

Secretariat of the Commission for Environmental Cooperation

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

Submitters: Fraser Riverkeeper Society (lead Submitter), and Lake Ontario Waterkeeper, Ottawa Riverkeeper, Fundy Baykeeper, Grand Riverkeeper, Georgian Baykeeper, Petitcodiac Riverkeeper, David Suzuki Foundation, T. Buck Suzuki Environmental Foundation, Georgia Strait Alliance, and Waterkeeper Alliance

Concerned Party: Canada

Date received: 07 May 2010

Date of this determination: 6 December 2013

Submission I.D.: SEM-10-003 (*Iona Wastewater Treatment*)

I. EXECUTIVE SUMMARY

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

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

² Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records, see: “Submissions on Enforcement Matters”, online: Commission for Environmental Cooperation <<http://www.cec.org/submissions>>.

2. On 7 May 2010, the above-listed Submitters filed SEM–10–003 (*Iona Wastewater Treatment*) (the “Submission”) with the Secretariat, in accordance with NAAEC Article 14.³ The Submitters assert that Canada is failing to effectively enforce subsection 36(3) of the *Fisheries Act*⁴ “with respect to sewage discharges from the Iona Island Wastewater Treatment Plant [the ‘Iona WWTP’], in Richmond, a suburb of Vancouver in British Columbia”.⁵
3. On 16 December 2011, the Secretariat determined that the Submission met all the criteria set out in Article 14(1) of the NAAEC and, in light of the factors contained in Article 14(2), requested a response from Canada.⁶ Canada responded in accordance with Article 14(3) on 14 February 2012 (the “Response”).⁷
4. The Secretariat has determined that the Response does not leave central open questions raised in the Submission regarding effective enforcement of the laws cited by the Submitters. In accordance with NAAEC Article 15(1) and Guideline 9.6, the Secretariat hereby informs the Council that the Submission, in light of the Party’s Response, does not warrant developing a factual record and provides its reasons below.

II. SUMMARY OF THE SUBMISSION

5. The Submission was originally summarized in the Secretariat’s Determination of 16 December 2011.⁸

III. SUMMARY OF THE RESPONSE

6. The Government of Canada’s Response in accordance with NAAEC Article 14(3) was prepared by Environment Canada.⁹ Canada states that, in addressing matters raised in the Secretariat’s 16 December 2011 Determination, the Response will provide information in the following areas:

- enforcement of the *Fisheries Act* at the Iona WWTP from 2001 to 2009 with respect to discharges in excess of the 96-hour Rainbow Trout

³ Submission SEM-10-003 (*Iona Wastewater Treatment*), Submission under Article 14 (07 May 2010), online: <http://cec.org/Storage/87/8394_10-3-SUB_en.pdf> (last visited 19 November 2013) [Submission].

⁴ RSC 1985, c F-14.

⁵ Submission, *supra* note 3 at para 2.

⁶ SEM-10-003 (*Iona Wastewater Treatment*), Secretariat Determination under Article 14 (1) and 14 (2) (16 December 2011), online: <[http://www.cec.org/Storage/131/15587_10-3-DET_14\(1\)\(2\)_en.pdf](http://www.cec.org/Storage/131/15587_10-3-DET_14(1)(2)_en.pdf)> (last visited 19 November 2013) [Secretariat Determination of 16 December 2011].

⁷ Government of Canada Response to Submission SEM-10-003 (*Iona Wastewater Treatment*) under Article 14(3) (14 February 2012), online: <http://cec.org/Storage/133/15831_10-3-RSP_en.pdf> (last visited 19 November 2013) [Response].

⁸ Secretariat Determination of 16 December 2011, *supra* note 6 at 2-14.

⁹ Response, *supra* note 7 at 1.

bioassay LC50 test for: a) 2001-2004, b) 2005-2006, c) 2007-2009; and on any discharge exceedances recorded for 2010;

- prosecutions involving Iona WWTP and on other enforcement activities related to the above dates, or any other dates on which documented discharges in excess of the 96-hour Rainbow Trout bioassay LC50 test occurred;
- the effectiveness of Canada’s efforts in conserving and protecting fish in accordance with the laws at issue in the area at issue;
- any special arrangements in place or planned to ensure the Iona WWTP’s compliance with the *Fisheries Act* from May 2010 until the date of the future planned upgrade of the Iona WWTP facility;
- how the Federal Government ensures the effective enforcement of the *Fisheries Act*, specifically with respect to the issuance of the Operational Certificate for the Iona WWTP by British Columbia; and
- warning letters issued for exceedances on 13 February 2001 and on other dates specified in the submission.¹⁰

7. The Response opens with an overview of wastewater systems in Canada, including increasing demands on aging wastewater treatment infrastructure.¹¹
8. The Response proceeds to describe Environment Canada’s role in administration and enforcement of the pollution prevention provisions of the *Fisheries Act*.¹² According to the Response, areas of operation within a typical wastewater treatment plant that are relevant to and captured under the pollution prevention provisions of the *Fisheries Act* are: (1) day-to-day deposits, and (2) deposits out of the normal course of events (“DONCE”), which could include “overflows, spills, leaks, by-passes and regulatory exceedances of the *Fisheries Act*”.¹³
9. Regarding (1), day-to-day deposits, Canada states that subsection 36(3) of the *Fisheries Act* provides a general prohibition that:

[N]o 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.¹⁴

Canada notes that as of 14 February 2012, there were no regulations under subsection 36(5) of the *Fisheries Act* that applied to wastewater effluent. Without such regulations, “the general prohibition of section 36(3) applies, meaning that

¹⁰ *Ibid.*

¹¹ *Ibid* at 3, 6.

¹² *Ibid* at 6, 7.

¹³ *Ibid.*

¹⁴ *Supra* note 4.

wastewater treatment plants are not authorized to deposit deleterious substances into fish bearing waters”¹⁵

10. Regarding point number (2), DONCE, Canada explains that in addition to subsection 36(3), section 38 of the *Fisheries Act*, and regulations made pursuant to it, apply.¹⁶
11. The Response describes how, as of 14 February 2012, Environment Canada was in the process of developing proposed *Wastewater Systems Effluent Regulations* (“proposed regulations”) that would, *inter alia*, regulate day-to-day discharge.¹⁷ Canada explains that the proposed regulations would help implement a harmonized approach to managing wastewater effluent in Canada, as endorsed by the Canadian Council of Ministers of the Environment (“CCME”).¹⁸ Canada also explains that the objectives of the proposed regulations would be achieved through risk-based implementation timelines extending over 30 years: “[w]astewater systems posing a high risk would be required to meet the effluent quality standards by 2020, those posing medium risk by 2030, and those posing low risk by 2040”.¹⁹
12. Canada explains that Environment Canada enforcement officers are responsible for enforcing a number of acts and regulations, with inspection activities spanning numerous sectors. Given these ongoing responsibilities, Environment Canada uses a priority-setting process to determine annual national enforcement and compliance priorities.²⁰
13. Canada explains that these established priorities are then incorporated into the National Enforcement Plan (“NEP”), which “forms the cornerstone of the environmental enforcement efforts for the next fiscal year.”²¹ Canada notes that enforcement of the pollution prevention provisions of the *Fisheries Act* is a “perennial priority,” including the time period since 2001.²²
14. Canada provides the 2011-12 NEP for the *Canadian Environmental Protection Act*, 1999 and for the pollution prevention provisions of the *Fisheries Act* to the

¹⁵ Response, *supra* note 7 at 7.

¹⁶ *Ibid.* See Response Annex 2, *Deposit Out of the Normal Course of Events Notification Regulations*. Although the DONCE provision enabling such regulations has been in effect since 1977, the DONCE notification regulations in Annex 2 are the first to be enacted, and came into force in March 2011, after the date of the Submission.

¹⁷ Response, *supra* note 7 at 7. See Response Annex 4, *Proposed Wastewater Systems Effluent Regulations*, Canada Gazette I [Annex 4].

¹⁸ Response, *supra* note 7 at 7-10. See Response Annex 3, *Canada-wide Strategy for the Management of Municipal Wastewater Effluent* [CCME Strategy]. Note that *Wastewater Systems Effluent Regulations* (SOR/2012-139) now apply to the wastewater sector, as will be discussed further below.

¹⁹ Response, *supra* note 7 at 10.

²⁰ *Ibid.* at 10-11. See Response Annex 5, *National Enforcement Plan 2011-2012* at 8 [Annex 5].

²¹ Response, *supra* note 7 at 11.

²² *Ibid.*

Secretariat on a confidential basis.²³ In accordance with NAAEC Article 39(2), and Guidelines 17.2 and 17.4, the Secretariat treats this information as confidential, except to the extent that Canada has referred to this information in the public section of its Response.

