investigation and Enforcement”) of the Agreement, suggesting that the Agreement has no effect on the respective powers and responsibilities of Alberta and Canada for enforcement of their legislation.<sup>55</sup>

32. The Submitters describe the Agreement as a “mechanism for the federal Minister of the Environment to carry out his/her responsibilities”, and as a “subsidiary agreement under an environmental law.”<sup>56</sup>

33. As the Secretariat observed in the Determination, the Agreement is not a “statute or regulation..., or provision thereof” as provided in the Article 45(2)(a) definition of “environmental law.” Rather, as the Submitters state, it appears to be a “mechanism” for cooperation between the two levels of government in the administration of subsection 36(3) of the *Fisheries Act* and related provisions and regulations, and of the Alberta *Environmental Protection and Enhancement Act*.<sup>57</sup> The Agreement appears to be intended to help coordinate and streamline both Canada’s and Alberta’s regulatory activities relating to the protection of the environment.

34. The Secretariat thus finds that the Agreement can be considered further in light of the Submitters’ assertion that the Party is failing to effectively enforce its environmental law. In SEM-09-002 (*Wetlands in Manzanillo*), where a similar federal-state coordination agreement was considered,<sup>58</sup> the Secretariat also concluded

---

<sup>53</sup> *Ibid* at s 5.1 [emphasis added].

<sup>54</sup> Revised Submission, *supra* note 8 at 7.

<sup>55</sup> *Ibid*; Appendix 14, *supra* note 52 at Annex 3, ss 2.1, 3.1, 3.2.8.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Supra* note 40.

<sup>58</sup> SEM-09-002 (*Wetlands in Manzanillo*), Revised Submission (2 November 2009) at para 1.1. In that case, the Coordination Agreement was concluded between three federal government agencies of Mexico (SEMARNAT, the Ecology National Institute and the Mineral Resources Council), the state government of Colima and the municipalities of Manzanillo and Armería, and was adopted under a provision of the main federal environmental law of Mexico.

that such an agreement could “be analyzed as an implementation device” of the challenged provision.<sup>59</sup>

35. Since the Secretariat has already examined and considered that the Submission meets the criteria under NAAEC Article 14(1)(a), (b), (d), (e) and (f),<sup>60</sup> the Secretariat now reviews the criterion of Article 14(1)(c).

***Article 14(1)(c) requires that a submission provide “sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based [...]”***

36. The Secretariat invited the Submitters to provide information regarding any “documented cases” of seepage from tailings ponds.<sup>61</sup> The revised Submission includes such information, as summarized in paragraphs 16-25 above. The Secretariat considers that the specific allegations of tailings pond seepage allege actual seepage, with the exception of the Shell Jackpine mine, which appears to deal with predicted seepage. The revised Submission also includes documents that are relevant to the assertions, and that allow the Secretariat to review the Submission in accordance with Article 14(1)(c). In the revised Submission, the Submitters assert that Canada has not prosecuted any company for the alleged water contamination. It also offers the Canada-Alberta Administrative Agreement as a possible reason for the alleged enforcement failure.<sup>62</sup>
37. The revised Submission states that the asserted leakage or seepage of oil sands tailings ponds water meets the requirements of subsection 36(3) of the *Fisheries Act*, making reference to case law,<sup>63</sup> and alleges that the substances involved are “deleterious” and that seepage constitutes a “deposit.” It also alleges that the wording of the offence in subsection 36(3) justifies “proactive enforcement action to prevent contaminated groundwater from reaching surface waters frequented by fish,”<sup>64</sup> as well as enforcement in response to deposits.
38. The revised Submission explains with sufficient supporting documentation how seepage from tailings ponds may occur indirectly (through groundwater to surface water) and directly to surface water, in view of the geological setting of the

---

<sup>59</sup> SEM-09-002 (*Wetlands in Manzanillo*), Article 14(1)(2) Determination (13 August 2010) at para 35. The provision in question in the Mexican case is Article 20 *bis* 2 of the *Law of Ecological Equilibrium and Environmental Protection*.

