

---

## Secretariat of the Commission for Environmental Cooperation

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

<b>Submitter:</b>	Center for Biological Diversity
<b>Represented by:</b>	Kassie Siegel, Climate Law Institute Director Brendan Cummings, Senior Counsel Sarah Uhlemann, Staff Attorney
<b>Concerned Party:</b>	Canada
<b>Date received:</b>	5 December 2011
<b>Date of this determination:</b>	29 November 2012
<b>Submission I.D.:</b>	<b>SEM-11-003</b> ( <i>Protection of Polar Bears</i> )

---

#### I. INTRODUCTION

1. On December 5, 2011, the Center for Biological Diversity (the “Submitter”) filed SEM-11-003 (*Protection of Polar Bears*) (the “Submission”), a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or the “Agreement”),<sup>1</sup> with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”). Articles 14 and 15 of the NAAEC provide for a process allowing any person or non-governmental organization to file a submission asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat initially 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] (the “Guidelines”).<sup>2</sup> 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

---

<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 < <http://bit.ly/eLLoyc> >.

<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 < <http://goo.gl/bRFBa> >. The current Determination was made in accordance with the Guidelines in effect at the time of the Submission. For all subsequent steps in the Articles 14 and 15 process, the current Submission will be subject to the Guidelines in effect as of 11 July 2012.

accordance with Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances prevail, it proceeds no further with its consideration of the submission.<sup>3</sup>

2. The Secretariat has determined that the Submission meets all of the requirements of Article 14(1), and merits requesting a response from the Party in light of the factors listed in Article 14(2). The Secretariat's reasons for this determination are set forth below in Section III.

## II. SUMMARY OF THE SUBMISSION

3. The Submitter asserts that the Government of Canada (“Canada” or the “Party”) is failing to effectively enforce its environmental law, specifically the *Species at Risk Act*<sup>4</sup> (“SARA” or the “Act”) by failing to list the polar bear (*Ursus maritimus*) in a timely manner as a threatened or endangered species.<sup>5</sup> The Submitter asserts that “after years of delay, Canada recently listed the polar bear as only a ‘species of special concern,’ instead of [as] threatened or endangered, thus denying the bear any substantive legal protections under SARA, in contravention of the statute’s clear requirements.”<sup>6</sup>
4. The Submitter alleges that 60 percent of the global population of polar bears, and 13 of 19 global subpopulations, occur in Canada and that seven of these subpopulations are “likely declining.”<sup>7</sup>
5. The Submission notes that in addition to other environmental threats, global climate warming is causing the disappearance of Arctic sea ice, the critical habitat of polar bears.<sup>8</sup> The Submitter concludes that, based on climate models that it says greatly underestimate the threat of sea-ice loss, “Scientists estimate that if the Arctic

---

<sup>3</sup> Previous Secretariat Determinations and Factual Records can be found on the CEC’s website at: < [www.cec.org/SEMregistry](http://www.cec.org/SEMregistry) >. References to the word “Article” throughout this Determination, unless otherwise stated, refer to an article of the NAAEC. Use of the masculine implies the feminine, and vice-versa.

<sup>4</sup> SC 2002, c 29 [SARA]. Provisions of the Act that are mentioned in or relevant to the Submission are reproduced in an Appendix following the last page of this Determination.

<sup>5</sup> Submission SEM-11-003 (*Protection of Polar Bears*) [Submission] at 2.

<sup>6</sup> *Ibid*; see SARA, *supra* note 4, s 2 (“endangered species;” “species of special concern;” “threatened species”). See also Submission at 7 (under the heading “Argument”).

<sup>7</sup> *Ibid* at 2, n 5, citing Exhibit A: Committee on the Status of Endangered Wildlife in Canada [COSEWIC], “COSEWIC assessment and update status report on the polar bear *Ursus maritimus* in Canada” (Ottawa: COSEWIC, 2008) [Exhibit A]; Exhibit B: SC Amstrup et al, “Forecasting the rangewide status of polar bears at selected times in the 21st Century” (Anchorage: USGS Alaska Science Center, 2007) [Exhibit B]; J Aars et al, eds, “Polar bears: Proceedings of the 14th Working Meeting of the IUCN Polar Bear Specialist Group” (Gland, Switzerland and Cambridge, UK: IUCN, 2006); ME Obbard et al, “Polar Bears: Proceedings of the 15th Working Meeting of the IUCN/SSC Polar Bear Specialist Group” (Gland, Switzerland and Cambridge, UK: IUCN, 2010) at 62-67.

<sup>8</sup> Submission, *supra* note 5 at 2; SARA, *supra* note 4, s 2 (“critical habitat”).

continues its melting trend, the worldwide polar bear population will decline by more than two-thirds by 2050 and will be near extinction by the end of the century.”<sup>9</sup>

6. Describing the activity and habitat of polar bears, the Submitter notes:

- “[The] effects of climate warming on conditions of sea ice are most important to the status of the species.”<sup>10</sup>
- “Polar bears are best characterized as an obligate predator of seals using sea ice as a hunting platform;”<sup>11</sup> polar bears depend on Arctic sea ice in order to access ringed and bearded seals, their primary food source, for mating and breeding, and as a platform for long-distance travel.<sup>12</sup>
- “In short, maintenance of polar bear populations is dependent upon marine prey, largely ringed seals, and they are tied to the surface of the ice for effective access to those prey.”<sup>13</sup>
- “Total habitat area ... was projected ... to be reduced from present-day conditions, at each time step in each ecoregion and for all ecoregions combined (global). ... [B]oth total and optimal habitat were projected to be less abundant than present amounts. ... Using the satellite observed sea ice record, total habitat area during the previous decade (year -10) varied among ecoregions and was between 3% and 17% more abundant than at present. Globally, total habitat in the last decade was 7% more abundant than it is now.”<sup>14</sup>

7. The Submitter reviews the status of the polar bear species as assessed by the International Union for Conservation of Nature (IUCN) (“vulnerable,” which the Submitters allege is the equivalent of SARA “threatened” status<sup>15</sup>), by the Canadian Provinces of Manitoba and Ontario (“threatened”), and by the United States (“threatened”) under the federal *Endangered Species Act*.<sup>16</sup>

8. The Submitter proceeds to characterize some features of the SARA; in particular, the Submitter states that the Act “extends varying degrees of protection depending on a

---

<sup>9</sup> Submission, *supra* note 5 at 2-3, citing Exhibit B, *supra* note 7; Exhibit C: SC Amstrup et al, “Greenhouse gas mitigation can reduce sea ice loss and increase polar bear persistence” (2010) 468 *Nature* 955 [Exhibit C].

<sup>10</sup> See Exhibit A, *supra* note 7 at 15.

<sup>11</sup> *Ibid* at 27.

<sup>12</sup> Submission, *supra* note 5 at 2-3; See also Exhibit F: GW Thiemann et al, “Polar bear *Ursus maritimus* conservation in Canada: an ecological basis for identifying designatable units” (2008) 42 *Oryx* 504 [Exhibit F] at 507.

<sup>13</sup> Exhibit B, *supra* note 7 at 4.