15. Canada then explains that, based on the above-mentioned priorities, Environment Canada’s five enforcement regions develop regional work plans that feed into the NEP.²⁴ Canada maintains that Environment Canada’s Pacific and Yukon Region (“PYR”), in which the Iona WWTP is situated, “generate[s] a large amount of inspection activity under the *Fisheries Act*”.²⁵ Canada also asserts that “the general prohibition of the *Fisheries Act* was a priority for the department and for the PYR” from 2001 to 2012.²⁶
16. Canada clarifies the PYR’s regional priorities:

[M]unicipal wastewater was a regional priority in the PYR at the beginning of the period referred to in the submission, which accounts for the inspections done at the Iona WWTP in 2001-2002 and 2002-2003. [...] However, due in part to the ongoing efforts to create a regulation authorizing deposits from wastewater treatment facilities, proactive enforcement activity in the wastewater sector was not a priority for PYR from that point forward. Rather, the region began to focus efforts on responding to DONCE occurrences and high risk facilities, such as those operating near shellfish harvesting areas. This is reflected in the 2009-2010 PYR regional priorities, which included “high risk municipal wastewater”. Iona is expected to be considered “medium risk” based on the criteria outlined in the proposed Regulations.²⁷

17. Canada proceeds to cite its *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention of the Fisheries Act* (“*Compliance and Enforcement Policy*”), which outlines how Environment Canada will “administer and enforce the pollution prevention provisions of the *Fisheries Act* in a fair, predictable and consistent manner”.²⁸ The *Compliance and Enforcement Policy* provides for discretion to choose among a range of enforcement actions, including warning letters and prosecutions.²⁹ Discretion takes into account various factors including: “the actual harm or perceived risk of harm to the environment, the compliance history, and the extent of corrective action taken or committed to be taken by the alleged violator in order to comply with the *Fisheries Act*”.³⁰ With

²³ *Ibid.* See Annex 5, *supra* note 20.

²⁴ Response, *supra* note 7 at 11.

²⁵ *Ibid.* at 12.

²⁶ *Ibid.* See Annex 5, *supra* note 20 at 18.

²⁷ Response, *supra* note 7 at 13.

²⁸ *Ibid.* at 14. See Response Annex 6, *Compliance and Enforcement Policy* [Annex 6].

²⁹ Response, *supra* note 7 at 14. See Annex 6, *supra* note 28 at 19.

³⁰ Response, *supra* note 7 at 15. See Annex 6, *supra* note 28 at 18.

respect to prosecutions, discretion also takes into account results from past prosecutions and the likelihood of prosecutions leading to “tangible benefits for Canadians”.³¹

18. Regarding enforcement of the *Fisheries Act* at wastewater treatment plants in general, Canada explains its strategy, recalling that:

[E]nforcement of the pollution prevention provisions of the *Fisheries Act* is carried out in two key ways. The first is through proactive enforcement of releases of effluents containing deleterious substances into water frequented by fish (section 36); and, the second is a reactive approach to DONCE notifications for releases caused by extraordinary circumstances, such as extreme weather events, spills and power outages (section 38).³²

19. Canada summarizes as follows:

Once the process to explore and develop the proposed Regulations began in 2002-2003, enforcement at wastewater treatment plants began to shift from a proactive to a reactive approach, focusing on DONCE notifications (section 38)—such as a system failures [sic], spills or overflows. This decision was taken in accordance with the *Compliance and Enforcement Policy* and reflected in subsequent *National Enforcement Plans*. Until the proposed regulations come into force, enforcement actions with respect to the deposit of municipal waste water into waters frequented by fish have been and will be carried out on a case-by-case basis in response to specific incidents such as DONCE. Should there be a deposit out of the normal course of events that results in significant impacts on the receiving environment, Environment Canada takes appropriate enforcement action, exercising its discretion in line with the *Compliance and Enforcement Policy*. In addition, Environment Canada continues to respond to complaints [emphasis in original].³³

20. Canada provides detailed information on monitoring and enforcement actions at Iona WWTP. First, Canada explains that municipal authorities have undertaken regular environmental monitoring around the Iona WWTP outfall since 2000. According to the results from the period in question in this Submission, Iona WWTP discharges “posed an insignificant environmental risk based on comparisons to the relative sediment quality and there was no appreciable effect on the benthic communities [...]”.³⁴

³¹ Response, *supra* note 7 at 15.

³² *Ibid* at 16.

³³ *Ibid*.

³⁴ *Ibid* at 17.

21. Canada notes that Environment Canada has conducted nine inspections and one investigation at the Iona WWTP, and has issued two warning letters, from 2001 to 2011.
22. Canada describes communications between Environment Canada enforcement officials and the Greater Vancouver Regional District (“GVRD;” now Metro Vancouver³⁵), in which the Iona WWTP is situated.³⁶ In a 25 May 2000 letter, Environment Canada enforcement officials “articulated the departmental preference for the plant operators to run monthly 96-hr Rainbow Trout LC50 bioassays on full-strength effluent and follow-up tests to determine the cause of effluent toxicity.”³⁷ Subsequently, Iona WWTP operators have conducted and reported on monthly 96-hr Rainbow Trout LC50 bioassays and follow-up tests.
23. Canada notes that the Submission refers to the results of 25 such monthly tests between 2001 and 2009 that failed to meet the 96-hr Rainbow Trout LC50 standard.³⁸ Canada summarizes enforcement activities with respect to these exceedances:³⁹

Table 2. Results of monthly toxicity testing and number of Environment Canada inspections at the Iona WWTP.

Time Period	Monthly Compliance with the 96-Hour Rainbow Trout LC ₅₀ standard	Number of Inspections/ Investigations	Warning Letters
2001-2004	83.3%	7 (6 in 2001; 1 in 2002)	20 March 2001
2005-2006	66.7%	0	NIL
2007-2009	69.5%	1	NIL
2010	66.7%	0	NIL
2011	66.7%	2	5 July 2011
<i>Total:</i>		10	2

These enforcement activities at Iona WWTP are also shown in a timeline in Annex I to this Determination.

24. According to Canada, these compliance results are “not unexpected,” given that Iona WWTP provides primary treatment.⁴⁰ However:

Under the proposed *Wastewater System* [sic] *Effluent Regulations*, Iona WWTP will move to secondary treatment over the coming 20 years, which will significantly improve both carbonaceous BOD and TSS

³⁵ Submission, *supra* note 3 at para 8.

³⁶ Response, *supra* note 7 at 17.

³⁷ *Ibid.* See Response Annex 8, Letter from Environment Canada to Greater Vancouver Regional District 25 May 2000.

³⁸ Submission, *supra* note 3 at para 28.

³⁹ Response, *supra* note 7 at 18.

⁴⁰ *Ibid.* Note that “primary treatment” refers to “the most basic form of treatment that relies on a mechanical process to physically separate suspended solids from the water” (*ibid* at 6).

quality parameters of the effluent at the final point of discharge. Until upgrades are made, and assuming operating circumstances of the Iona WWTP are maintained (e.g., the size of the community being served and the nature of the influent), then a minority proportion of the monthly samples would be expected to fail the 96-Hour test.⁴¹

The Response does not state what frequency of monthly samples failing the 96-hour test would constitute “a minority proportion.”

25. Canada explains that on 20 March 2001, Environment Canada issued a warning letter to the Iona WWTP operators. This warning letter was intended to bring an alleged contravention of subsection 36(3) of the *Fisheries Act* to the attention of the operators.⁴² In response, the Iona WWTP operators stated their intention to “continue all reasonable measures to achieve optimal fish bioassay results at the Iona WWTP”.⁴³ Following this exchange:

Further discussion between Environment Canada and municipal authorities regarding such measures continued in 2001 (Annex 11) and, as noted above, six inspections were conducted subsequent to the warning letter [for the period 2001-2002].⁴⁴

26. With respect to 2007-2009 and 2011, Canada summarizes that Environment Canada conducted two inspections and one investigation related to the Iona WWTP, and issued a 5 July 2011 warning letter⁴⁵ in relation to the first 2011 inspection.⁴⁶
27. Canada describes the investigation following a DONCE occurrence in December 2009. This DONCE occurrence was reported to Environment Canada pursuant to subsection 38(4) of the *Fisheries Act*. A power interruption caused influent and effluent pumps to stop working, which led to the discharge of 116 million litres of sewage from the Iona WWTP.⁴⁷ Effluent samples were collected and were found to pass the 96-hr Rainbow Trout LC₅₀ test. The Party states that, due to this test result, “no further action was undertaken.”⁴⁸

⁴¹ *Ibid* at 18. Note that “secondary treatment” uses “biological processes to remove additional solids from the water” (*ibid* at 6). “BOD” means “biological oxygen demand” and “TSS” means “total suspended solids.”

