
Secretariat of the Commission for Environmental Cooperation

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

Submitters:	Center for Biological Diversity (US) (Represented by Environmental Law Clinic, University of Denver Sturm College of Law), Pacific Coast Wild Salmon Society (Canada), Kwikwasu'tinuxw Haxwa'mis First Nation (Canada), Pacific Coast Federation of Fishermen's Associations (US)
Concerned Party:	Canada
Date received:	10 February 2012
Date of this determination:	12 September 2013
Submission I.D.:	SEM-12-001 (BC Salmon Farms)

I. INTRODUCTION

1. On 13 February 2012, the Center for Biological Diversity (represented by the Environmental Law Clinic at the University of Denver), the Pacific Coast Wild Salmon Society (Canada), the Kwikwasu'tinuxw Haxwa'mis First Nation (Canada), and the Pacific Coast Federation of Fishermen's Associations (US) (the "Submitters") filed SEM 12-001 (*BC Salmon Farms*) (the "Submission"), a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or the "Agreement"),¹ 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").²

¹ *North American Agreement on Environmental Cooperation*, United States, Canada and Mexico, 14-15 September, 1993, Can TS 1994 No 3, 32 ILM 1480 (entered into force 1 January, 1994) [NAAEC], online: CEC <www.cec.org/NAAEC>.

² 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 former Guidelines] [Guidelines]. 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) [the new Guidelines] online:

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 where certain circumstances prevail, it proceeds no further with its consideration of the submission.³

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. In submission SEM-12-001 (*BC Salmon Farms*), the Submitters assert⁴ that the Government of Canada (“Canada” or the “Party”) is failing to effectively enforce its environmental law, specifically section 35 and subsection 36(3) of the *Fisheries Act* (the “Act”).⁵
4. In relation to subsection 35(2), the Submitters assert that

[the federal Department of Fisheries and Oceans or “DFO”] is failing to enforce § 35 of the Fisheries Act by not ensuring that salmon aquaculture does not harmfully alter, disrupt, or destroy fish habitat. [...] DFO has allowed over 100 salmon feedlots to operate in this same habitat, despite the fact that salmon feedlots harmfully alter and degrade this environment. [...]

By anchoring millions of sea lice infested salmon in pens along wild salmon migratory corridors, salmon feedlots reduce the habitat’s capacity to provide young salmon with safety and respite. Instead, susceptible young salmon are subjected to sea lice infection rates at approximately seventy times greater than natural levels. Thus each salmon feedlot is responsible for creating a harmful alteration, disruption, or destruction of fish habitat. *Despite § 35(1)’s prohibition*

CEC <www.cec.org/guidelines>. The current Determination was done in accordance with the former Guidelines. For all subsequent steps in the Articles 14 and 15 process, the current Submission will be subject to the new Guidelines.

³ Previous Secretariat Determinations and Factual Records can be found on the CEC’s website at: <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.

⁴ The Submitters provided a “revised submission” on 13 February 2012, and all citations regarding “the submission” herein, refer to the revised, rather than the “original submission” of 7 February 2012. Submission SEM-12-001 (*BC Salmon Farms*) [Submission] at 1, 8-11; see also Exhibit F: Letter from Kevin Lynch and Professor Michael Harris to Hon. Keith Ashfield (29 December, 2011) at 8-11 [Exhibit F].

⁵ RSC 1985, c F-14 [Act].

*on harmful alteration, disruption, or destruction of fish habitat, the DFO may issue a § 35(2) authorization for harmful alteration, disruption, or destruction of fish habitat. Authorizations are available if the residual impacts of a project cause, or result in harmful alteration, disruption, or destruction of fish habitat. Because each salmon feedlot is responsible for creating harmful alteration, disruption, or destruction of fish habitat, each feedlot in operation must be authorized by DFO. In 2009, there were more than 130 salmon feedlot sites in operation B.C. [sic].*⁶

5. The submitters assert in Part D (“Fish Feedlot Impacts from Toxic Chemicals, Pollution and Escaped Invasive Fish”) that drugs, chemicals, pesticides and disinfectants, as well as “the risk of escape of non-native fish from pens,” are examples of harmful alteration, disruption or destruction of fish habitat (“HADDs”).⁷
6. The Submission continues:

The location of the salmon feedlots reduces the coastlines’ ability to support the natural life cycle of wild salmon [sic] by introducing unnaturally high levels of disease and sea lice, to which young wild salmon are particularly vulnerable. The result is the rapid decline and predicted local extinction of B.C. wild salmon. *By failing to authorize harmful alteration, disruption, or destruction of fish habitat for each individual salmon feedlot and enforce the “no net loss” of fish habitat principle, the Canadian government is failing to enforce § 35 of the Fisheries Act.*⁸

The Submitters thus assert that the failure to enforce section 35 of the Fisheries Act includes a failure to issue authorizations pursuant to subsection 35(2).

⁶ Submission, *supra* note 4 at 9-10 (italics added).

⁷ *Ibid* at 6; Exhibit C: “Fish Feedlot Impacts from Toxic Chemicals, Pollution and Escaped Invasive Fish” [Exhibit C], citing several references that note harmful alteration, disruption or destruction resulting from pollution related to net-pen salmon farms (Kenneth M. Brooks et al, “Environmental Effects Associated with Marine Netpan Waste with Emphasis on Salmon Farming in the Pacific Northwest” in Robert R. Stickney & James P. McVey, eds, *Responsible Marine Aquaculture* (New York: CABI Publishing, 2002) 159 [Brooks]; Adrian M. H. DeBruyn et al, “Ecosystemic Effects of Salmon Farming Increase Mercury Contamination in Wild Fish” (2006) 40 *Environmental Science and Technology* 3489 at 3492) and resulting from farmed salmon escapees (Julia Gardner & David L. Peterson, *Making Sense of the Aquaculture Debate: Analysis of the Issues Related to Netcage Salmon Farming and Wild Salmon in British Columbia* (Vancouver: Pacific Fisheries Resource Conservation Council, 2003); Alexandra Morton & John Volpe, “A Description of Escaped Farmed Atlantic Salmon *Salmo Salar* Captures and Their Characteristics in One Pacific Salmon Fishery Area in British Columbia Canada, in 2000” (2002) 9 *Alaska Fishery Research Bulletin* 102; Eva B. Thorstad et al, *Incidence and Impacts of Escaped Farmed Atlantic Salmon in Nature* (np: World Wildlife Fund, Inc., 2008), online: Food and Agriculture Organization of the United Nations <http://ftp.fao.org/fi/document/aquaculture/aq2008_09/root/aj272e.pdf>; John P. Volpe et al, “Evidence of Natural Reproduction of Aquaculture-escaped Atlantic Salmon in a Coastal British Columbia River” (2000) 14 *Conservation Biology* 899; and John P. Volpe et al, “Competition Among Juvenile Atlantic Salmon (*Salmo salar*) and Steelhead (*Oncorhynchus mykiss*): Relevance to Invasion Potential in British Columbia” (2001) 58 *Canadian Journal of Fisheries and Aquatic Sciences* 197).

⁸ Submission, *supra* note 4 at 10-11 (italics added).

7. The Submission includes information about the locations of the salmon farms in question.⁹
8. The Submission also includes information about the alleged threats of virus transmission from farmed salmon to wild salmon. It discusses four diseases, namely Bacterial Kidney Disease (BKD), Infectious Hematopoietic Necrosis (IHN), infectious salmon anemia virus (ISAv) and Furunculosis.¹⁰ In relation to ISAv, the Submitters state that

In Canada, ISAv only became a ‘federally reportable disease’ in 2011, meaning that now all suspected or confirmed cases must be immediately reported to the Canadian Food Inspection Agency (CFIA). Yet over 1,100 reports by a B.C. aquaculture veterinarian of ‘classic lesions’ associated with ISAv were never reported to the CFIA.¹¹