<sup>14</sup> *Ibid* at 19-20.

<sup>15</sup> Submission, *supra* note 5 at 3, citing Exhibit A, *supra* note 7.

<sup>16</sup> Submission, *supra* note 5 at 3, citing *US Endangered Species Act*, 73 CFR s. 28,293 (May 15, 2008).

species' listing status,"<sup>17</sup> and that it prohibits certain activities (killing, harming, taking, etc.) in relation to a wildlife species that is endangered or threatened, and prohibits damaging or destroying the residence of such species on federal land or on designated provincial or territorial lands.<sup>18</sup> The Submitter also states that the Minister must prepare a recovery strategy and action plan, and identify critical habitat, for species listed as endangered or threatened.<sup>19</sup>

9. The Submitter notes that in the case of a "species of special concern," the SARA requires the competent minister (in the case of the polar bear, the federal Minister of the Environment (the "Minister")) to "prepare a management plan for the species,' including 'measures for the conservation of the species that the Minister considers appropriate,' within three years of the species' listing."<sup>20</sup> The Submitter remarks that "the statute affords no substantive protections to these species."<sup>21</sup>
10. The Submitter also states that SARA "provides a detailed procedure, including a series of strict deadlines, for listing species."<sup>22</sup> In that connection, the Submitter notes that in accordance with subsection 25(3) of SARA, "[o]n receiving a copy of an assessment ... of a wildlife species from [the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") established by section 14 of SARA] ..., the Minister must, *within 90 days*, include in the public registry a report on how the Minister intends to respond."<sup>23</sup>
11. The Submission includes excerpts from *House of Commons Debates* during deliberations on SARA, emphasizing the importance of timelines and in particular, a reverse onus provision, whereby the Minister must list the species in a timely manner unless the government decides otherwise (within nine months of the Governor in Council receiving COSEWIC's assessment).<sup>24</sup>
12. On the subject of determining whether a species is at risk and if so, at which level, the Submitter states that COSEWIC has developed an assessment process and criteria for listing, including a process for determining a species' generation span and an approach for probabilistic determination of a species' endangerment. The Submitter also states that COSEWIC has developed guidance for determining status at taxonomic levels below the species level.<sup>25</sup> The Submitter points out that the COSEWIC procedures can be used to assess the status of one or more "genetically or

---

<sup>17</sup> Submission, *supra* note 5 at 3.

<sup>18</sup> *Ibid*, citing SARA, *supra* note 4, ss 2 ("federal land;" "residence;" "wildlife species"), 32(1), 33-35.

<sup>19</sup> Submission, *supra* note 5 at 3. See SARA, *supra* note 4, s 2 ("action plan;" "recovery strategy").

<sup>20</sup> Submission, *supra* note 5 at 3-4, citing SARA, *supra* note 4; see ss 2 ("competent minister;" "Minister"), 65 and 68.

<sup>21</sup> Submission, *supra* note 5 at 3.

<sup>22</sup> *Ibid* at 4.

<sup>23</sup> *Ibid* at 6, citing SARA, *supra* note 4, ss 2 ("public registry") and 25(3) [italics in Submission].

<sup>24</sup> Submission, *supra* note 5 at 4-5; see SARA, *supra* note 4, s 27(3).

<sup>25</sup> Submission, *supra* note 5 at 5, nn 12-15 and surrounding text; see Exhibit D: "COSEWIC's Assessment Process and Criteria (Ottawa: COSEWIC, 2010) and Exhibit E: COSEWIC, "Guidelines for Recognizing Designatable Units below the Species Level" (Appendix F5 in the COSEWIC O&P Manual) (Ottawa: COSEWIC, 2005).

geographically distinct populations” of a species<sup>26</sup> such as the polar bear, as an alternative to assessing the status of the species as a whole.

13. The Submitter details COSEWIC’s past evaluations of the polar bear, beginning with a “not at risk” designation in 1986, and “species of special concern” designations in 1991, 1999, 2002 and 2008.<sup>27</sup>

14. At page 6 of the Submission, the Submitter states that

COSEWIC entirely discounted the critical impact climate change will have on the species, in direct conflict with polar bear expert opinions. COSEWIC found the ‘negative effects of continued global warming cannot be reliably assessed,’ dismissing credible analyses demonstrating that *two-thirds of the Canadian polar bear population* will face a sufficient probability of extinction in just 45 years to qualify the species as ‘endangered.’<sup>28</sup>

15. The Submission notes that Canada published its proposed listing of the polar bear on July 2, 2011 and formally listed the polar bear as a “species of special concern”<sup>29</sup> under SARA on November 9, 2011 on the basis of the 2008 COSEWIC assessment.<sup>30</sup> The Submitters state that despite the Governor in Council (“GiC”) acknowledging that “it [the GiC] had received comments arguing that COSEWIC’s status assessment had failed to fully evaluate”<sup>31</sup> all of the information on climate change effects and the polar bear species, it accepted COSEWIC’s assessment. The Submitter thus implicates the GiC in the assertion that contrary to subsection 15(2), “COSEWIC failed to carry out its functions on the basis of the best available information.”<sup>32</sup>

### ***Delay***

16. The Submitter asserts that the Minister was required, by subsection 25(3) of the SARA, within ninety days of receiving COSEWIC’s assessment report on the polar bear, to “include in the public registry a report on how the Minister intends to respond,”<sup>33</sup> and that the Minister failed to do so. After COSEWIC’s deliberations on the polar bear ended in late April 2008, “the Minister’s response on the polar bear was due in late July 2008. However, the Minister did not issue a ‘Response

---

<sup>26</sup> SARA, *supra* note 4, s 2 (“wildlife species”).

<sup>27</sup> Submission, *supra* note 5 at 5-6, n 16, citing Exhibit A, *supra* note 7 at iii; n 21, citing COSEWIC, “Polar Bear and other Species at Risk Assessed by Independent Canadian Science Body (Ottawa: COSEWIC, April 2008), online: COSEWIC <[http://www.cosewic.gc.ca/rpts/sct7\\_3\\_11\\_e.pdf](http://www.cosewic.gc.ca/rpts/sct7_3_11_e.pdf)> and n 22, citing Exhibit A, *supra* note 7 at iii and 59.

<sup>28</sup> Submission, *supra* note 5 at 6 and n 23, citing Exhibit A, *supra* note 7; Exhibit B, *supra* note 7; and Exhibit C, *supra* note 9.

<sup>29</sup> SARA, *supra* note 4, s 2 (“species of special concern”).

<sup>30</sup> Submission, *supra* note 5 at 7 and n 27, citing “Order Amending Species at Risk Act,” (9 November 2011) C Gaz II, 2282 [“Order Amending SARA”]. [The Submission incorrectly gives the *Canada Gazette* reference as Part I.]

<sup>31</sup> Submission, *supra* note 5 at 7, n 28, citing the “Order Amending SARA,” *supra* note 30 at 2310.

<sup>32</sup> Submission, *supra* note 5 at 9-10.

<sup>33</sup> Submission, *supra* note 5 at 6, citing SARA *supra* note 4, s 25(3).