⁴² *Ibid* at 18. See Response Annex 9, Warning Letter: 20 March 2001 [Annex 9].

⁴³ Response, *supra* note 7 at 18. See Response Annex 10, Response to 20 March 2001 Warning Letter at 2.

⁴⁴ Response, *supra* note 7 at 18. See Response Annex 11, Written communications between Environment Canada and Greater Vancouver Regional District in 2001.

⁴⁵ Response, *supra* note 7 at 18. See Response Annex 12 Warning Letter: 5 July 2011 [Annex 12].

⁴⁶ Response, *supra* note 7 at 19.

⁴⁷ *Ibid* at 18.

⁴⁸ *Ibid* at 19.

28. Canada states that the first 2011 inspection occurred following a DONCE occurrence on 31 March 2011. A power interruption caused the discharge of an estimated 20.5 million litres of untreated sewage into the Georgia Strait.⁴⁹ A warning letter was issued on 5 July 2011 to the Iona WWTP.⁵⁰ Canada states that “[t]he decision to issue a warning letter, rather than a more severe measure, took into consideration the diligence taken by the operators of the Iona WWTP to prevent the release.”⁵¹ Iona WWTP operators corresponded with Environment Canada, providing information on actions taken to prevent future releases.⁵² Canada concludes:

Due to the nature of the incident, and the actions taken by the operators of the Iona WWTP to prevent a future release, Environment Canada was satisfied that no follow up was necessary and this matter was closed.⁵³

29. Canada goes on to describe the second 2011 inspection, which followed another DONCE occurrence due to power interruption. All material was contained and there was no sewage release.⁵⁴
30. Canada notes the Secretariat’s request, in the Determination of December 2011, for information concerning prosecutions. Canada reports that “[t]here are no other actions related to prosecution to report with respect to the Iona WWTP.”⁵⁵ Canada notes that:

The decision of the Attorney-General not to pursue prosecution by the Public Prosecution Service of Canada is further evidence that Environment Canada exercised the appropriate level of enforcement discretion as it concerns the Iona WWTP facility. In the past, investigations under the *Fisheries Act* in the pursuit of prosecutions concerning the release of deleterious substances under similar factual circumstances where the regulatee deposited effluents contrary to the *Fisheries Act*, but operated in compliance with a provincial Control Order, have resulted in a fine of \$1.00.⁵⁶

31. Canada proceeds to discuss provincial permitting for the Iona WWTP. The British Columbia Ministry of Environment issued an Operational Certificate (“OC”) for Iona WWTP on 23 April 2004.⁵⁷ The OC specifies compliance levels and

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* See Annex 12, *supra* note 45.

⁵¹ Response, *supra* note 7 at 19.

⁵² *Ibid.* See Response Annex 13, Letter from Metro Vancouver to Environment Canada (Response to 5 July 2011 Warning Letter)(8 July 2011).

⁵³ Response, *supra* note 7 at 19.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 20.

⁵⁶ *Ibid.* at 26, citing *R v Cyanamid Canada Inc.*, 11 CELR 31, 1981 CarswellOnt 1399 (WL Can) (Ont Prov Ct) [*Cyanamid*].

⁵⁷ Response, *supra* note 7 at 20.

monitoring requirements for certain parameters, including effluent toxicity using the 96-hr Rainbow Trout LC₅₀ test.⁵⁸

32. Canada clarifies its role with respect to the issuance of OCs:

Environment Canada does not enforce provincial permits such as the Operational Certificate issued by British Columbia for the operation of the Iona WWTP. The treated sewage discharges allowed under the Liquid Waste Management Plan are not exempt from the general prohibition of [sic] the *Fisheries Act*. However, upon an alleged violation, Environment Canada would take into consideration compliance with other similar legislation (e.g., provincial waste management acts) in determining the type of enforcement action to be taken under the *Fisheries Act*.⁵⁹

33. Canada asserts that Environment Canada is involved in other governmental action consistent with Article 5 of the NAAEC by “engaging with provincial and municipal authorities” in a manner that is “appropriate.”⁶⁰ For example, Environment Canada has provided comments and suggestions to municipal officials regarding the Liquid Waste Management Plan five-year review.⁶¹ Correspondence has “encouraged municipal officials to consider advancing their upgrade timelines for their WWTP.”⁶²

34. Canada notes that “[t]here are no special, site-specific arrangements with the operators of the Iona WWTP to ensure their future compliance. Rather, [compliance] will be managed as part of a broader process.”⁶³ Canada points to the CCME Strategy, the proposed *Wastewater Systems Effluent Regulations*, risk-based implementation timelines for upgrades to secondary treatment, enforcement in line with the *Compliance and Enforcement Policy* and National Enforcement Plans, and collaboration with provincial and municipal authorities.⁶⁴

35. Canada highlights the resources dedicated to enforcing the *Fisheries Act*:

Since 2007, Environment Canada has significantly increased its enforcement capacity and processes for identifying compliance promotion and enforcement priorities. Environment Canada has focused on building its organization, and hired, trained, equipped, and deployed 50% more officers (program support and field officers) over this period,

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid* at 20-21. See Response Annex 14, Letter from Environment Canada to Greater Vancouver Regional District (13 August 2007) [Annex 14]; Response Annex 15, Letter from Environment Canada to Metro Vancouver (24 April 2009) [Annex 15].

⁶² Response, *supra* note 7 at 21. See Annex 14, *supra* note 61 at 2; Annex 15, *supra* note 61 at 1.

⁶³ Response, *supra* note 7 at 22.

⁶⁴ *Ibid.*

including nine new environmental Enforcement Officers in PYR alone, in addition to opening new offices, and restructuring its workforce to accommodate program growth.⁶⁵

36. Regarding enforcement in the PYR, Canada notes:

Between 2001 and 2010, the PYR regional office had between five and 13 full time equivalent (FTE) employees responsible for compliance promotion across the range of Acts and regulations for which Environment Canada is responsible.⁶⁶

Furthermore, during the same period, “the PYR regional office had between 1.5 and 2.5 FTEs devoted to risk management activities within the wastewater sector”.⁶⁷ These employees have also been “engaged with Metro Vancouver and other British Columbia municipalities at several events,” such as conferences and meetings about the *Wastewater Systems Effluent Regulations*.⁶⁸

37. In conclusion, Canada asserts that it “exercises its discretion in a reasonable manner” and “uses a good-faith priority setting process.”⁶⁹ Furthermore, Canada maintains that its “enforcement actions are effective.”⁷⁰ Canada summarizes:

In response to Environment Canada inspections, investigations and warning letters, Iona WWTP operators implemented upgrades, revised procedures and provided new training for staff, demonstrating that this was the appropriate government response, bringing about effective change. Municipal monitoring indicated that – during the period in question in this submission – Iona WWTP discharges posed an insignificant environmental risk based on comparisons to the relative sediment quality and there was no appreciable effect on the benthic communities.⁷¹

38. Canada states finally that its “approach to enforcing the *Fisheries Act* at the Iona WWTP constitutes effective and appropriate government action with respect to this enforcement matter.”⁷²

⁶⁵ *Ibid* at 23.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid* at 24.

⁶⁹ *Ibid* at 26.

⁷⁰ *Ibid.*

⁷¹ *Ibid* at 26-27.

⁷² *Ibid* at 27.

IV. ANALYSIS

39. Article 15(1) of NAAEC now requires the Secretariat to consider whether the submission, in light of Canada's response, warrants developing a factual record. Article 15(1) also requires that if the Secretariat determines that a factual record is warranted, it must so inform the Council and provide reasons for its determination. As the Secretariat has noted in a previous determination, "Under NAAEC 15(1), the Secretariat has broad discretion to determine whether or not a submission warrants the development of a factual record."⁷³ One factor motivating the Secretariat to recommend a factual record in previous NAAEC Article 15(1) determinations is whether, after considering the Response in light of the Submission, any "central open questions" remain, on which a factual record could shed light.⁷⁴

(a) Content of Response

40. The Secretariat in its Determination dated 16 December 2011 requested that the Government of Canada include information regarding the Submitters' assertions that Canada is failing to effectively enforce subsection 36(3) of the *Fisheries Act*.⁷⁵ The Secretariat in its 16 December 2011 Determination noted that the Party may wish to provide:

- 1) Information on "*Fisheries Act* enforcement at the Iona WWTP from 2001 to 2009 with respect to the Submission's documented 96-hour Rainbow Trout bioassay LC50 test failures, and any additional documented failures for: a) 2001-2005, b) 2005-2006, c) 2007-2009, or d) any discharge exceedances recorded for 2010."⁷⁶
- 2) "[C]opies of any Warning Letters such as the one issued for exceedances on February 13, 2001 but related to the dates of such exceedances specified in the Submission."⁷⁷
- 3) "[I]nformation on prosecutions involving Iona WWTP (Operational Certificate ME-00023) [the Party] has undertaken or any other enforcement activities related to the above dates, and any other dates not mentioned in the Submission, but such as may be related to documented

⁷³ See SEM 01-001 (*Cytrar II*), Secretariat Determination Pursuant to Article 14(3) (13 June 2001) at 5, online: <http://www.cec.org/Storage/70/6436_01-1-DET14_3-E.pdf> (last visited 19 November 2013).