The Submitters also assert that “Evidence presented at the Cohen Commission in 2010 revealed that DFO scientists [...] detected signs of ISAv as long ago as 2002 in 117 wild salmon [...] but the Canadian government neither fully investigated nor allowed a draft research paper on the findings by a DFO researcher be published.”¹² The Submitters also assert that Canada had some obligation to report the presence of ISAv “per the World Animal Health Organization.”¹³

9. In relation to subsection 36(3) of the Act, in section “D. Fish Feedlot Impacts from Toxic Chemicals, Pollution and Escaped Invasive Fish,” the Submitters allege that “Salmon feedlots add drugs such as antibiotics and therapeutants to salmon feed, and chemicals such as antifoulants, pesticides and disinfectants are also released into the environment by feedlots in an attempt to control unwanted organisms and diseases.”¹⁴

⁹ See *Supplement – Appendices to Fish Health Report 2008*, Appendix 7.2, “Map of Fish Health Zones in British Columbia” at 5. Supplement to British Columbia Ministry of Agriculture and Lands, *Fish Health Program Annual Report 2008* (British Columbia, 2008) at 58, online: BCMAL <http://www.agf.gov.bc.ca/ahc/fish_health/Fish_Health_Supplement_APPENDICES_2008.pdf> and <http://www.agf.gov.bc.ca/ahc/fish_health/Fish_Health_Report_2008.pdf> [BCMAL 2008], cited in Exhibit C *supra* note 7 at 2; and “British Columbia Salmon Farm Tenures” map in Sarah K. Cox, *Diminishing Returns: An Investigation into the Five Multinational Corporations that Control British Columbia’s Salmon Farming Industry* (Victoria: Raincoast Conservation Society, 2004) [Cox] at iv, cited in Exhibit C, *supra* note 7 at 3.

¹⁰ Submission, *supra* note 4 at 3-5.

¹¹ *Ibid* at 4.

¹² *Ibid*. The Cohen Commission was established under Part I of the federal *Inquiries Act* (RSC 1985, c I-11). See “Terms of Reference for the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River,” established by Order in Council (5 November 2009) online: Cohen Commission <<http://www.cohencommission.ca/en/About.php>> (last visited 5 August 2013) [Cohen Commission]. The Cohen Commission issued its final report in October 2012.

¹³ *Ibid*.

¹⁴ Submission, *supra* note 4 at 6; Exhibit C, *supra* note 7, including BCMAL 2008, *supra* note 9 at 53-55; Exhibit F, *supra* note 4 at 5-6.

10. The Submitters also allege that “sal[m]on feedlots in B.C. use the neurotoxic chemical emamectin benzoate, trade named SLICE, to treat infestations of sea lice, despite evidence [that] it is deleterious to natural fish habitat.”¹⁵
11. In section “F. 2. Section 36,” the Submitters paraphrase subsection 36(3),¹⁶ saying that it “prohibits the deposit of deleterious substances into Canadian waters.” The Submitters say that the failure to enforce “section 36” “stems from” the government’s failure to prohibit the use of emamectin benzoate, “despite evidence that this substance is deleterious to natural fish habitat.”¹⁷
12. The Submitters also allege that “SLICE may soon be replaced by Alphamax,” and that “Alphamax is described as being acutely toxic to all crustaceans,” and further that “if DFO allows salmon feedlots to add Alphamax to the water it [DFO] will again be failing to enforce the Fisheries Act.”¹⁸
13. The Submitters propose that Canada should prohibit the use of SLICE in the wild salmon’s habitat.¹⁹
14. The Submitters also assert that the Canadian *Fish Health Protection Regulations*²⁰ were “waived” in 2004, in order to permit the importation of Atlantic Salmon eggs from Iceland that, they allege, “did not meet these regulations.”²¹

III. ANALYSIS

15. The Secretariat now turns to examine whether Submission SEM-12-001 (*BC Salmon Farms*) 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,²² 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.

¹⁵ Submission, *supra* note 4 at 6; Exhibit C, *supra* note 7 at 2-4.

¹⁶ See Part III, “Analysis,” below, for the text of subsection 36(3).

¹⁷ Submission, *supra* note 4 at 11.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ CRC, c 812.