Statement’ until November 26, 2008 – seven months after COSEWIC assessed the polar bear.”<sup>34</sup>

17. The Submitter alleges that a further delay occurred, stating that

SARA separately requires that ‘within nine months after receiving an assessment ... by COSEWIC,’ the GiC ‘may review the assessment and may, on the recommendation of the Minister,’ accept, reject, or refer the assessment back to COSEWIC. [Citing subsection] 27(1.1)[... However,] if the GiC ‘has not taken’ action ‘within nine months after receiving’ the COSEWIC assessment, ‘the Minister shall, by order, amend the List in accordance with COSEWIC’s assessment’ [citing subsection 27(3)].<sup>35</sup>

The Submitter concludes that

**SARA required the polar bear to be *automatically* listed as a ‘species of special concern’ by January of 2009,** nine months after COSEWIC assessed the polar bear [but instead,] the GiC claimed it did not ‘receive’ COSEWIC’s assessment until ... *nearly [three] years after COSEWIC completed its assessment*, even though the assessment had been widely available in the SARA public registry and online and had been sent directly to several ministers who are part of the GiC.<sup>36</sup>

18. The Submitter asserts that Canada has unlawfully granted itself an unlimited amount of time for species listings and is thus failing to effectively enforce ss 27(3) of SARA. The Submitter alleges that “Canada believes that ... the Minister may constructively withhold the assessment from the GiC while the Minister conducts extended economic and political consultations, thus delaying when the GiC ‘receives’ the assessment” and “[a]ccordingly, Canada believes the Minister may indeterminately delay species’ listing well beyond the nine month deadline set in the statute.”<sup>37</sup> With these allegations, the Submitter relies in part on two documents<sup>38</sup> not included with the Submission.<sup>39</sup>

---

<sup>34</sup> Submission, *supra* note 5 at 5, n 25, citing Canada, Minister of the Environment, “Response statement – Polar Bear,” (Ottawa: Minister of the Environment, Nov 26, 2008) online: Species at Risk Public Registry <<http://bit.ly/w7AYJt>> (last visited 1 February, 2012).

<sup>35</sup> Submission, *supra* note 5 at 6-7, citing SARA, *supra* note 4, ss 27(1.1) and 27(3).

<sup>36</sup> Submission, *supra* note 5 at 7 (bold and italic emphasis in Submission), n 26, citing “Order Acknowledging Receipt of the Assessment Done Pursuant to Subsection 23(1) of the Act” (Feb. 3, 2011) C Gaz II, 430. The Order reads in part: “His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, hereby acknowledges receipt, on the making of this Order, of the assessment done pursuant to subsection 23(1) of the *Species at Risk Act* by the [COSEWIC]...”. An explanatory note published in the *Canada Gazette* but “not part of the Order” reads in part: “A decision was made to delay receipt of this wildlife species to allow for extended consultations with the Nunavut Wildlife Management Board and the Nunavut Government. The consultations are now complete ...” (*ibid*).

<sup>37</sup> Submission, *supra* note 5 at 8. While allegations about a Party’s “belief,” intention or motivation are outside the Secretariat’s purview, the Secretariat may consider the alleged acts or omissions of a Party.

<sup>38</sup> *Ibid* at 7, n 30, citing Environment Canada, “Consultation on Amending the List of Species under the Act: Terrestrial Species” (Gatineau: Environment Canada, 2009), online: Government of Canada Publications <[http://publications.gc.ca/collections/collection\\_2010/ec/EN1-36-2009-eng.pdf](http://publications.gc.ca/collections/collection_2010/ec/EN1-36-2009-eng.pdf)> at 5 (the Submitter alleges that this document “explain[s] that some species will undergo ‘extended consultations’ by the Minister, and listing may be delayed several years after the assessment”), and Environment

### ***Implications of Delay***

19. The Submitter contends that if Cabinet delays its decisions after the completion of a COSEWIC assessment, the purpose of the SARA requirement that COSEWIC carry out its functions on the basis of the best available information on the biological status of a species<sup>40</sup> might be contravened, because COSEWIC assessments would not include consideration of new scientific research and information that might be published in the period between the COSEWIC assessment and the Cabinet decisions.<sup>41</sup>

### ***Best Available Information Considered and Applied***

20. In the “Argument” section of the Submission, the Submitter expands on its assertions that Canada failed in considering and applying the best available information correctly. The Submitter alleges that COSEWIC ignored the future effects of climate change on polar bears, attributing this in part to COSEWIC’s alleged use of modeling methods that discount some current and all future climate change impacts, with the alleged result that “COSEWIC found that only four polar bear subpopulations have a substantial risk of decline, and thus the whole polar bear population did not qualify as even threatened.”<sup>42</sup> The Submitter then alleges that COSEWIC did not consider other studies that, by contrast, conclude that seven Canadian sub-populations are declining and just three are stable.<sup>43</sup> The Submitter thus asserts that Canada failed to enforce subsection 15(2) of the SARA because it did not consider and apply the “best available information on the biological status”<sup>44</sup> of the polar bear species.<sup>45</sup>

---

Canada, “Draft Species at Risk Policies” (Ottawa: Environment Canada, 2009), online: Government of Canada Publications <[http://publications.gc.ca/collections/collection\\_2009/ec/En4-113-2009-eng.pdf](http://publications.gc.ca/collections/collection_2009/ec/En4-113-2009-eng.pdf)> at 13: “Receipt of the assessments by the Governor in Council will generally occur within three months of posting the response statements. Delivery by the Minister of the Environment and receipt by the Governor in Council may be delayed in certain circumstances.”

<sup>39</sup> Documents relied upon in a Submission should normally be provided as an exhibit or appendix to a Submission, and not merely referred to in a footnote. However, as these documents are generated by the Government of Canada and can be readily found using the Uniform Resource Locators (URLs) provided in the Submission, note 30, the Secretariat will not request the documents from the Submitter in this case.

<sup>40</sup> SARA, *supra* note 4, s 15(2) (“COSEWIC must carry out its functions on the basis of the best available information on the biological status of the species ...”).

<sup>41</sup> Submission, *supra* note 5 at 8-9, n 33; See Exhibit G: Center for Biological Diversity Comments on Proposed Order Amending Schedule 1 for Polar Bears (Aug. 1, 2011) [Exhibit G] at 5-6. See also assertion that “COSEWIC also failed to include or adequately address numerous other studies that were available in 2008 that forecast declines and document climate change threats to Canadian polar bear populations;” *ibid* at 10, n 41, citing Exhibit I: CM Hunter et al, “Polar bears in the Southern Beaufort Sea II: Demography and Population Growth in Relation to Sea Ice Conditions” (Reston, Virginia: US Geological Survey, 2007).

<sup>42</sup> Submission, *supra* note 5 at 9, n 36, citing Exhibit A, *supra* note 7 at 37: “... due to unknown effects of directional climate change on survival and recruitment, results should be used to interpret current and short-term likelihoods of decline only.”

<sup>43</sup> Submission, *supra* note 5 at 9, nn 37-38.