⁷⁴ See e.g.: "The Secretariat has concluded that the response leaves open central questions that the submission raises [...]" (SEM 03-005 (*Montreal Technoparc*), Article 15(1) Notification to Council that a Factual Record is Warranted (19 April 2004) at 2, online: <http://www.cec.org/Storage/74/6772_03-5-ADV_en.pdf> (last visited 19 November 2013)); "The response and submission leave open several central questions of fact relating to whether the Party is effectively enforcing the environmental laws at issue" (SEM 97-006 (*Oldman River II*), Article 15(1) Notification to Council that a Factual Record is Warranted (19 July 1999) at 3, online: <http://www.cec.org/Storage/68/6235_97-6-ADV-E.pdf> (last visited 19 November 2013)).

⁷⁵ Secretariat Determination of 16 December 2011, *supra* note 6 at paras 93-95.

⁷⁶ *Ibid* at para 93 [footnotes omitted].

⁷⁷ *Ibid* at para 94 [footnotes omitted].

- discharges in excess of the 96-hour Rainbow Trout bioassay LC50 test results.”⁷⁸
- 4) “[I]nformation on the effectiveness of its efforts in conserving and protecting fish in accordance with the laws at issue in the area at issue.”⁷⁹
 - 5) “[C]omment[s] on any special arrangements [the Party] has in place or planned to ensure the Iona WWTP’s compliance with the *Fisheries Act* from the date of the Submission until the date of the future planned upgrade of the Iona WWTP facility.”⁸⁰
 - 6) Information on “how the federal government ensures the effective enforcement of the Act, specifically with respect to the issuance of OCs by the Province, and in particular for the Iona WWTP OC,” particularly “[g]iven the complex jurisdictional environment in which the *Fisheries Act* is administered.”⁸¹
41. Regarding point 1 of the Secretariat’s above request for information on enforcement efforts at the Iona WWTP, the Party provides information for the period 2001-2011 in Table 2. The Party provides monthly rates of compliance with the 96-hour Rainbow Trout LC50 standard. The Party also details the circumstances surrounding inspections, investigations, and warning letters issued, including actions taken following DONCE occurrences.⁸²
42. Regarding point 2 of the Secretariat’s above request for copies of Warning Letters related to exceedances specified in the Submission, the Party provides Annexes 9 and 12. These Annexes contain Warning Letters from 20 March 2001 and 5 July 2011, respectively.⁸³
43. Regarding point 3 of the Secretariat’s above request for information on prosecutions, the Party notes that “[t]here are no other actions related to prosecution to report with respect to the Iona WWTP.”⁸⁴ Canada notes that:

The decision of the Attorney-General not to pursue prosecution by the Public Prosecution Service of Canada is further evidence that Environment Canada exercised the appropriate level of enforcement discretion as it concerns the Iona WWTP facility. In the past, investigations under the *Fisheries Act* in the pursuit of prosecutions concerning the release of deleterious substances under similar factual circumstances where the regulatee deposited effluents contrary to the *Fisheries Act*, but operated in compliance with a provincial Control Order, have resulted in a fine of \$1.00.⁸⁵

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid* at para 95.

⁸² Response, *supra* note 7 at 18.

⁸³ *Ibid.* See Annex 9, *supra* note 42; Annex 12, *supra* note 45.

⁸⁴ Response, *supra* note 7 at 20.

⁸⁵ *Ibid* at 26, citing *Cyanamid*, *supra* note 56.

44. Regarding point 4 of the Secretariat's above request for information on effectiveness of its efforts in conserving and protecting fish in accordance with the laws at issue, the Party comments on environmental risks posed by Iona WWTP. The Party states that according to environmental monitoring results from the period in question in this Submission, Iona WWTP discharges "posed an insignificant environmental risk based on comparisons to the relative sediment quality and there was no appreciable effect on the benthic communities".⁸⁶ As mentioned above, Table 2 provided by the Party also includes monthly compliance rates with the 96-hour Rainbow Trout LC50 standard.
45. Regarding point 5 of the Secretariat's above request for information on special arrangements to ensure the Iona WWTP's compliance with the *Fisheries Act* until its planned upgrade, the Party notes that "[t]here are no special, site-specific arrangements".⁸⁷ The Party points to managing compliance at the Iona WWTP within a broader process, including: the CCME Strategy; the proposed *Wastewater Systems Effluent Regulations*; risk-based implementation timelines; enforcement actions in response to DONCE events, in line with the *Compliance and Enforcement Policy* and National Enforcement Plans; and general collaboration with provincial and municipal authorities.⁸⁸
46. Regarding point 6 of the Secretariat's above request for information on the federal role with respect to issuance of OCs by the Province, the Party provides information on how provincial permits, such as OCs, may affect Environment Canada's enforcement efforts, but are not directly enforced by Environment Canada.⁸⁹
47. In light of the above, the Secretariat considers that the Party has provided adequate information as requested by the Secretariat in its Determination of 16 December 2011.

(b) Enforcement choice: proactive to reactive approach

48. The Secretariat now turns to consider information about the Party's enforcement choice – *i.e.*, the move from a proactive approach, based on section 36 of the *Fisheries Act*, to a reactive approach, based on section 38 DONCE notifications⁹⁰ – in greater detail. This policy choice is apposite to the Submitters' central assertion that sewage discharges from Iona constitute releases of deleterious substances into waters frequented by fish, contravening subsection 36(3) of the *Fisheries Act*.

⁸⁶ Response, *supra* note 7 at 17.

⁸⁷ *Ibid* at 22.

⁸⁸ *Ibid*.

⁸⁹ *Ibid* at 20.

⁹⁰ *Ibid* at 16.

49. Subsection 36(3) of the *Fisheries Act* is environmental law related to pollution prevention.⁹¹ The Secretariat notes the Submitters' assertion that the purpose of subsection 36(3) of the *Fisheries Act* is to protect fish and fish habitat through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants.⁹² The Secretariat also notes that the purpose of subsection 36(3) can be understood by considering its placement within that part of the *Fisheries Act* entitled "Fish Habitat Protection and Pollution Prevention."⁹³ From this placement, it is reasonable to infer that subsection 36(3) aims to address fish habitat protection and pollution prevention. Furthermore, Environment Canada's *Compliance and Enforcement Policy* states that: "The desired result [of enforcement measures] is compliance with the Act in the shortest possible time and with no further occurrence of violations, *in order to protect fish and fish habitat and human use of fish.*"⁹⁴

50. The Party states that it uses a "good-faith priority setting process" to allocate departmental resources.⁹⁵ The Secretariat recalls that the Party explains:

Once the process to explore and develop the proposed [Wastewater Systems Effluent Regulations] began in 2002-2003, enforcement at wastewater treatment plants began to shift from a proactive to a reactive approach, focusing on DONCE notifications [...].⁹⁶

51. The Secretariat observes that the shift from a proactive to reactive enforcement approach began in 2002-2003.⁹⁷ Yet, the *Wastewater Systems Effluent Regulations* were not registered until 29 June 2012, with most provisions coming into force upon the date of registration.⁹⁸ Certain provisions came into force 1 January 2013, while others will come into force 1 January 2015, and 1 January 2021, respectively.⁹⁹ The *Wastewater Systems Effluent Regulations* are discussed further below.

52. The Secretariat also notes that the results of toxicity testing in the Party's Table 2 (reproduced in paragraph 23, above), showing a lower rate of compliance after 2004, coincide with a shift in the Party's enforcement priorities for wastewater treatment plants.¹⁰⁰ Table 2 outlines the results of monthly tests for compliance with the LC₅₀ standard between 2001 and 2011.¹⁰¹ During this time, monthly

⁹¹ Secretariat Determination of 16 December 2011, *supra* note 6 at 18.

⁹² Submission, *supra* note 3 at para 6.

⁹³ *Supra* note 4, ss 34-42.1.

⁹⁴ Annex 6, *supra* note 28 at 18 [emphasis added].

⁹⁵ Response, *supra* note 7 at 26.

⁹⁶ *Ibid* at 16 [emphasis in original].

⁹⁷ *Ibid*.