²¹ Submission, *supra* note 4 at 2; see also Exhibit E: “Previous Failed Attempts Address Fish Feedlot Impacts on Wild Salmon” [Exhibit E] at 3-4. Exhibit E at 3 states that the same regulations “were waived in 2003.”

²² 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).

A. Opening Paragraph of Article 14(1)

16. 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 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).
17. The Submitters are the Center for Biological Diversity, the Pacific Coast Wild Salmon Society, the Kwikwasu’tinuxw Haxwa’mis First Nation, and the Pacific Coast Federation of Fishermen’s Associations. Each Submitter meets the definition of non-governmental organization (“NGO”) in Article 45(1) of the NAAEC.²³ In keeping with this definition, each is a scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of, a government.
18. The Secretariat next considers whether the assertions relate to an ongoing alleged failure to effectively enforce environmental law.²⁴ The subject-matter of the submission concerns certain aquaculture operations (fish farms) in British Columbia that the Submitters allege have operated since the 1980s, and which are still in operation.²⁵ The assertions 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.
19. There is one exception to the observations in the previous paragraph. In relation to the assertion about Alphamax, namely that “if DFO allows salmon feedlots to add Alphamax to the water it [DFO] will again be failing to enforce the Fisheries Act,”²⁶ the Secretariat considers that this assertion focuses on a prospective rather than on an ongoing asserted failure of effective environmental law enforcement. The assertion does not, therefore, meet the requirement that a Party allegedly “is failing” to effectively enforce its environmental law.²⁷

²³ 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...”.

²⁴ 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) that a submission assert that a Party ‘is failing’ to effectively enforce its environmental law.” See also SEM-09-004 (*Quebec Mining*), Article 14(1) Determination (20 October 2009) at note 31.

²⁵ Submission, *supra* note 4 at 2, 3.

²⁶ See para 13, above.

²⁷ In SEM-00-003 (*Jamaica Bay*) Article 14(1) Determination (12 April 2003) at 3, the Secretariat made a similar determination in relation to an assertion that by *proposing* to construct a paved, multi-purpose bicycle path through a Wildlife Refuge located in a United States National Recreation Area, the National Parks Service would violate the US *Endangered Species Act* and *Migratory Birds Treaty Act*. The

20. In order for the submission to proceed, the Secretariat must also be able to identify the environmental law(s) in question in the submission. The provisions (section 35 and subsection 36(3), reproduced below) of the *Fisheries Act* identified by the Submitters are clearly environmental law within the meaning of Article 45(2), as they are provisions the primary purpose of which is the protection of the environment through the protection of endangered species and their habitat.²⁸ Indeed, in previous determinations and factual records the Secretariat has interpreted both of these provisions as meeting the NAAEC definition of environmental law.²⁹
21. At the time of the submission, the relevant provisions read as follows:

FISH HABITAT PROTECTION AND POLLUTION PREVENTION

Definitions

- 34.** (1) For the purposes of sections 35 to 43,

“deleterious substance” means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

Secretariat noted that the submission focused on a prospective rather than on an ongoing asserted failure to effectively enforce.

²⁸ Article 45(2) of the NAAEC reads in part: “2. For purposes of Article 14(1) and Part Five: (a) ‘environmental law’ means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through [...] (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory [...].”

²⁹ See, for example, SEM-97-001 (*BC Hydro*) Final Factual Record (30 May 2000) at 11-21; SEM-98-004 (*BC Mining*) Final Factual Record (7 August 2003); SEM-00-04 (*BC Logging*) Final Factual Record (11 August 2003); SEM-03-001 (*Ontario Power Generation*) Article 14(1) and (2) Determination (19 September 2003); SEM-03-005 (*Montreal Technoparc*) Final Factual Record (28 March 2008); and SEM-10-002 (*Alberta Tailing Ponds*) Article 14(1) Determination (3 September 2010) at 32.

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);

“deposit” means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

“fish habitat” means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;

“water frequented by fish” means Canadian fisheries waters.

Regulations for purpose of definition “deleterious substance”

(2) The Governor in Council may make regulations prescribing

(a) substances and classes of substances,

(b) quantities or concentrations of substances and classes of substances in water, and

(c) treatments, processes and changes of water

for the purpose of paragraphs (c) to (e) of the definition “deleterious substance” in subsection (1).

