

**Reasons for Council Instructions,
by a Two-Thirds Vote, Regarding
Submission SEM-12-001 (*British Columbia (BC) Salmon Farms*)**

Pursuant to its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation responsible for overseeing the implementation of the *North American Agreement on Environmental Cooperation* (NAAEC or the “Agreement”), the Council of the Commission for Environmental Cooperation (the “Council”), hereby makes public the reasons for its instructions, decided by a two-thirds majority, to the Secretariat regarding submission SEM-12-001 (*BC Salmon Farms*).

1. Notification by a Party of pending judicial and administrative proceedings under NAAEC Article 14(3)(a)

- a. Pending proceedings under the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”)

NAAEC Article 14(3) states the following:

The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further. [emphasis added]

For further clarification, NAAEC Article 45(3) defines a “judicial or administrative proceeding” as:

(a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and (b) an international dispute resolution proceeding to which the Party is party.

To support the implementation of Article 14(3), Guideline 9.6 of the Guidelines states that:

If, in its response under Article 14(3), the Party informs the Secretariat and explains in writing that the matter raised in the submission is the subject of a pending judicial or administrative proceeding, as defined in Article 45(3) of the Agreement, the Secretariat will proceed no further with the submission and will promptly notify the Submitter and the Council, in writing, that the submission process is terminated without prejudice to the Submitter’s ability to file a new submission. [emphasis added]

According to Article 14(3), the Party named in a submission is responsible for advising the Secretariat of pending judicial or administrative proceedings in a timely manner. The NAAEC and the Guidelines are very clear on the steps to be taken following the Party notification: the Secretariat is required to proceed no further with the submission and promptly notify the Council and Submitter that the submission file has been terminated without prejudice to the submitter’s ability to file a new submission. The Secretariat is neither directed nor authorized (explicitly or implicitly) by the NAAEC or the Guidelines to perform an additional analysis of a Party’s

notification, including assessing the validity of the pending proceedings addressed in such notification.

b. Pending proceedings related to the *BC Salmon Farms* submission

The submission provided information regarding a private remedy being pursued by one of the Submitters, the Kwikwasu'tinuxw Haxwa'mis First Nation (KAFN), "against the British Columbia government over the negative impact of commercial salmon feedlots on wild salmon" (*Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*). The Government of Canada was later added as a defendant in this suit.

On 12 February 2013, Canada sent a letter to the Secretariat regarding the KAFN case referenced in the submission. The letter explained that the submission and the KAFN case both allege government mismanagement, through authorization and regulation, of the salmon aquaculture sector in British Columbia, resulting in negative impacts on wild salmon stocks and habitat. More specifically, both instances concern issues related to sea lice, infectious diseases, and the application of pest and disease treatments. Moreover, Canada's letter indicated that the representative action filed by Chief Chamberlin on his own behalf and for other members of the KAFN had not been discontinued and that continuing the *BC Salmon Farms* submission process could duplicate and interfere with the KAFN case.

In its notification, dated 4 October 2013, Canada fulfilled its responsibility under Article 14(3) of the Agreement and advised the Secretariat that "[Government of Canada] records indicate that the representative action of Chief Chamberlin on behalf of the Kwicksutainneuk/Ah-Kwa-Mish First Nation has not been discontinued," and therefore constitutes a "pending judicial or administrative proceeding" in the sense of Article 45(3)(a) of the Agreement —namely a judicial proceeding— concerning the effective enforcement of subsection 36(3) of the *Fisheries Act*. Furthermore, in its notification, Canada also advised the Secretariat that another proceeding had commenced regarding the same enforcement matter raised in the submission (the *Morton* case).