⁹⁸ *Supra* note 18, s 50(1).

⁹⁹ *Ibid*, s 50(2)-(4).

¹⁰⁰ Response, *supra* note 7 at 18.

¹⁰¹ *Ibid*.

compliance results decreased from 83.3% compliance (for 2001-2004) to 66.7% (in 2010 and 2011, respectively).¹⁰²

53. The Secretariat considers that no central, open question remains regarding the Party's priority-setting approach at wastewater treatment plants from 2002 until the entry into force of the *Wastewater Systems Effluent Regulations* that would warrant a factual record.

(c) Responses to alleged violations of subsection 36(3): inspections, investigations, warning letters

54. Regarding alleged violations, the Party's *Compliance and Enforcement Policy* specifies that "Enforcement measures are directed towards ensuring that violators comply with the *Fisheries Act* within the shortest possible time and that violations are not repeated."¹⁰³ "Guiding principles" of the *Compliance and Enforcement Policy* include the concept that:

Enforcement personnel will administer the provisions and accompanying regulations with an emphasis on preventing harm to fish, fish habitat or human use of fish caused by physical alteration of fish habitat or pollution of waters frequented by fish. Priority for action to deal with suspected violations will be guided by:

- the degree of harm to fish, fish habitat or human use of fish caused by physical alteration of habitat or pollution of waters frequented by fish, or the risk of that harm; and/or
- whether or not the alleged offence is a repeat occurrence.¹⁰⁴

55. Enforcement of the pollution prevention provisions of the *Fisheries Act* is characterized by discretion,¹⁰⁵ and according to the *Compliance and Enforcement Policy*.¹⁰⁶ The Party states that it has exercised its discretion in a reasonable manner when choosing from a range of enforcement options.¹⁰⁷ The Secretariat does not however, opine on the efficacy of these enforcement actions or evaluate the Party's statements regarding its exercise of discretion, as doing so could be seen as taking a position on whether or not the Party has effectively enforced its environmental law.

¹⁰² *Ibid.*

¹⁰³ Annex 6, *supra* note 28 at 18.

¹⁰⁴ *Ibid* at 4.

¹⁰⁵ Offences and liabilities flowing from contraventions of subsection 36(3) are specified in subsection 40(2) (see *supra*, note 4). Guidance on compliance and enforcement is found not in the *Fisheries Act*, but in the *Compliance and Enforcement Policy* (Annex 6, *supra* note 28).

¹⁰⁶ Response, *supra* note 7 at 14. See Annex 6, *supra* note 28.

¹⁰⁷ Response, *supra* note 7 at 26.

56. In 2001, Environment Canada issued a warning letter to bring an alleged contravention of subsection 36(3) of the *Fisheries Act* to the attention of the Iona WWTP operators.¹⁰⁸ Following this warning letter, six inspections were conducted for the period 2001-2002.¹⁰⁹
57. After adopting the reactive enforcement approach,¹¹⁰ Environment Canada conducted fewer inspections, with one investigation and two inspections related to the Iona WWTP, and one warning letter issued, over the period between 2003 and 2011.¹¹¹
58. Regarding the 2009 investigation referred to by the Party, Canada states that:

In **December 2009**, Environment Canada was informed of a DONCE occurrence in accordance with subsection 38(4) of the *Fisheries Act*, and as a result conducted an investigation into the discharge of 116 million litres of sewage from the Iona WWTP. The discharge was due to a power interruption, which caused influent and effluent pumps to stop working for two hours [and] 48 minutes. Samples of the effluent were collected and were found to pass the 96-hr Rainbow trout LC50 test. As such, no further action was undertaken.¹¹²

The Secretariat notes that although the Response does not specify the dates of the DONCE occurrence and the sampling, respectively, the effluent samples complying with the LC50 test must have been taken well after the 116 million litres of sewage had been discharged from the Iona WWTP.¹¹³

59. Canada explains how the first 2011 inspection, and issuance of the 5 July 2011 warning letter, occurred following a DONCE event on 31 March 2011.¹¹⁴ A power outage had caused the discharge of an estimated 20.5 million litres of untreated sewage into the Georgia Strait.¹¹⁵ Canada asserts that “[t]he decision to issue a warning letter, rather than a more severe measure, took into consideration the **diligence** taken by the operators of the Iona WWTP to prevent the release” [emphasis added].¹¹⁶ The Secretariat notes that Environment Canada asserts its discretion in choosing the appropriate response to alleged violations.¹¹⁷ However, the Secretariat would need more information to determine what “diligence...to prevent

¹⁰⁸ *Ibid.* See Annex 9, *supra* note 42.

¹⁰⁹ Response, *supra* note 7 at 18.

¹¹⁰ *Ibid.* at 16.

¹¹¹ *Ibid.* at 18. For greater clarity, the 2002 inspection appearing in Table 2 (reproduced in para 23, *supra*) occurred during the proactive period.

¹¹² *Ibid.* at 18-19 [emphasis in original].

¹¹³ It appears that the event was not reported until well after the sewage had been discharged from the plant and that the compliant samples were taken well after power had been restored.

¹¹⁴ Response, *supra* note 7 at 19.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* at 14. See Annex 6, *supra* note 28 at 18.

the release”¹¹⁸ means in practice, since an estimated 20.5 million litres of untreated sewage was, in fact, released.¹¹⁹

60. Canada describes how the second 2011 inspection followed another DONCE occurrence due to a power interruption. All material was contained and there was no sewage release.¹²⁰ This inspection occurred 4 July 2011, one day prior to the issuance of the 5 July 2011 warning letter.¹²¹

(d) Responses to alleged violations of subsection 36(3): prosecutions

61. Prosecution is another potential enforcement measure for alleged violations of subsection 36(3).¹²² The Submitters state that a private prosecution was filed regarding Iona WWTP discharges, alleging contravention of subsection 36(3) of the *Fisheries Act*.¹²³ The Submitters state that the federal Attorney General formally intervened and entered a stay of prosecution.¹²⁴ According to the prosecutor, the charges were stayed because “the public interest did not require this prosecution to be pursued” and no “reasonable prospect of conviction” existed.¹²⁵
62. In response, the Party notes that “[t]here are no other actions related to prosecution to report with respect to the Iona WWTP”.¹²⁶ The Party summarizes relevant sections from the *Compliance and Enforcement Policy* in its Response:

Prosecution is the preferred course of action where evidence establishes that, among other facts, the alleged violation resulted in risk of harm to fish or fish habitat, the alleged violator had previously received a warning for the activity and did not take all reasonable measures to stop or avoid the violation, or the alleged violator had previously been convicted of a similar offence.¹²⁷

63. Canada notes in the Response that the exercise of discretion in choosing from among enforcement actions involves consideration of a number of factors.¹²⁸ As noted above,¹²⁹ one such factor is whether the offender, in violating a federal law, was in

¹¹⁸ Response, *supra* note 7 at 19.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid* at 14. See Annex 6, *supra* note 28 at 22.

¹²³ Submission, *supra* note 3 at paras 35-36.

¹²⁴ *Ibid* at para 40.

¹²⁵ *Ibid.*

¹²⁶ Response, *supra* note 7 at 20.

¹²⁷ *Ibid* at 14. See Annex 6, *supra* note 28 at 22.

¹²⁸ Response, *supra* note 7 at 15. See also Annex 6, *supra* note 28 at 22.

¹²⁹ See paras 30 and 43, *supra*.

compliance with provincial law, in which case the sentence may be minimal, as was the case in *Cyanamid*.¹³⁰

64. In that case,¹³¹ the defendant Cyanamid Canada was charged with depositing a deleterious substance into water frequented by fish.¹³² The defendant was found guilty of the offence.¹³³ Wallace J found that the court had wide discretion in considering mitigating factors for sentencing¹³⁴ including, *inter alia*, the compliance of the defendant with a provincial control order.¹³⁵ The defendant was fined \$1.00.¹³⁶
65. In order to give further context to the Party's information on discretion to prosecute, the Secretariat notes that Environment Canada has obtained recent convictions for subsection 36(3) violations involving the release of wastewater and/or untreated sewage from municipal plants. Limited information on these prosecutions is available on the Environment Canada website.¹³⁷ However, the sentences included fines of more than one dollar for subsection 36(3) violations, as follows:

- Town of Ponoka, Alberta, \$70,000, December 2011;¹³⁸
- City of Moose Jaw, Saskatchewan, \$55,000, August 2010;¹³⁹ and
- Town of Beaverlodge, Alberta, \$20,000, August 2008.¹⁴⁰

In each case, the sentence followed a guilty plea by the offending municipality. Further details on these convictions illustrating situations in which Environment

¹³⁰ *Supra* note 56.

¹³¹ *Ibid.*

¹³² *Ibid* at para 1.