Harmful alteration, etc., of fish habitat

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

Alteration, etc., authorized

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

[...]

36. [...] Deposit of deleterious substance prohibited

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

Deposits authorized by regulation

(4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of

(a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; or

(b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).

Regulations for authorizing certain deposits

(5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing

(a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);

(b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

(c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

(d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;

(e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious

substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and

(f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.

Directions by the Minister

(6) A person authorized to deposit a deleterious substance by or under regulations made pursuant to subsection (5) shall, when directed in writing by the Minister, notwithstanding any regulations made pursuant to paragraph (5)(e) or any conditions set out in an authorization made pursuant to paragraph (5)(f), conduct such sampling, analyses, tests, measurements or monitoring, install or operate such equipment or comply with such procedures, and report such information, as may be required by the Minister in order to determine whether the person is depositing the deleterious substance in the manner authorized. [...]

22. However, amendments to the Act became law on 29 June 2012, as part of the federal government's *Jobs, Growth and Long-term Prosperity Act*.³⁰ These amendments do not affect the Secretariat's consideration of the Submission's assertions however, as the Secretariat considers the law which is the subject of the assertions at the time of Submission, rather than retroactively considering how changes to the law might have affected the assertions in a Submission. However, changes in a law that clearly address and remedy the subject matter of the assertions must be taken into account at later stages of the submission process, for example under Article 15(1) when considering whether to recommend a factual record.
23. The Secretariat next analyzes whether the assertions in the Submission concern alleged failures to effectively enforce the environmental laws in question.
24. An assertion must contain a positive statement that a Party is failing to effectively enforce its environmental law and according to Guideline 5.1, it must also sufficiently document the alleged failures of a Party, including any acts or omissions, to enforce its environmental law.³¹ The Secretariat has stated in previous determinations that assertions should be explicit and properly documented and

³⁰ Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures*, 1st Sess, 41st Parl, 2012, cls 132-156 (Part 3, *Responsible Resource Development*; Division 5, *Fisheries Act*) (assented to 29 June 2012), SC 2012, c 19. Further amendments to the relevant provisions are found in the same statute and are to be proclaimed in force "on a day to be fixed by order of the Governor in Council:" see cl 156.

³¹ Guidelines, *supra* note 2, ss 1.1 and 5.1.

reasoned.³² This generally means that a submission should focus on any acts or omissions of the Party that are asserted to demonstrate a failure to effectively enforce an environmental law. Once the environmental law has been identified, what acts or omissions of the Party constitute a failure to enforce that law effectively? Information must be provided that supports and explains such assertions (see Guidelines 5.1, 5.2 and 5.3).

25. The current Submission asserts that Canada has not authorized fish farms in BC pursuant to subsection 35(2) of the *Fisheries Act*, despite the farms allegedly causing HADDs in wild salmon habitat;³³ and that fish feed and other waste from net pens, including drugs and other materials used to control disease, constitute deposits of deleterious substances contrary to subsection 36(3).³⁴ The Submission makes particular mention of the chemical therapeutant Emelectin benzoate (SLICE) being used for sea lice control. The Submission also asserts that the introduction of salmon farming has increased the incidence of sea lice in wild salmon and poses the risk of Atlantic salmon escape from pens, and that each of these occurrences constitutes another type of HADD.³⁵ The Secretariat considers that the latter assertions meet the criteria set out in the opening paragraph of Article 14(1), and these, and any information Canada may wish to provide about them in any Response, may be considered further.
26. In relation to the comments that Canada is failing to prohibit the use of SLICE in waters frequented by fish,³⁶ and that there has been a failure to report lesions associated with ISAv,³⁷ the Secretariat notes that these are not assertions in the context of Article 14, and these comments will not be considered further.
27. A call for prohibiting the use of a substance is a call for a change in policy or an alleged deficiency in the law, rather than an alleged failure to enforce. This is in contrast to the assertion that SLICE is a deleterious substance being deposited into waters frequented by fish, an assertion that meets the criteria of Article 14 because such deposits would constitute violations of subsection 36(3) of the *Fisheries Act*.³⁸
28. In the case of the alleged failure to report lesions associated with ISAv, no environmental law is identified, and this is also not considered an assertion with which the Secretariat can proceed further.