In a subsequent letter dated 17 December 2013, Canada provided further clarification regarding the subject matter of the *Morton* case and the status of the KAFN case. In that letter, Canada explained that the submission and the *Morton* case both address the same matter addressed in the submission, namely: Canada's enforcement of its environmental law with regard to the same fish species (salmon), specifically with regard to the licencing terms for aquaculture operations in the same geographic location (British Columbia), and concerning the interaction between farms and wild salmon habitats. With regard to the KAFN case, Canada's letter makes clear that "[u]nless it is discontinued by the plaintiff [Chief Robert Chamberlin] or otherwise resolved, the representative action remains open, and Federal Crown officials are and will continue to be pursuing the case." As of the signing of this Council Resolution, the action has not been discontinued or otherwise resolved.

c. Analysis of the matter at issue in the *BC Salmon Farms* submission and the 2009 KAFN pending proceeding

The contentions of the *BC Salmon Farms* submission and the KAFN lawsuit appear to be framed by differing claims: the KAFN’s 2009 lawsuit alleges a failure to protect aboriginal fishing rights under section 35 of the *Canadian Constitution Act, 1982*, while the *BC Salmon Farms* submission asserts a failure to effectively enforce subsection 35(2) and subsection 36(3) of the *Fisheries Act*. However, the matter at issue in both instances is the same: the Government’s decision to allow the operation of salmon farms in British Columbia, which allegedly contaminate and disturb waters inhabited by fish.

The following table highlights the fundamental similarities between the matter at issue in the *BC Salmon Farms* submission and the KAFN’s “Statement of Claim” for the pending 2009 suit, drawing on excerpts from each.

“The matter” asserted in the <i>BC Salmon Farms</i> submission	“The matter” presented in KAFN pending proceeding <i>Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)</i>
<i>Fisheries Act</i> subsection 36(3) “[...] no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.”	
Government allowing deposits of deleterious substances into water	
“the <u>addition of deleterious substances</u> to fish habitat (section 36)”	“allowing the <u>pollution</u> of Wild Salmon habitat” “permitting <u>Salmon Farms that allow the transmission of parasites and disease</u> to Wild Salmon by the use of permeable cages <u>causing free flow of contaminated water and waste</u> between the Salmon Farms and the marine environment”
Exposure to parasites (sea lice)	
“ <u>exposing wild salmon to amplified levels of parasites such as sea lice</u> viral and bacterial diseases toxic chemicals and concentrated waste”	“ <u>failing to prevent or adequately manage the concentration of parasites, including sea lice</u> ”
Transmission of disease from farmed to wild salmon	
“The potential for British Columbia salmon <u>feedlots to introduce, amplify and spread pathogens</u> also jeopardizes the health of every other wild salmon run along the Pacific Coast, as well as the entire West Coast salmon fishing industry, because <u>these stocks co-mingle.</u> ”	“ <u>failing to prevent or adequately manage the concentration of infectious diseases</u> at the Salmon Farms and the <u>transmission</u> of these infectious diseases <u>from the Salmon Farms to the Wild Salmon</u> ”

Note: all emphasis is added.

It is, therefore, the Council’s majority determination that in various instances, including its Response, Canada has fulfilled its responsibility under Article 14(3) of the Agreement to advise the Secretariat that the matter at issue in the submission is the subject of pending judicial

proceedings. Accordingly, the Council's majority position is that the Secretariat should have terminated the submission in a timely manner pursuant to the Agreement and the Guidelines.

2. Further information on government actions taken by Canada

In support of the NAAEC objectives of transparency, openness and public participation, the Council would also like to share information with the Submitters and interested members of the public regarding actions taken by Canada directly related to the matter raised in the *BC Salmon Farms* submission.

The Government of Canada has recently proposed new *Aquaculture Activities Regulations* under *Fisheries Act* sections 35 and 36 (published in the *Canada Gazette Part I* on 23 August 2014) in order to continue to effectively enforce the *Fisheries Act* in the context of aquaculture operations.

The objectives of the proposed regulations are to:

- provide national coherence in the environmental management of licensed aquaculture activities;
- complement the objectives of the *Pest Control Products Act*, the *Food and Drugs Act*, the *Health of Animals Act*, and the *Canadian Environmental Protection Act, 1999*;
- streamline and coordinate a complex federal/provincial regulatory environment; and
- increase public transparency regarding the regulation of the aquaculture sector.

Background information on the *Aquaculture Activities Regulations* can be found at:

<http://www.dfo-mpo.gc.ca/aquaculture/management-gestion/aar-raa-proposition-eng.htm>. The Regulatory Impact Analysis Statement (RIAS) for the *Aquaculture Activities Regulations* also provides details on the proposed regulations and can be accessed at: <http://www.gazette.gc.ca/rp-pr/p1/2014/2014-08-23/html/reg1-eng.php>.