¹³³ *Ibid* at para 61.

¹³⁴ *Ibid* at para 63.

¹³⁵ *Ibid* at para 62. Other mitigating factors included: no evidence of fish being killed or water deteriorating due to Cyanamid effluent; poor quality of fishing in the Welland River near the Cyanamid plant, which was "principally inhabited by catfish;" Ontario officials' approval of the effluent deposits; Cyanamid's financial commitment to pollution abatement; Cyanamid's cooperation with Ontario environmental authorities; Cyanamid's compliance with the control order, which mandated reductions in effluent deposits over a three year period; and the potential consequences of shutting down the factory, which would cause "a loss of jobs and dire and severe financial consequences to Cyanamid and to many, if not all of its employees" (*ibid*).

¹³⁶ *Ibid* at para 64.

¹³⁷ Environment Canada, "Enforcement Notifications" (21 November 2013), online: Government of Canada <<http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=8F711F37-1>> [Enforcement Notifications].

¹³⁸ Environment Canada, "Town of Ponoka Pleads Guilty and is Fined \$70,000 for Release of Wastewater to Battle River" (7 December 2011), online: < www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=6326E764-1>.

¹³⁹ Environment Canada, "City of Moose Jaw Fined \$55,000 for Violation of Fisheries Act" (5 August 2010), online: < <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=66BCCB6A-1>>.

¹⁴⁰ Environment Canada, "Town of Beaverlodge Sentenced to Pay A \$20,000 Penalty for Water Pollution" (27 August 2008), online: < <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=CCAA8EDB-1>>.

Canada chose to prosecute such violations are provided in Annex II to this Determination.

66. Another source of information on federal prosecution of subsection 36(3) offences is the annual reports to Parliament on the administration and enforcement of the fish habitat and pollution prevention provisions of the *Fisheries Act*. Their publication is required by section 42.1 of the Act. However, the annual reports do not always provide specific information such as whether a prosecution involves a wastewater treatment plant.¹⁴¹
67. In light of the above, the Secretariat determines that there remain no central, open questions of fact pertaining to enforcement choices at the Iona WWTP that would warrant a factual record.

(e) Enforcement resources

68. The Secretariat now considers information provided by the Party regarding enforcement resources in the PYR. This information provides context for the Party's responses to alleged violations of subsection 36(3) at the Iona WWTP, as discussed above.
69. Recall that the Party states that between five and thirteen full time equivalent ("FTE") employees were responsible for compliance promotion generally in the PYR, with 1.5-2.5 FTEs "devoted to risk management activities within the wastewater sector" in particular.¹⁴²
70. Regarding PYR enforcement officers as opposed to compliance promotion officers, the Party does not provide extensive information for the period 2001-2010. However, the Party notes that Environment Canada has hired nine new enforcement officers in the PYR since 2007,¹⁴³ and specifies that there were 33 enforcement officers in the PYR in 2011-2012.¹⁴⁴
71. The Secretariat determines that there remain no central, open questions of fact related to enforcement resources in the PYR that would warrant a factual record.

¹⁴¹ See, for example, the Annual Report for 2008-2009, online:
<<http://webcache.googleusercontent.com/search?q=cache:g3FJUStsNn4J:www.dfo-mpo.gc.ca/habitat/role/141/reports-rapports/2008-2009/pdf/ann08-eng.pdf+&cd=2&hl=en&ct=clnk&gl=ca&client=firefox-a>> (last viewed 3 December 2013), Table 9 at 30.

¹⁴² Response, *supra* note 7 at 23.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid* at 12.

(f) Wastewater Systems Effluent Regulations

72. The Party states that the Iona WWTP will be “managed as part of a broader process,” including the *Wastewater Systems Effluent Regulations*.¹⁴⁵ There are no “special, site-specific arrangements with the operators of the Iona WWTP”.¹⁴⁶
73. The Party also explains that the reactive enforcement approach was linked to the development of the proposed *Wastewater Systems Effluent Regulations*.¹⁴⁷ The Party includes in its Response the proposed regulations and its Regulatory Impact Analysis statement, as presented in the *Canada Gazette* of 20 March 2010 (“2010 RIAS”).¹⁴⁸
74. According to the 2010 RIAS, the objective of the proposed regulations is to “reduce the risks to ecosystem health, fisheries resources and human health by decreasing the level of harmful substances deposited to Canadian surface water from wastewater effluent.”¹⁴⁹ The *status quo* “has not achieved this objective” and was not considered to be an “appropriate” option for managing the above risks.¹⁵⁰
75. The Secretariat notes two key differences between the proposed regulations and the *Wastewater Systems Effluent Regulations* that were registered on 29 June 2012 (“registered regulations”).¹⁵¹
76. The first difference relates to environmental effects monitoring (“EEM”). The proposed regulations would have specified:

The owner or operator of a wastewater system must conduct the environmental effects monitoring studies referred to in paragraph 4(4)(c) in respect of its effluent if the water at any point that is 100 m from the point of entry for the final discharge point is comprised of 10% or more of that effluent.¹⁵²

Under the proposed regulations, authorization to deposit effluent would have been conditional on conducting EEM, if applicable.¹⁵³ The EEM would have included water quality and biological monitoring.¹⁵⁴ According to the 2010 RIAS, the proposed EEM requirements would have been “intended to help evaluate the effectiveness of the effluent quality standards in protecting fish and fish

¹⁴⁵ *Ibid* at 22.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid* at 16.

¹⁴⁸ Annex 4, *supra* note 17.

¹⁴⁹ *Ibid* at 485.

¹⁵⁰ *Ibid* at 492.

¹⁵¹ *Supra* note 18. Note that most provisions enter into force on the date of registration (*ibid*, s 50(1)).

¹⁵² Annex 4, *supra* note 17, s 14(1).

¹⁵³ *Ibid*, s 4(4)(c).

¹⁵⁴ *Ibid*, Schedule 2.

habitat.”¹⁵⁵ EEM costs would have amounted to “only about \$80,000 per system,” out of total costs to wastewater system owners and operators estimated at \$5.9 billion (discounted to 2010 dollars).¹⁵⁶

77. After the public comment period following publication of the 20 March 2010 *Canada Gazette*, Part I, the EEM provisions were removed from the regulations. The RIAS published in the 18 July 2012 *Canada Gazette*, Part II (“2012 RIAS”) specifies:

During the *Canada Gazette*, Part I, comment period, stakeholders, mainly provincial governments, industry associations and municipalities, stated that having environmental effects monitoring (EEM) requirements in the proposed Regulations was premature and ahead of the timing in the CCME Strategy. Secondly, they questioned the ability of the criterion to trigger wastewater systems into EEM studies, including the lack of guidance on the use of the criterion, its ability to be applied consistently across Canada and its potential to trigger more than the 200 systems originally envisaged. Thirdly, concerns were raised regarding the associated cost and capacity issues around the implementation of the proposed EEM program, especially for small municipalities with limited financial resources and access to internal expertise.

- Given the extent of the comments, the EEM requirements have been removed from the Regulations with the intent to include them at a later date as a regulatory amendment in consultation with stakeholders and interested parties.¹⁵⁷

78. The second difference relates to DONCEs. The proposed regulations would have specified that:

The owner or operator of a wastewater system must prepare a response plan that describes the measures to be taken to prevent any deposit out of the normal course of events of effluent that contains a deleterious substance from the wastewater system into any water or place referred to in subsection 36(3) of the Act, and to mitigate or remedy the effects of any such deposit that may occur.¹⁵⁸

The response plans would have been required to include the following information:

¹⁵⁵ *Ibid* at 487.

¹⁵⁶ *Ibid* at 495.

¹⁵⁷ *Wastewater Systems Effluent Regulations*, (2012) C Gaz II, archived online: Government of Canada <<http://gazette.gc.ca/rp-pr/p2/2012/2012-07-18/html/sor-dors139-eng.html>> [2012 RIAS].

¹⁵⁸ Annex 4, *supra* note 17, s 42(1).

- (a) the identification of any deposit out of the normal course of events that may reasonably be expected to occur from the wastewater system and that may reasonably be expected to result in damage or danger to fish habitat or fish or the use by man of fish, and the identification of the damage or danger;
- (b) a description of the measures to be used to prevent, prepare for and respond to a deposit identified under paragraph (a);
- (c) a list of the individuals who are to implement the plan in the event of a deposit out of the normal course of events and a description of their roles and responsibilities;
- (d) the identification of the response training required for, and received by, each of those individuals;
- (e) a list of the response equipment included as part of the plan and the equipment's location; and
- (f) a description of alerting and notification procedures including the measures to be taken to notify members of the public who may be adversely affected by a deposit identified under paragraph (a) and to inform them of those measures and of what to do in the event of such a deposit.¹⁵⁹

Furthermore, the proposed regulations would have included notice and reporting requirements regarding DONCEs, particularly regarding acutely lethal deposits.¹⁶⁰

79. The above proposed DONCE provisions are not included in the final regulations. The 2012 RIAS explains:

Most stakeholders and interested parties requested, during the *Canada Gazette*, Part I, comment period, clarification on proposed requirements related to deposits out of the normal course of events. Many municipalities viewed the requirement to prepare emergency response plans as duplicating pre-existing requirements. Concerns were also expressed with respect to the requirements for immediate notification and written reporting, especially as they related to combined sewer overflows.