³² See for example, SEM-10-003 (*Iona Wastewater Treatment*), Article 14(1)(2) Determination (16 December 2011) at 19.

³³ See paras 4-6, above.

³⁴ See paras 10-12, above.

³⁵ See paras 4-6, above.

³⁶ See para 11, above.

³⁷ See para 9, above.

³⁸ The assertion is reinforced by documentation indicating that “deposits” of SLICE into waters frequented by fish occurred each year between 2000 and 2008: BCMAL 2008, *supra* note 9 at 55; and that SLICE may be a “deleterious substance.” Cox, *supra* note 9; and Brooks, *supra* note 7.

29. Similarly, the Submission suggests that Canada did not investigate signs of ISAv detected by DFO in wild salmon.³⁹ No reference is made however to any particular environmental law in this context. The Submitters also assert that Canada was obliged to report the presence of ISAv “per the World Animal Health Organization,”⁴⁰ but here again, they do not make reference to an environmental law. The Submission does include other information related to ISAv, but the text and references neither include nor relate directly to an Article 14 assertion.
30. In alleging that the Canadian *Fish Health Protection Regulations*⁴¹ were “waived” in relation to the importation of Atlantic salmon eggs that, they allege, “did not meet these regulations,”⁴² the Submitters have not clearly documented alleged failures by the Party, including acts or omissions, to constitute an Article 14 assertion.
31. The Submission provides some information about the locations of fish farms where the alleged failures are occurring.⁴³ This information contributes to the documentation of the assertions.
32. The Secretariat now treats each requirement of NAAEC Article 14(1), paragraphs (a) through (f), in turn.

14(1)(a) The Submission must be in writing in a language designated by that Party in a notification to the Secretariat

33. The Secretariat finds the Submission meets the criterion of NAAEC Article 14(1)(a) as the Submission is in English, an official language designated by the Parties for the filing of a Submission.

14(1)(b) The Submission must clearly identify the person or organization making the Submission

34. The Submission provides the name and mailing address of the Submitters. The Submission includes the names and addresses of the organizations, which clearly identify all of the Submitters. The Submission thus meets the criterion of Article 14(1)(b).

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

35. In accordance with Article 14(1)(c) and Guideline 5.3, the Submission provides documents and materials related to the assertion that the Party is failing to effectively

³⁹ See para 8, above.

⁴⁰ *Ibid.*

⁴¹ *Fish Health Protection Regulations*, *supra* note 20.

⁴² See para 15, above.

⁴³ See para 7, above.

enforce section 35 and subsection 36(3) of the *Fisheries Act*. The Submission includes background information on the locations, as well as documents suggesting various alleged hazards posed by salmon farms to wild salmon habitat and water quality. The Submitters provide scientific and other information that, they allege, is related to the asserted failures.⁴⁴

36. The Secretariat thus finds that the Submission satisfies the requirements of Article 14(1)(c).

14(1)(d) The Submission must *appear to be aimed at promoting enforcement rather than at harassing industry*

37. Article 14(1)(d) requires that a submission “be aimed at promoting enforcement rather than at harassing industry,” and Guideline 5.4(a) provides that in making such determination, the Secretariat will consider factors such as whether “the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the submitter is a competitor that may stand to benefit economically from the submission.” Guideline 5.4(b) provides that the Secretariat consider whether the submission appears frivolous.
38. In accordance with Guideline 5.4, the Submission focuses on the central assertions concerning the Party’s enforcement of section 35 and subsection 36(3) of the *Fisheries Act*. It is not focused on compliance by a particular company or business, and is not frivolous. Both the Submission and correspondence by the representative of one of the Submitters to the Party⁴⁵ suggest an interest in the enforcement of environmental laws for the purpose of protecting wild salmon habitat and water quality from various hazards.
39. It does not appear that the Submitters are associated with any company or business that would potentially stand to benefit economically from the submission.
40. For the foregoing reasons, the Secretariat finds the Submission is in accordance with Article 14(1)(d) and Guideline 5.4.