<sup>44</sup> SARA, *supra* note 4, s 15(2).

<sup>45</sup> Submission, *supra* note 5, 9-10.

### ***Choice of Polar Bear Scientist***

21. The Submitter suggests that the approach taken to COSEWIC's assessment was influenced by the alleged choice of a biased scientist to write the species assessment in 2008.<sup>46</sup>

### ***Status of Species or of Designatable Unit(s)***

22. The Submitter states that rather than assessing the polar bear species as a single unit, COSEWIC ought to have assessed the status of "designatable units" (DUs) of polar bears. The Submitter considers that, based on the information in Exhibit F of the Submission, "the continued consideration of polar bears as a single biological unit is untenable,"<sup>47</sup> that five designatable units (DUs) can be identified in Canada on the basis of geographic and genetic distinction in keeping with the definition of "wildlife species" in SARA,<sup>48</sup> and that some or all of the five DUs ought to be found to qualify for endangered or threatened status according to COSEWIC's assessment process and guidelines.

23. The Submitter contends that either the polar bear species as a whole, or the DUs identified by Thiemann et al., ought to be considered "endangered" or "threatened" because in either case, the relevant definitions in subsection 2(1) of SARA are met.

24. The Submitter contends that COSEWIC failed to apply its Assessment Process and Criteria, as well as its Guidelines, correctly, with the result that the level of threat to the species was underestimated. This contention is connected to the Submitter's assertion that Canada has failed to apply the provisions of the SARA as a whole to the case of the polar bear species.<sup>49</sup>

### ***Relationship between climate models chosen and estimated risk to species***

25. The Submitter contends that the Amstrup et al. study underestimates the actual risk of polar bear extinction because, the Submitter states, the Intergovernmental Panel on Climate Change (IPCC) climate models referred to in that research predict rates of sea ice melting that are slower than actual melting.<sup>50</sup> The Submitter notes that while Amstrup et al. applied "mid-range" greenhouse gas emissions scenarios from the IPCC, actual emissions have more closely approximated the IPCC's most fossil fuel-intensive emissions scenarios.<sup>51</sup> In summary, the Submitter asserts that either the Canadian polar bear subpopulations, or the Canadian polar bear population as a whole, therefore meets the requirements for at least "threatened" if not "endangered"

---

<sup>46</sup> *Ibid*, at 8, citing Exhibit H: Dag Vongraven, "Guest editorial—the ballyhoo over polar bears" (2009) 28 *Polar Research* 323 [Exhibit H] at 324.

<sup>47</sup> Submission, *supra* note 5 at 10, n 45, citing Exhibit F, *supra* note 12 at 512.

<sup>48</sup> SARA, *supra* note 4, s 2 ("wildlife species").

<sup>49</sup> See paragraph 3 and notes 5-6, *supra*.

<sup>50</sup> Submission, *supra* note 5 at 11, n 53, citing J. Stroeve et al, "Arctic sea ice decline: Faster than forecast" (2007) 34 *Geophysical Research Letters*, L09501.

<sup>51</sup> Submission, *supra* note 5 at 11, n 54, citing Michael R Raupach et al, "Global and regional drivers of accelerating CO2 emissions" (2007) 104: 24 *Proceedings of the National Academy of Sciences of the United States of America* 10288 and Ø Wiig, "Erratum: Predicting 21st-century polar bear habitat distribution from global climate models" (2009) 79: 3 *Ecological Monographs* 522.

status. This assertion is integral with and part of the assertion that Canada has failed to effectively enforce subsection 15(2) of SARA.

26. The Submitter maintains that its Submission and supporting information are drawn primarily from Canadian administrative documents and published scientific studies, and not exclusively from mass media reports, in accordance with Article 14(1)(c) and Article 14(2)(d) of the NAAEC.<sup>52</sup>
27. The Submitter notes that it, and its members, are suffering harm from Canada's failure to list the polar bear as an endangered species under SARA, saying that the result will be "the continued take of bears and degradation of their habitat, compounding the risk faced by the species due to climate change."<sup>53</sup> The Submitter relates this alleged harm to polar bears to the description of the Submitter as a "non-profit corporation dedicated to the preservation, protection, and restoration of biodiversity," with a long-standing interest in polar bear protection including petitioning pursuant to the United States *Endangered Species Act* and subsequent litigation.<sup>54</sup> The Submitter asserts that the Submission "raises matters whose further study ... would advance the goals of" the NAAEC,<sup>55</sup> and that the Submitter has communicated with Canadian officials about the proposed listing of the polar bear as a species of special concern,<sup>56</sup> and later, "provided relevant Canadian officials detailed notice of Canada's failure" to list the polar bear as endangered.<sup>57</sup>

### III. ANALYSIS

28. The Secretariat now turns to examining whether Submission SEM-11-003 (*Protection of Polar Bears*) fulfils the requirements of Article 14(1) of the NAAEC. In the following paragraphs, the Secretariat treats each component of Article 14(1) in turn. As the Secretariat has found in previous Article 14(1) determinations,<sup>58</sup> Article 14(1) is not intended to be an insurmountable screening device. This means that the Secretariat will interpret every Submission in accordance with the NAAEC and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria.

#### A. Opening Paragraph of Article 14(1)

29. The opening paragraph of Article 14(1) of the NAAEC provides: "[t]he Secretariat may consider a submission from any non-governmental organization or person

---

<sup>52</sup> Submission, *supra* note 5 at 12.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* at 13; see Exhibit K: "Declaration of Kassia Siegel in Support of NAAEC Petition" [Exhibit K], paras 6-7 at 2.

<sup>55</sup> Submission, *supra* note 5 at 13; citing NAAEC, *supra* note 1, art 14(2)(b).

<sup>56</sup> Submission, *supra* note 5 at 13; see Exhibit G, *supra* note 41.

<sup>57</sup> Submission, *supra* note 5 at 13; see Exhibit J: "Center for Biological Diversity Letter regarding SARA Violations and NAAEC Petition" (Oct. 6, 2011) at 15 [Exhibit J].

<sup>58</sup> See, for example, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998), and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

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).

30. The Submitter, the Center for Biological Diversity, is a non-governmental organization as defined in Article 45(1) of the NAAEC:<sup>59</sup> it states that it is a US non-profit corporation incorporated under the laws of the State of New Mexico, that it “resides” in the State of Arizona, and has offices in various cities in the US. The Secretariat considers that the Submitter does not appear to be affiliated with, or under the direction of, any government.<sup>60</sup>
31. The Secretariat next considers whether the assertions relate to an alleged ongoing failure to effectively enforce environmental law.<sup>61</sup> The Submitter asserts that certain provisions of the SARA have not been enforced. While the particulars of the Submission date back to COSEWIC evaluations of the polar bear’s status in 1986, 1999, 2002 and 2008, the relevant provisions of the SARA came into force in 2003 and 2004.<sup>62</sup> The alleged effects of the asserted failures to effectively enforce the Act continue to the present day, as they include a lesser degree of protection for the polar bear as a result of its designation as a species of special concern rather than as threatened or endangered.<sup>63</sup> The assertions appear to concern an ongoing situation at the time of the Submission, and the Secretariat therefore considers that the temporal requirement in the opening paragraph of Article 14(1) is met by the Submission.
32. In addition, the Secretariat considers that the provisions of SARA identified by the Submitters are environmental law within the meaning of Article 45(2), as they are provisions of a statute the primary purpose of which is the protection of the environment through the protection of endangered species and their habitat.<sup>64</sup> The tasks set out in the SARA and identified in the submission and that together make up this scheme, such as COSEWIC’s role of engaging in scientific inquiry and reporting to decision-makers on the findings, and competent ministers’ and Cabinet’s roles in

---

<sup>59</sup> NAAEC, *supra* note 1. Article 45(1) states “... ‘non-governmental organization’ means any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government...”.