<sup>60</sup> Determination, *supra* note 7 at paras 37-38, 44-47.

<sup>61</sup> *Ibid* at para 39.

<sup>62</sup> Revised Submission, *supra* note 8 at 2.

<sup>63</sup> *Ibid* at 3-4; Appendix 1: *Fletcher v Kingston (City)*, 2004 CarswellOnt 1860, 7 C.E.L.R. (3d) 198, 187 OAC 143, 240 DLR (4th) 734, 185 CCC (3d) 446, 70 OR (3d) 577 (Ont CA), Gillese JA at paras 69, 77-78.

<sup>64</sup> See Appendix 19, *supra* note 43 at 15 (at page 10 of letter from Environmental Defence Canada to Environmental Enforcement Division, Environment Canada (8 May 2009)).

Athabasca region and in light of the offence in subsection 36(3) of the *Fisheries Act*, and includes acknowledgment by the Party's officials of such possibility.<sup>65</sup>

39. The revised Submission thus has the elements of what the Secretariat has called

the paradigmatic submission involving "enforcement:" 1) a Party's law establishes specific environmental standards; 2) regulated entities (i.e., parties subject to such standards) are allegedly operating in violation of such standards; and 3) the Party has allegedly failed to effectively enforce this law (e.g., by allegedly allowing violations to occur without using available enforcement authorities to curtail them). Many variations on this paradigm undoubtedly would fall within the ambit of Article 14 as well.<sup>66</sup>

40. The Secretariat thus finds that the revised Submission meets the requirements of Article 14(1)(c), as it provides sufficient information and supporting documentation to allow the Secretariat to properly review the assertion that the Party has allegedly failed to enforce subsection 36(3) of the *Fisheries Act* concerning contaminated process water from tailings ponds leaking into surface water.

***Article 14(2) Factors***

41. Having determined that the Submission meets the requirements of Article 14(1), the Secretariat reviews the Submission in order to determine whether it warrants requesting a response from the Party in accordance with Article 14(2). While the considerations in Article 14(2) are not mandatory, they do guide the Secretariat in making its determination.

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

42. As the Secretariat noted in the Determination, the Submitters comprise two non-governmental organizations and three persons who reside in Canada,<sup>67</sup> each alleging a demonstrated interest in water and environmental quality in the area of the oil sands.<sup>68</sup> The revised Submission states that "the Submitters and their members make use of these waters and [that] water pollution harms the entire ecosystem, including people, fish and their habitat."<sup>69</sup>

43. The Secretariat concludes from the foregoing that the Submission alleges harm to the Submitter in accordance with Article 14(2)(a), and that any such alleged harm would be due to the alleged failure to enforce subsection 36(3) of the *Fisheries Act*.

---

<sup>65</sup> See paras 7-15 and 17-25, *supra*.

<sup>66</sup> SEM-98-003 (*Great Lakes*), Article 14(1) Determination (14 December 1998) at 4.

<sup>67</sup> Determination, *supra* note 7 at para 25.

<sup>68</sup> *Ibid.*

<sup>69</sup> Revised Submission, *supra* note 8 at 12.

***(b) the Submission ... raises matters whose further study in this process would advance the goals of this Agreement***

44. The revised Submission states that it raises matters that could advance NAAEC objectives.<sup>70</sup> As the Secretariat has established in previous determinations, allegations of widespread patterns of ineffectual or non-enforcement, as inferred by the Submitters' assertion that there has been no enforcement despite alleged violations of subsection 36(3), are well-suited to the SEM process.<sup>71</sup> The Secretariat considers that the matters raised in the Submission could advance the NAAEC objectives alleged by the Submitters, and found in Article 1(a), (b), (c), (e), (f), (g) and (j).<sup>72</sup>

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

45. The Submitters contend that "there are no realistic private remedies available," that some of the Submitters lack status for civil remedies, that remedies would be difficult to pursue because the evidentiary burdens require significant resources, and that pursuing individual prosecutions would "not address the systemic problem of persistent non-enforcement by the authorities."<sup>73</sup>

46. The Secretariat acknowledges that that it may be impractical or unrealistic for individuals or non-governmental organizations with limited resources to seek redress through private remedies, particularly in complex matters.