14(1)(e) The Submission must *indicate that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response*

41. In accordance with Guideline 5.5, the Submission must include, if available, “copies of any relevant correspondence with the relevant authorities,” which are “the agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question,” and the “Party’s response” (if any).

⁴⁴ See paras 7-12, above.

⁴⁵ Exhibit F, *supra* note 4.

42. The Submission includes a letter from the representative of the Submitter the Center for Biological Diversity to Canada's federal minister of Fisheries and Oceans, dated 29 December 2011,⁴⁶ and the minister's response, dated 3 February 2012.⁴⁷
43. The Secretariat therefore determines that the matter has been communicated in writing to a relevant authority of Canada, that the Submission meets the requirements of Article 14(1)(e), and that it is in accordance with Guideline 5.5.

14(1)(f) The Submission must be filed by a person or organization residing or established in the territory of a Party

44. The Submission clearly indicates that each of the Submitters resides or is established in Canada or the United States. The Co-submitters that are listed in the Submission are the Center for Biological Diversity (US), Pacific Coast Wild Salmon Society (Canada), Kwikwasu'tinuxw Haxwa'mis First Nation (Canada), Pacific Coast Federation of Fishermen's Associations (US). The Environmental Law Clinic, University of Denver Sturm College of Law is the representative of the Center for Biological Diversity for the purposes of the Submission, and is located in the US.
45. The Secretariat finds that the Submission is filed by organizations and persons residing in and established in the territories of two of the Parties to the NAAEC, and thus satisfies the requirements of Article 14(1)(f).

B. Article 14(2) Factors

46. Article 14(2) of the NAAEC provides that where the Secretariat determines that a submission meets the criteria set out in paragraph 1 of Article 14, the Secretariat shall determine whether the submission merits requesting a response from the Party.
47. In particular, 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.⁴⁸

⁴⁶ *Ibid.*

⁴⁷ Letter from Hon. Keith Ashfield, Minister of Fisheries and Oceans, to Mr. Kevin Lynch and Mr. Michael Harris (3 February, 2012) [Exhibit G].

⁴⁸ NAAEC, *supra* note 1, art 14(2).

Having determined in the preceding section that the Submission indeed meets the requirements of NAAEC Article 14(1), the Secretariat now reviews each of these considerations in turn.

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

48. The Secretariat first examines whether the Submission alleges harm to the person or organization making the Submission. 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 failure to enforce section 35 and subsection 36(3) of the *Fisheries Act*).
49. The Submission describes various ways that the operation of salmon farms may allegedly alter, disrupt or destroy fish habitat and entail or lead to the deposit of deleterious substances into water frequented by fish, any of which may violate provisions of the Act. The Submission states that the Submitters and their members are suffering harm from the alleged failures by Canada to effectively enforce the environmental laws identified in the Submission.⁴⁹ It goes on to say that the Submitters' interests are commercial, conservation, educational and scientific in nature, and that these are jeopardized by the asserted failures.⁵⁰
50. The Submission also outlines the interests of each of the Submitters in the fish habitat and waters that the Submission describes. The Center for Biological Diversity is described as a non-profit, public-interest conservation organization dedicated to the protection of endangered species and wild places.⁵¹
51. The Pacific Coast Wild Salmon Society, also a non-profit society, is "engaged in raising public awareness of impacts of salmon feedlots." The Submission says that the Society has participated in the Cohen Commission, and in litigation involving salmon aquaculture.⁵²
52. The Submission states that the traditional territory of the Submitter Kwikwasu'tinuxw Haxwa'mis First Nation is within the Broughton Archipelago, where "numerous fish farms" have been authorized to operate, and that the First Nation has thus advocated for reforms in order to protect wild salmon.⁵³ The Submitters also note that "wild salmon are fundamental to the cultural and spiritual integrity" of first nations in the Broughton Archipelago.⁵⁴

⁴⁹ Submission, *supra* note 4 at 13.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Exhibit E, *supra* note 21 at 3.