<sup>60</sup> Submission, *supra* note 5 at 12.

<sup>61</sup> The Secretariat has often discussed the need for assertions regarding failures to effectively enforce to meet the temporal requirement of concerning an apparently “ongoing” situation at the time of the Submission. These occasions include: SEM-97-03 (*Quebec Hog Farms*), Article 15(1) Notification to Council (29 October 1999) at 8 (“the Submission meets the temporal requirement in Article 14(1) because...the Submission asserts that many of the alleged violations are ongoing”); and SEM-99-02 (*Migratory Birds*), Article 14(1) and (2) Determination (23 December 1999) at 4 (“the Submission focuses on asserted failures to enforce that are ongoing. It thereby meets the jurisdictional requirement in the first sentence of Article 14(1).” See also SEM-09-004 (*Quebec Mining*), Article 14(1) Determination (20 October 2009) at n 31.

<sup>62</sup> SARA, *supra* note 4, s 142.

<sup>63</sup> See for example paras 3, 9 and 13, *supra*.

<sup>64</sup> NAAEC, *supra* note 1, Art 45(2)(a)(iii); see also SEM-06-005 (*Species at Risk*) Article 14(1) and (2) Determination (11 December 2006) at 4, where the Secretariat likewise found that provisions of SARA are environmental law within the meaning of Article 45(2).

following up by developing the necessary recovery strategies, action plans or management plans, appear integral to this purpose.

33. The Secretariat next analyzes whether the particular assertions in the Submission regarding SARA concern alleged failures of the “effective enforcement” of environmental laws, in accordance with the opening paragraph of NAAEC Article 14(1). An assertion should contain a positive statement that a Party is failing to effectively enforce its environmental law and according to Guideline 5.1, it should also sufficiently document the alleged failures of a Party, including any acts or omissions to enforce its environmental law.<sup>65</sup> The Secretariat has stated in previous determinations that assertions should be explicit and properly documented and reasoned.<sup>66</sup>
34. The Secretariat finds that the Submission meets the above requirements in relation to the assertions that Canada has failed to enforce the SARA as a whole, as well as subsections 15(2), 25(3) and 27(3): it outlines the relevant facts and is well-documented. The Submission describes in concrete terms how the alleged failures occurred, including the impact of alleged delays.
35. In particular, the Submission alleges that COSEWIC failed to “carry out its functions on the basis of the best available information,” as required by subsection 15(2) of the SARA. The “best available information” that the Submitter alleges Canada failed to consider includes information on the possible future effects of climate warming on polar bears, as indicated by climate models. In particular, the Submitters state that COSEWIC failed to take into account, and/or dismissed or ignored available information concerning climate change modeling that discounts impacts, leading to underestimated levels of risk to sub-populations and to the Canadian polar bear population as a whole.<sup>67</sup> The Submission makes a similar assertion with respect to information on designatable units of polar bears.<sup>68</sup> The Secretariat finds that these are assertions of failures to effectively enforce environmental law that the Secretariat may consider further.
36. The Submission goes on to state that, following the asserted failure by COSEWIC to make use of the best available information pursuant to subsection 15(2), the Minister then failed to meet the ninety-day deadline specified in subsection 25(3) of the Act.<sup>69</sup> This too is an assertion of a failure to effectively enforce environmental law that the Secretariat may consider further.
37. The Submitter asserts that the Minister then failed to take the action specified in subsection 27(3)<sup>70</sup> – namely, to “amend the List in accordance with COSEWIC’s

---

<sup>65</sup> Guidelines, *supra* note 2, ss 1.1 and 5.1.

<sup>66</sup> See for example SEM-10-003 (*Iona Wastewater Treatment*), Article 14(1)(2) Determination (16 December 2011) at 19.

<sup>67</sup> See paras 4-5, 14, 20, 26, *supra*.

<sup>68</sup> See paras 22-24, *supra*.

<sup>69</sup> See paras 3, 10, 16, *supra*.

<sup>70</sup> See para 17, *supra*.

assessment.” As described in paragraphs 16 to 19, above, the Submission elaborates further on the assertions involving subsections 25(3) and 27(3), and these as well are assertions the Secretariat may consider further.<sup>71</sup>

38. In summary, the Submitter’s assertions concerning the failure to effectively enforce the SARA<sup>72</sup> as a whole, as an integrated scheme for protecting species, including subsections 15(2), 25(3), and 27(3), all regard alleged failures to effectively enforce environmental law for the purpose of Article 14(1), and as defined in Article 45(2), and these assertions may be considered further by the Secretariat. COSEWIC procedures and guidelines may serve to inform the Secretariat’s further consideration of the Submission.
39. As noted at paragraph 21 above, the Submitter implies (by merely quoting from Exhibit H) that COSEWIC’s assessment was affected because allegedly “Canada gave ‘the most eager climate-sceptic among experienced polar bear scientists the task of assessing the status of polar bears for COSEWIC.’”<sup>73</sup> Neither the author of Exhibit H, nor the Submitter, expands on this assertion. The Secretariat considers that because this particular statement is not an assertion of a failure to effectively enforce environmental law,<sup>74</sup> it cannot be further reviewed by the Secretariat.
40. The Secretariat notes that the Submission addresses the application of the SARA, and does not deal with alleged deficiencies in the law itself.
41. The Secretariat next considers whether the Submission meets the criteria in paragraphs 14(1)(a) through (f).

***(a) Article 14(1)(a) The submission must be in writing in a language designated by that party in a notification to the Secretariat***

42. The Secretariat finds that the Submission meets the criterion in Article 14(1)(a) because the Submission is in writing in English, an official language designated by the Parties.

***(b) Article 14(1)(b) The submission must clearly identify the person or organization making the submission***

43. The Secretariat notes that the Submitter is a United States non-profit organization, incorporated under the laws of the State of New Mexico, with offices in several

---

<sup>71</sup> See paras 18-19, *supra*.

<sup>72</sup> See para 3, *supra*.

<sup>73</sup> Submission, *supra* note 5 at 9, citing Exhibit H, *supra* note 46.

<sup>74</sup> For example, no details are given about the general procedure for deciding on authorship of COSEWIC reports; no information is given about how the selection was made in this case; there is no explanation of the term “climate-sceptic,” let alone any substantive information connecting the author (who is not identified by name) with COSEWIC’s findings, or the requirements of the law at issue.

locations in the United States.<sup>75</sup> The submission clearly identifies the organization making the submission, and thus satisfies the criterion of Article 14(1)(b).