- Environment Canada has not included requirements related to deposits out of the normal course of events in the Regulations. The duty to report (notify) a deposit out of the normal course of events is set out in subsection 38(4) of the *Fisheries Act*. An unauthorized deposit of a deleterious substance that occurs or that is serious and in imminent danger of occurring and results or may reasonably be expected to result in any damage or danger to fish, fish habitat, or the use by people of fish is required to be notified to the person prescribed in the Deposit Out of the

¹⁵⁹ *Ibid*, s 42(2).

¹⁶⁰ *Ibid*, s 43.

Normal Course of Events Notification Regulations (*Canada Gazette*, Part I, March 25, 2011).¹⁶¹

80. Additional selected differences between the proposed and registered regulations are summarized in Annex III, and further details can be found in the 2012 RIAs.¹⁶²
81. In light of the above, the Secretariat determines that there remain no central, open questions of fact pertaining to regulation of the Iona WWTP under the *Wastewater Systems Effluent Regulations* that would warrant a factual record.

V. DETERMINATION

82. The Secretariat finds that, having considered both the Submission and Response, no central open questions remain and thus, does not consider a factual record to be warranted with respect to the assertions in submission SEM-10-003 (*Iona Wastewater Treatment*) concerning Canada's alleged failures to effectively enforce subsection 36(3) of the *Fisheries Act*.
83. In accordance with NAAEC Article 15(1), and pursuant to Guideline 9.6,¹⁶³ the Secretariat hereby notifies the Submitters and the Council that the process is terminated with respect to Submission SEM-10-003 (*Iona Wastewater Treatment*).

Respectfully submitted for your consideration on this 6th day of December, 2013.

Secretariat of the Commission for Environmental Cooperation



per: Irasema Coronado, Ph.D.
Executive Director

cc: Mr. Dan McDougall, Canada Alternate Representative
Mr. Enrique Lendo, Mexico Alternate Representative
Ms. Jane Nishida, US Alternate Representative (Acting)
Submitters

¹⁶¹ 2012 RIAs, *supra* note 157.

¹⁶² *Ibid.*

¹⁶³ Since 11 July 2012, the equivalent guideline is 9.8; see *Guidelines for Submissions on Enforcement Matters* at <www.cec.org/guidelines>.

Annex I

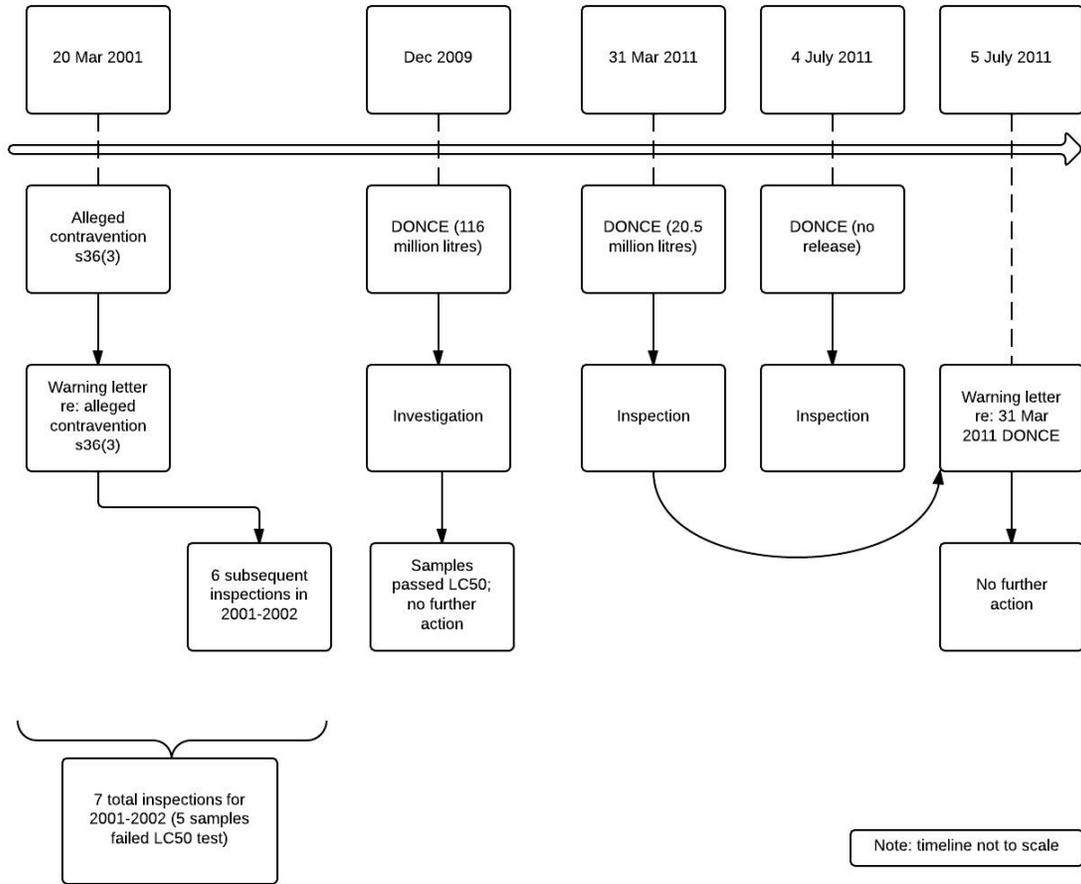


Figure I: Timeline of enforcement activities at Iona WWTP 2001-2011¹⁶⁴

¹⁶⁴ Response, *supra* note 7 at 18-19.

Annex II

Table I: Selected recent prosecutions under subsection 36(3) *Fisheries Act* related to municipal wastewater¹⁶⁵

Offender	Relevant dates	Location	Details	Outcome
Town of Beaverlodge	Complaints and investigation May 2006; online notification posted 27 August 2008	Alberta – Prairie and Northern Region	Reports of brilliant green colour to water and dead fish in Beaverlodge River sparked investigation; investigation found wastewater discharges from sewage lagoon were acutely lethal to fish.	\$20,000 fine total
City of Moose Jaw	Sewage discharge 4 August 2007; pleaded guilty 4 August 2010	Saskatchewan – Prairie and Northern Region	Release of approximately 431,000 litres of untreated sewage into Moose River, due to power failure; discharge was undetected for extended period of time due to “equipment deficiencies”	\$50,000 fine total
Town of Ponoka	Complaint received by EC June 2009; online notification posted 7 December 2011	Alberta – Prairie and Northern Region	Complaint about dead fish in Battle River sparked investigation; investigation found wastewater effluent releases from wastewater lagoon that were harmful to fish	\$70,000 fine total, plus public education requirements

¹⁶⁵ Enforcement Notifications, *supra* note 137.

Annex III

Table II: Selected differences between the proposed¹⁶⁶ and registered¹⁶⁷ *Wastewater Systems Effluent Regulations* (including selected information from 2012 RIAS¹⁶⁸)

Note: selected differences are highlighted in yellow.

Proposed provision	Registered provision	Comments
<p>2. (1) These Regulations apply in respect of a wastewater system that (a) has a capacity to deposit 10 m3 or more, per day, of effluent via its final discharge point based on its design specifications; and (b) deposits a deleterious substance prescribed in section 3 in any water or place referred to in subsection 36(3) of the Act.</p>	<p>Application 2. (1) These Regulations apply in respect of a wastewater system that, when it deposits effluent via its final discharge point, deposits a deleterious substance prescribed in section 5 in water or a place referred to in subsection 36(3) of the Act and that (a) is designed to collect an average daily volume of 100 m3 or more of influent; or (b) during any calendar year, collects an average daily volume of 100 m3 or more of influent. Annual exceptions (2) Despite paragraph (1)(a), these Regulations do not, for the subsequent calendar year, apply in respect of a wastewater system referred to in that paragraph that, during a calendar year, collected an average daily volume of less than 100 m3 of influent.</p>	<ul style="list-style-type: none"> • Different scope of application regarding scale (10m3 vs. 100m3) and parameter (effluent vs. influent) • 2012 RIAS: “[S]everal stakeholders and interested parties raised concerns about affordability of meeting the requirements of the Regulations for small facilities... The Regulations have been revised such that the threshold of applicability was increased from 10 m3 to 100 m3 of influent per day. As a consequence, this change will help mitigate some of the affordability concerns for small facilities and businesses by reducing the required investment in capital upgrades and monitoring equipment, as well as reducing their administrative burden.”
<p>NONE</p>	<p><i>Combined Sewer Overflow Report</i></p>	<ul style="list-style-type: none"> • Combined Sewer Overflow Report

¹⁶⁶ Annex 4, *supra* note 17.