47. The Secretariat notes that the Submitters took other reasonable actions to seek information in support of the Submission; for example, documents generated by a House of Commons standing committee<sup>74</sup> and a memorandum to the federal Minister

---

<sup>70</sup> *Ibid* at 12-13.

<sup>71</sup> SEM-99-001 (*Methanex*), Article 14(1)(2) Determination (30 March 2000) at 8; SEM-99-002 (*Migratory Birds*) Article 14(1)(2) Determination (23 December 1999) at 7; SEM-02-003 (*Pulp and Paper*) Article 14(1)(2) Determination (7 June 2002) at 9.

<sup>72</sup> Article 1 reads in part: "Article 1: Objectives. The objectives of this Agreement are to:

- (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
- (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna; ...
- (e) avoid creating trade distortions or new trade barriers;
- (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- (g) enhance compliance with, and enforcement of, environmental laws and regulations; ...
- (j) promote pollution prevention policies and practices."

<sup>73</sup> Revised Submission, *supra* note 8 at 13.

<sup>74</sup> Appendix 15, *supra* note 14. As indicated in para 13, *supra*, this document acknowledges the possibility of subsection 36(3) violations in connection with seepage from tailings ponds.

of the Environment<sup>75</sup> appear to have been obtained through access to information legislation.

48. In light of the foregoing, the Secretariat finds that the revised Submission includes information regarding private remedies that have been pursued, in accordance with Article 14(2)(c).

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

49. The Submitters note that (other than a newspaper editorial that is alleged to conclude with a statement that Canada “failed to enforce the *Fisheries Act*”<sup>76</sup>) the Submission “is based primarily upon information obtained from governments, industry, and academic resources,”<sup>77</sup> rather than on mass media reports.
50. Because the Submitters include information from several non-mass-media sources in support of their assertions, the Secretariat considers that the revised Submission is in accordance with the guidance in Article 14(2)(d).

**III. DETERMINATION**

51. For the reasons given in the present Determination and in the Determination of September 2010, the Secretariat determines that Submission SEM—10—002 (*Alberta Tailings Ponds*) meets the criteria in Article 14(1) of the NAAEC. Having also considered the factors in Article 14(2), the Secretariat further determines that the Submission warrants requesting a response from the Government of Canada.
52. In any response, the Party may wish to provide information concerning enforcement of subsection 36(3) of the *Fisheries Act* in the Alberta oil sands region, in relation to both direct and indirect deposits of deleterious substances from tailings ponds into water frequented by fish.
53. As set out in Article 14(3)(a), the Party may provide a response to the Submission within the thirty working days following receipt of the present Determination, *i.e.*, by 5 February 2014. In exceptional circumstances, the Party may give written notice of the extension of this period to sixty working days, *i.e.*, by 20 March 2014.

---

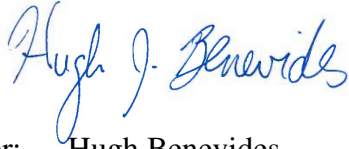
<sup>75</sup> Revised Submission, Appendix 18: Environment Canada, “Memorandum to the Minister—Oil Sands Tailings Ponds” (revised 19 January 2009).

<sup>76</sup> Revised Submission, *supra* note 8 at 10. The Submitters did not append the editorial to either the revised or the original Submission.

<sup>77</sup> *Ibid* at 13.

Respectfully submitted,

**Secretariat of the Commission for Environmental Cooperation**



per: Hugh Benevides  
Legal Officer, Submissions on Enforcement Matters Unit



per: Dane Ratliff  
Director  
Submissions on Enforcement Matters Unit

c.c.: Mr. Dan McDougall, Canada Alternate Representative  
Ms. Jane Nishida, US Acting Alternate Representative  
Mr. Enrique Lendo, Mexico Alternate Representative  
Ms. Irasema Coronado, Ph.D., CEC Executive Director  
Submitters