***(c) Article 14(1)(c) The submission must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based***

44. Most of the scientific research and government documents that the Submitter relies upon have been provided in the Exhibits. The exceptions are references to IUCN Polar Bear Specialist Group meeting reports,<sup>76</sup> the entry for *Ursus maritimus* in the 2011 IUCN Red List of Threatened Species,<sup>77</sup> the 2002 COSEWIC assessment and update status report,<sup>78</sup> the “Minister’s Response Statement for Polar Bear,”<sup>79</sup> scientific articles,<sup>80</sup> a COSEWIC press release,<sup>81</sup> the *Canada Gazette*,<sup>82</sup> an Environment Canada consultation document,<sup>83</sup> and two draft Government of Canada species at risk policies.<sup>84</sup> In each case where documents have not been provided by the Submitter, the documents are referenced and readily accessible.

45. The Secretariat considers that the Submission meets the criteria of Article 14(1)(c) and is in accordance with Guidelines 5.1 and 5.3.

***(d) Article 14(1)(d) The submission appears to be aimed at promoting enforcement rather than at harassing industry***

46. The Submission appears to be aimed at promoting enforcement of the laws at issue, rather than at harassing industry. In accordance with the guidance in Guideline 5.4(a), the Submission focuses on the alleged acts or omissions of the Party rather than on compliance by a particular company, and the Submitter is not a competitor that may stand to benefit economically from the Submission. The Submission therefore appears to meet the criteria of Article 14(1)(d).

***(e) Article 14(1)(e) requires that a submission indicate that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any***

---

<sup>75</sup> Submission, *supra* note 5 at 12; Exhibit K, *supra* note 54, para 2 at 1.

<sup>76</sup> Submission, *supra* note 5, at nn 2 and 5. The Uniform Resource Locators (URLs) for these reports were included, and the Secretariat was able use the URLs to access and download the reports.

<sup>77</sup> *Ibid* at n 8.

<sup>78</sup> *Ibid* at n 17.

<sup>79</sup> *Ibid* at nn 18 and 25; the first is the Minister’s Statement for 2004 and the second, for 2008.

<sup>80</sup> *Ibid* at n 33, citing Exhibit G, *supra* note 41 at 5-6, nn 33, 41 and 52-54.

<sup>81</sup> Submission, *supra* note 5 at nn 21 and 32; see COSEWIC, “Polar Bear and other Species at Risk Assessed by Independent Canadian Science Body” online: Committee on the Status of Endangered Wildlife in Canada < [http://www.cosewic.gc.ca/rpts/sct7\\_3\\_11\\_e.pdf](http://www.cosewic.gc.ca/rpts/sct7_3_11_e.pdf) >.

<sup>82</sup> Submission, *supra* note 5 at nn 19, 20, and 26-28.

<sup>83</sup> *Ibid* at n 30.

<sup>84</sup> *Ibid*.

47. The Submission includes in Exhibit G, the Submitter's 1 August 2011 letter to the Director, Conservation Service Delivery and Permitting at the Canadian Wildlife Service of Environment Canada, and Exhibit J, the Submitter's 6 October 2011 letter to Canada's federal ministers of the Environment, Fisheries and Oceans, and Canadian Heritage, to the Chair of COSEWIC, and to the Manager of the COSEWIC Secretariat. The latter October 2011 letter, the Submitter notes, included the August 2011 letter as an attachment. In the aforementioned letters, the Submitter expresses its concern about the polar bear and also expresses, in a fashion similar to the Submission, its concern about the process followed in assessing the status of the species. In the August 2011 letter, the Submitter also gives notice of its intention to "initiate the NAAEC process"<sup>85</sup> in relation to the matter. The Submitter asserts that "as of the date of this [Submission], the Center [for Biological Diversity (the Submitter)] has received no response."<sup>86</sup>
48. On 27 October 2011, the GiC added the Polar Bear to Part 4 of Schedule 1 to the *Species at Risk Act*.<sup>87</sup> Submission SEM-11-003 (*Protection of Polar Bears*) was received by the Secretariat on 5 December 2011.
49. The Secretariat is satisfied that the Submitter communicated the matter to relevant Canadian authorities in writing, and notes that the Submitter had received no reply by the date of the Secretariat's receipt of the Submission. The Submission thus meets the criteria of Article 14(1)(e).

***(f) Article 14(1)(f) requires that the Submission be filed by a person or organization residing or established in the territory of a Party***

50. As mentioned in paragraph 30, *supra*, the Secretariat finds that the Submission was filed by the Center for Biological Diversity, a non-governmental organization established in the United States of America, and that the Submission thus meets the requirements of Article 14(1)(f).

## **B. Article 14(2) Factors**

51. The Secretariat reviews a Submission under Article 14(2) if it finds that the Submission meets the criteria set out in NAAEC Article 14(1). Having determined in the preceding section that the Submission indeed meets the requirements of NAAEC Article 14(1), the Secretariat now reviews the Submission under Article 14(2), in order to determine whether the Secretariat should request a response from the Party. The requirements under Article 14(2) serve to orient the Secretariat in determining whether a response from the Party is warranted.<sup>88</sup>

---

<sup>85</sup> See Exhibit J, *supra* note 57 at 15.

<sup>86</sup> Submission, *supra* note 5 at 11-12; See Exhibit G, *supra* note 41 and Exhibit J, *supra* note 57.

<sup>87</sup> "Order Amending SARA," *supra* note 30. [Note: The Submission indicates that listing occurred on 9 November, but the Order was registered on 27 October 2011. The Order was published in the *Canada Gazette*, Part II on 9 November 2011.]

<sup>88</sup> SEM-10-003 (*Iona Wastewater Treatment*), Article 14(1) and (2) Determination (16 December 2011).

52. NAAEC Article 14(2) provides that:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the Submission alleges harm to the person or organization making the Submission;
- (b) the Submission, alone or in combination with other Submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the Submission is drawn exclusively from mass media reports.<sup>89</sup>

The Secretariat reviews each of these considerations in turn.

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

53. First, the Secretariat examines whether the Submission alleges harm to the person or organization making the Submission under Article 14(2)(a). In accordance with guideline 7.4(a), the Secretariat considers whether the harm alleged by the Submitter is due to the asserted failure to effectively enforce environmental law (in this case, the listing and protection schemes of the *Species at Risk Act*).

54. The Submitter states it is “dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands,” and “has over 320,000 members and online activists residing within the US, in Canada, and abroad.”<sup>90</sup>

55. The Submitter links the alleged harm to the polar bear species as a result of the species’ not being listed as endangered or threatened under the Act, to the Submitter’s activities in protecting biological diversity.<sup>91</sup> The Submitter relates “the health and vigor of human societies” to “the integrity and wildness of the natural environment,”<sup>92</sup> and describes the Submitter’s programs, including its “Climate Law Institute, an internal coordinating institution with the primary mission of curbing global warming and sharply limiting its damaging effects on endangered species and their habitats.”<sup>93</sup> The Submitter states that its “members and supporting activists throughout North America are vitally concerned with polar bear conservation” and appreciate and enjoy the species’ habitat as well.<sup>94</sup> The Submitter alleges that “the Center and its members will be irreparably harmed if Canada continues to fail to

---

<sup>89</sup> NAAEC, *supra* note 1, art 14(2).