¹⁶⁷ *Supra* note 18.

¹⁶⁸ *Supra* note 154.

	<p>Information</p> <p>20. The owner or operator of a wastewater system that includes at least one combined sewer overflow point must, in accordance with subsections 19(4) and (5), send to the authorization officer a combined sewer overflow report in respect of each calendar year by February 15 of the following calendar year and the report must contain the following information:</p> <p>(a) for each month of the calendar year during which effluent was deposited via a combined sewer overflow point, the information referred to in subparagraphs 17(b)(iii) and (iv); and</p> <p>(b) for each month of the calendar year during which effluent was not deposited via a combined sewer overflow point, a statement indicating that no effluent was deposited via an overflow point during the month.</p>	<p>added to registered regulations</p> <ul style="list-style-type: none"> • 2012 RIAs: “During the <i>Canada Gazette</i>, Part I, comment period, [environmental non-governmental organizations] requested significant reductions in combined sewer overflows and the ultimate elimination of them.”
<p>BOD and SS transitional authorization</p> <p>21. (1) The owner or operator of a wastewater system may apply to an authorization officer for a transitional authorization to deposit via the final discharge point effluent that contains biochemical oxygen demanding matter or suspended solids, or both — referred to in these Regulations as a “BOD and SS transitional authorization” — if the average referred to in paragraph 4(1)(a) or (b) as determined in accordance with subsection 4(3) but expressed on an annual basis — over the year that ended before the month in which the application was made — exceeded 25 mg/L.</p> <p>NH₃, BOD and SS transitional authorization</p> <p>(2) The owner or operator of a wastewater system may apply to an authorization officer for a</p>	<p>Transitional authorization</p> <p>24. (1) The owner or operator of a wastewater system may, on or before June 30, 2014, apply to an authorization officer for a transitional authorization to deposit via the final discharge point effluent that contains a deleterious substance prescribed in section 5, or any combination of those substances, if the average referred to in paragraph 6(1)(a) or (b), as determined in accordance with subsection 6(3), exceeded 25 mg/L during the following periods: [details]</p>	<ul style="list-style-type: none"> • Substances treated differently for transitional authorizations (BOD, SS, NH₃ in proposed vs. “deleterious substances” in registered regulations) • 2012 RIAs: “During the <i>Canada Gazette</i>, Part I, comment period, stakeholders and interested parties informed Environment Canada that the effluent from wastewater systems could meet the national standard for CBOD or the concentration of suspended solids on an annual basis, while exceeding on a monthly or quarterly basis for several

<p>transitional authorization to deposit via the final discharge point effluent that contains any combination of un-ionized ammonia, biochemical oxygen demanding matter and suspended solids — referred to in these Regulations as an “NH₃, BOD and SS transitional authorization” — if subsection (1) applies and the concentration of un-ionized ammonia as determined in accordance with subsection 4(3) — for the year that ended before the month in which the application was made — was, on average, greater than or equal to 1.25 mg/L, expressed as nitrogen (N) at 15°C ± 1°C.</p>		<p>periods of the year. Under these circumstances, the owner or operator would not be able to apply for and obtain a transitional authorization, even though upgrades to the wastewater systems may be required.”</p>
<p>Duration of transitional authorization 23(2) The transitional authorization must be issued for the following period of authorization: (a) from the date of issuance to December 31, 2019, if the final discharge point is, under the table to Schedule 3, allocated 70 or more points and, if the wastewater system has combined sewer overflow points for which points are allocated under Schedule 4, each combined sewer overflow point of the wastewater system is allocated less points than the number of points allocated under the table to Schedule 3 to the final discharge point; (b) from the date of issuance to December 31, 2029, if the final discharge point is, under the table to Schedule 3, allocated 50 or more points but less than 70 points and, if the wastewater system has combined sewer overflow points for which points are allocated under Schedule 4, each combined sewer overflow point of the</p>	<p>Duration of transitional authorization 26(2) The transitional authorization must be issued for the following period: (a) from January 1, 2015 to December 31, 2020, if the final discharge point is, under the table to Schedule 2, allocated 70 or more points and, if the wastewater system has combined sewer overflow points for which points are allocated under Schedule 3, each combined sewer overflow point of the wastewater system is allocated less points than the number of points allocated under the table to Schedule 2 to the final discharge point; (b) from January 1, 2015 to December 31, 2030, if the final discharge point is, under the table to Schedule 2, allocated 50 or more points but less than 70 points and, if the wastewater system has combined sewer overflow points for which points are allocated under Schedule 3, each combined sewer overflow point of the wastewater system is allocated less points</p>	<ul style="list-style-type: none"> • Slightly different dates for proposed vs. registered transitional authorization periods • 2012 RIAs: “During the comment period following the publication of the proposed Regulations in the <i>Canada Gazette</i>, Part I, several comments indicated that the proposed Regulations did not provide sufficient preparation time to allow the owners and operators of wastewater systems to meet the requirements of the Regulations.”

<p>wastewater system is allocated less points than the number of points allocated under the table to Schedule 3 to the final discharge point; and (c) from the date of issuance to December 31, 2039, (i) if the final discharge point is, under the table to Schedule 3, allocated less than 50 points, or (ii) if the final discharge point is, under the table to Schedule 3, allocated 50 or more points and, if the wastewater system has combined sewer overflow points for which points are allocated under Schedule 4, there is at least one combined sewer overflow point that is, under Schedule 4, allocated a number of points that is greater than or equal to the number of points allocated under the table to Schedule 3 to the final discharge point.</p>	<p>than the number of points allocated under the table to Schedule 2 to the final discharge point; and (c) from January 1, 2015 to December 31, 2040, (i) if the final discharge point is, under the table to Schedule 2, allocated less than 50 points, or (ii) if the final discharge point is, under the table to Schedule 2, allocated 50 or more points and the wastewater system has combined sewer overflow points for which points are allocated under Schedule 3, there is at least one combined sewer overflow point that is, under Schedule 3, allocated a number of points that is greater than or equal to the number of points allocated under the table to Schedule 2 to the final discharge point.</p>	
<p>COMING INTO FORCE On registration 44. (1) Subject to subsections (2) and (3), these Regulations come into force on the day on which they are registered.</p>	<p>COMING INTO FORCE On registration 50. (1) Subject to subsections (2) to (4), these Regulations come into force on the day on which they are registered.</p>	<ul style="list-style-type: none"> • No substantive difference
<p>24 months after registration 44(2) Sections 4, 14, 24, 25, 32 and 36 to 43 come into force 24 months after the day on which these Regulations are registered.</p>	<p>January 1, 2013 50(2) Subsections 6(2) to (6), sections 7, 8, 10, 12 to 14 and 16, paragraphs 17(a), (b) and (d) to (g) and sections 18 to 20, 23 to 27, 30, 31, 34 to 36, 39, 41, 48 and 49 come into force on January 1, 2013. January 1, 2015 50(3) Subsections 6(1) and (7), sections 11, 15, 28, 29, 32, 33, 37, 38, 40 and 42 to 47 come into force on January 1, 2015.</p>	<ul style="list-style-type: none"> • Differences in coming into force dates and provisions
<p>January 1, 2014 — paragraph 4(1)(c) in relation to certain owners or operators 44(3) Despite subsection (2), paragraph 4(1)(c) comes into force on January 1, 2014 in relation to an owner or operator of a wastewater system that during a given quarter or month</p>	<p>January 1, 2021 — paragraphs 6(1)(c) and 28(1)(c) in relation to certain owners or operators 50(4) Despite subsection (3), paragraphs 6(1)(c) and 28(1)(c) come into force on January 1, 2021 in relation to an owner or operator of a wastewater system that has, on the day on which</p>	<ul style="list-style-type: none"> • Differences in coming into force dates and provisions, and different meanings of “certain owners or

determined in accordance with subsection 4(2) had an annual average daily volume of effluent deposited via its final discharge point that was less than 5 000 m3 during the year that ended before that quarter or month.	these Regulations are registered, an average daily volume of effluent deposited annually via its final discharge point of less than 5 000 m3, determined on the basis of its average design rate of flow of influent.	operators”
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