<sup>90</sup> Submission, *supra* note 5 at 12; Exhibit K, *supra* note 54, para 2 at 1.

<sup>91</sup> Submission, *supra* note 5 at 12-13.

<sup>92</sup> *Ibid*; see Exhibit K, *supra* note 54 at para 3.

<sup>93</sup> Exhibit K, *supra* note 54 at para 4.

<sup>94</sup> *Ibid* at para 15.

protect” the polar bear<sup>95</sup> and specifically, that “Canada’s failure to list the polar bear as an endangered species ... harms the polar bear and our work to protect the species.”<sup>96</sup>

56. 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 failures in enforcing the SARA, in accordance with Guideline 7.4(a).
57. In accordance with Guideline 7.4(b), the Secretariat considers whether the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.
58. The harm alleged in the Submission is related to the alleged denial of a higher level of protection than has been accorded to the polar bear, as a result of its being designated a “species of special concern” rather than “threatened” or “endangered.” The definition of “environmental law” in Article 45(2) provides that “the protection of the environment” can take place, among other possible means, through “ ... (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory ... .”
59. The Secretariat also concludes that the harm alleged in the Submission relates to the protection of the environment in accordance with Article 45(2) and Guideline 7.4(b).

***(b) “the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement”***

60. The Secretariat next considers whether the Submission raises matters that, given further study in the Articles 14 and 15 process, would advance the goals of the Agreement. The Submission has as its focus the implementation of the *Species at Risk Act*, the Purposes section of which reads:

The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.<sup>97</sup>

61. Among the relevant objectives listed in Article 1 of the NAAEC, those listed in paragraphs 1(a), (c), (f), (g) and (h),<sup>98</sup> in particular, could in the view of the

---

<sup>95</sup> *Ibid* at para 16.

<sup>96</sup> *Ibid* at para 11.

<sup>97</sup> SARA, *supra* note 4, s 6 (“Purposes”).

<sup>98</sup> Article 1: “The objectives of this Agreement are to:

Secretariat be advanced by further study of the Submission. The Secretariat considers that the Submission thus adequately addresses the matters set out in Article 14(2)(b).

*(c) “private remedies available under the Party’s law have been pursued”*

62. The Secretariat’s consideration of Article 14(2)(c) is informed by Guidelines 5.6(c) and 7.5.
63. The Submitter states that it “submitted detailed, substantive comments on the [GiC’s ...] proposal to list the polar bear as a ‘species of special concern’”<sup>99</sup> under Canadian law. The Submitter’s comments appear to have been submitted in response to the “Proposed Regulatory Text” published in the July 2, 2011 issue of the *Canada Gazette*, Part I.<sup>100</sup> Commenting on the publication of proposed Orders may be considered an “action ... available under a Party’s law,” in view of the fact that Canada’s law-making process includes an opportunity to make representations on proposals for regulations.
64. The Secretariat is not aware that any other private remedy in relation to the subject-matter of the Submission has been pursued by the Submitter under Canadian law. Based on the information before it, the Secretariat does not consider that the preparation of a factual record on this Submission will duplicate or interfere with any private remedies.<sup>101</sup>
65. The Secretariat also finds that submitting its comments to the Government of Canada on the proposed order, prior to making the present Submission, was a “reasonable action” on the part of the Submitter in accordance with Guideline 7.5(b),<sup>102</sup> particularly considering that the Submitter is based in the United States. The Secretariat notes that the Submitter asserts that as of the date of the Submission, it had received no response from the Party to its comments.

- 
- (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; [...]
  - (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna; [...]
  - (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;
  - (h) promote transparency and public participation in the development of environmental laws, regulations and policies; [...].

<sup>99</sup> See Exhibit K, *supra* note 54, para 10; citing Exhibit G, *supra* note 41.

<sup>100</sup> The text of the proposal in the *Canada Gazette* reads in part: “Notice is hereby given that the [GiC], pursuant to section 27 of the [SARA], proposes to make the annexed *Order Amending Schedule I to the [SARA]*. Interested persons may make representations with respect to the proposed Order within 30 days after the date of publication of this notice.” “Proposed Regulatory Text,” (2 July 2011) C Gaz I, 2144 at 2170.

<sup>101</sup> See Guideline 7.5(a), *supra* note 2.

<sup>102</sup> Guideline 7.5(b), *ibid.*

66. In light of the foregoing, the Secretariat finds that the Submission thus adequately addresses the matters set out in Article 14(2)(c).

*(d) “the submission is drawn exclusively from mass media reports”*

67. The Submission does not appear to be “drawn exclusively from mass media reports.” The Submission makes use of published scientific journal articles, reports and assessments on the polar bear by domestic and international science organizations, government science and policy documents, and includes the Submitter’s own documentation of the alleged facts.

68. The Secretariat thus finds that the Submission adequately addresses the matters set out in Article 14(2)(d).

#### **IV. DETERMINATION**

69. In light of the foregoing, and having considered the Submission and its documentation, the Secretariat determines that Submission SEM-11-003 (*Protection of Polar Bears*) meets the requirements of Article 14(1) of the Agreement. Having also considered the Submission in light of Article 14(2) and the relevant Guidelines, the Secretariat further determines that the Submission warrants requesting a response from the Government of Canada in accordance with Article 14(3) of the Agreement and Guidelines 9.2 to 9.6.

70. Any response from the Government of Canada should, to the extent possible, include information concerning the assertions that Canada is failing to effectively enforce its environmental law, namely the SARA, including subsections 15(2), 25(3), and 27(3).

71. In any response, the Party may wish to include information regarding the Submitters’ assertions that Canada is failing to effectively enforce the *Species at Risk Act*. In particular, the Party may wish to include information about

(a) the nature and content of the information taken into account by COSEWIC and/or by the Minister and/or by the GiC, in light of the Submitter’s assertion that COSEWIC failed to “carry out its functions on the basis of the best available information,” as required by subsection 15(2) of the SARA;<sup>103</sup>

(b) the nature, content and result of any consultations undertaken by the Minister pursuant to paragraphs 27(2)(a), (b) and (c) of the SARA, prior to his recommendation to the GiC in respect of the classification of the polar bear species;

---

<sup>103</sup> See para 35, *supra*.

(c) the asserted failures to meet statutory deadlines; and

(d) the effects of (a) and (b), above, on the decisions made in classifying the polar bear species.

72. The above are only examples of possible information the Party may wish to provide and are not meant to limit or constrain the breadth or type of information provided by the Party.

73. Any response from the Government of Canada to the abovementioned Submission in accordance with Article 14(3) should be received normally within thirty working days of this Determination or in exceptional circumstances, within sixty working days. The Secretariat therefore requests that any response be provided by Wednesday, 23 January 2013. A copy of the Submission and its exhibits has been forwarded to the Party under separate cover.

74. Recognizing that a response from the government of Canada may contain confidential information and that the Secretariat shall make public its reasons to recommend or not recommend a factual record, the Secretariat recalls that Guideline 17.3 encourages the Party to provide a summary of any confidential information, or a general explanation of why information is considered confidential, for public disclosure.

Respectfully submitted,

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*  
per: Hugh Benevides  
Legal Officer  
Submissions on Enforcement Matters Unit

*(original signed)*  
per: Dane Ratliff  
Director  
Submissions on Enforcement Matters Unit

cc: Mr. Dan McDougall, Canada Alternate Representative, Environment Canada  
Mr. Michael Stahl, US Alternate Representative, EPA  
Mr. Enrique Lendo, Mexico Alternate Representative, Semarnat  
Mr. Evan Lloyd, CEC Executive Director  
Submitters

## APPENDIX – Relevant provisions of the *Species at Risk Act*

[...]

2. (1) The definitions in this subsection apply in this Act.

“*action plan*” means an action plan included in the public registry under subsection 50(3) and includes any amendment to it included in the public registry under section 52. [...]

“*competent minister*” means

(a) the Minister responsible for the Parks Canada Agency with respect to individuals in or on federal lands administered by that Agency;

(b) the Minister of Fisheries and Oceans with respect to aquatic species, other than individuals mentioned in paragraph (a); and

(c) the Minister of the Environment with respect to all other individuals. [...]

“*COSEWIC*” means the Committee on the Status of Endangered Wildlife in Canada established by section 14.

“*critical habitat*” means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species. [...]

“*endangered species*” means a wildlife species that is facing imminent extirpation or extinction. [...]

“*federal land*” means

(a) land that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above that land;

(b) the internal waters of Canada and the territorial sea of Canada; and

(c) reserves and any other lands that are set apart for the use and benefit of a band under the *Indian Act*, and all waters on and airspace above those reserves and lands. [...]

“*List*” means the List of Wildlife Species at Risk set out in Schedule 1.

“*listed*” means listed on the List.

“*Minister*” means the Minister of the Environment. [...]

“*public registry*” means the registry established under section 120.

“*recovery strategy*” means a recovery strategy included in the public registry under subsection 43(2), and includes any amendment to it included in the public registry under section 45.

“*residence*” means a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating. [...]

“*species at risk*” means an extirpated, endangered or threatened species or a species of special concern.

“*species of special concern*” means a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats. [...]

“*threatened species*” means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction. [...]

“*wildlife species*” means a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism, other than a bacterium or virus, that is wild by nature and

(a) is native to Canada; or

(b) has extended its range into Canada without human intervention and has been present in Canada for at least 50 years.

(2) For the purposes of the definition “*wildlife species*” in subsection (1), a species, subspecies, variety or geographically or genetically distinct population is, in the absence of evidence to the contrary, presumed to have been present in Canada for at least 50 years.

(3) A reference to a competent minister in any provision of this Act is to be read as a reference to the competent minister in respect of the wildlife species, or the individuals of the wildlife species, to which the provision relates. [...]

**15.** (2) COSEWIC must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge. [...]

**25.** (1) When COSEWIC completes an assessment of the status of a wildlife species, it must provide the Minister and the Canadian Endangered Species Conservation Council with a copy of the assessment and the reasons for it. A copy of the assessment and the reasons must also be included in the public registry. [...]

(3) On receiving a copy of an assessment of the status of a wildlife species from COSEWIC under subsection (1), the Minister must, within 90 days, include in the public registry a report on how the Minister intends to respond to the assessment and, to the extent possible, provide time lines for action. [...]

**27.** (1) The Governor in Council may, on the recommendation of the Minister, by order amend the List in accordance with subsections (1.1) and (1.2) by adding a wildlife species, by reclassifying a listed wildlife species or by removing a listed wildlife species, and the Minister may, by order, amend the List in a similar fashion in accordance with subsection (3).

(1.1) Subject to subsection (3), the Governor in Council, within nine months after receiving an assessment of the status of a species by COSEWIC, may review that assessment and may, on the recommendation of the Minister,

(a) accept the assessment and add the species to the List;

(b) decide not to add the species to the List; or

(c) refer the matter back to COSEWIC for further information or consideration.

(1.2) Where the Governor in Council takes a course of action under paragraph (1.1)(b) or (c), the Minister shall, after the approval of the Governor in Council, include a statement in the public registry setting out the reasons.

(2) Before making a recommendation in respect of a wildlife species or a species at risk, the Minister must

(a) take into account the assessment of COSEWIC in respect of the species;

(b) consult the competent minister or ministers; and

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, consult the wildlife management board.

(3) Where the Governor in Council has not taken a course of action under subsection (1.1) within nine months after receiving an assessment of the status of a species by COSEWIC, the Minister shall, by order, amend the List in accordance with COSEWIC's assessment. [...]

**32.** (1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species. [...]

**33.** No person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.

**34.** (1) With respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*, sections 32 and 33 do not apply in lands in a province that are not federal lands unless an order is made under subsection (2) to provide that they apply.

(2) The Governor in Council may, on the recommendation of the Minister, by order, provide that sections 32 and 33, or either of them, apply in lands in a province that are not federal lands with respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*.

(3) The Minister must recommend that the order be made if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.

(4) Before recommending that the Governor in Council make an order under subsection (2), the Minister must consult

(a) the appropriate provincial minister; and

(b) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board.

**35.** (1) Sections 32 and 33 apply in each of the territories in respect of a listed wildlife species only to the extent that the Governor in Council, on the recommendation of the Minister, makes an order providing that they, or any of them, apply.

(2) Subsection (1) does not apply

(a) in respect of individuals of aquatic species and their habitat or species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*; or

(b) on land under the authority of the Minister or the Parks Canada Agency.

(3) The Minister must recommend that the order be made if the Minister is of the opinion that the laws of the territory do not effectively protect the species or the residences of its individuals.

(4) Before recommending that an order be made under subsection (1), the Minister must

(a) consult the appropriate territorial minister; and

(b) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, consult the wildlife management board. [...]

**65.** If a wildlife species is listed as a species of special concern, the competent minister must prepare a management plan for the species and its habitat. The plan must include measures for the conservation of the species that the competent minister considers appropriate and it may apply with respect to more than one wildlife species. [...]

**68.** (1) Subject to subsection (2), the competent minister must include a proposed management plan in the public registry within three years after the wildlife species is listed as a species of special concern.

(2) With respect to a wildlife species that is set out in Schedule 1 as a species of special concern on the day section 27 comes into force, the competent minister must include a proposed management plan in the public registry within five years after that day.

(3) Within 60 days after the proposed management plan is included in the public registry, any person may file written comments with the competent minister.

(4) Within 30 days after the expiry of the period referred to in subsection (3), the competent minister must consider any comments received, make any changes to the proposed management plan that he or she considers appropriate and finalize the management plan by including a copy of it in the public registry. [...]