53. The Pacific Coast Federation of Fisherman's Associations, according to the Submission, is a trade association of commercial fishers that works "to assure the rights of individual fishermen and fights for the long-term survival of commercial fishing as a productive livelihood and way of life."⁵⁵
54. The Secretariat concludes from the above descriptions of the Submitters' interests in the Submission, that the Submission alleges harm to the Submitters and their interests in accordance with Article 14(2)(a). The alleged harm to fish habitat, to water quality and to the Submitters' interests, all of which relate to the protection of the environment, would not occur but for the asserted failures.

(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

55. In asserting a failure by the Party to enforce provisions of the Act, the Submission includes detailed information on alleged potential hazards of salmon farming on fish habitat and also mentions alternatives to open net salmon farming. Further study of these matters could advance the NAAEC objectives found in Articles 1(a), (b), (c), (d), (f), (g), (h), (i) and (j).⁵⁶

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

56. In accordance with Article 14(2)(c), and guided by Guidelines 5.6(c) and 7.5, the Secretariat considers whether private remedies under the Party's law have been pursued.⁵⁷

⁵⁵ Submission, *supra* note 4 at 13.

⁵⁶ *Supra* note 1, Article 1: "The objectives of this Agreement are to: (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies; (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna; (d) support the environmental goals and objectives of the NAFTA; [...] (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; (i) promote economically efficient and effective environmental measures; and (j) promote pollution prevention policies and practices."

⁵⁷ Guideline 5.6(c) provides that submissions should address "the actions, including private remedies, available under the Party's law that have been pursued." Guideline 7.5(a) provides that "the Secretariat will be guided by whether requesting a response to the submission is appropriate if the preparation of a factual record ... could duplicate or interfere with private remedies that are being pursued or have been pursued ...". Guideline 7.5(b) provides that the Secretariat be guided by whether "reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases."

Morton case and Cohen Commission

57. The Submission states that the Submitter Pacific Coast Wild Salmon Society was “involved in the successful jurisdictional challenge against Canada and the Province of BC that removed provincial management” of salmon aquaculture in favour of federal control.⁵⁸ In that case, *Morton v. British Columbia (Agriculture and Lands)*⁵⁹ (the “*Morton case*”), “The Supreme Court of B.C. ruled that the federal government, not the province, has exclusive jurisdiction over the regulation of aquaculture.”⁶⁰ The Submission also states that the Submitter the Pacific Coast Wild Salmon Society was a participant in the Cohen Commission.⁶¹
58. Although the Supreme Court of British Columbia (court of first instance in the *Morton case*) reviewed some of the issues raised by the petitioners about the asserted environmental effects of fish farms on the environment, and the relationship between the provincial legislative regime and these effects, the remedies that were sought and granted were declarations that key provisions of British Columbia’s regulatory regime were beyond the province’s legislative power or otherwise invalid. The court noted:

It is not for this court to determine the merits or effectiveness of the provincial legislation respecting aquaculture in the province of British Columbia. [...] The question for the court is that of the jurisdiction of the provincial government to pass the impugned legislation. [...]⁶²

Kwicksutaineuk/Ah-Kwa-Mish First Nation Case

59. The Submission also states that a proceeding initiated by eight First Nations in the Broughton Archipelago against the BC government “over the negative impact of commercial salmon feedlots on wild salmon” was certified as a class action in 2010.⁶³
60. On appeal to the British Columbia Court of Appeal, the order certifying the case as a class action under the *Class Proceedings Act*⁶⁴ of British Columbia was struck down in May 2012. Leave to appeal to the Supreme Court of Canada was refused in November 2012.⁶⁵

⁵⁸ Submission, *supra* note 4 at 13.

⁵⁹ 2009 BCSC 136 (CanLii), *aff’d* 2009 BCCA 481 (“*Morton*”).

⁶⁰ Exhibit E, *supra* note 21 at 3; see also Submission, *supra* note 4 at 13.

⁶¹ Submission, *supra* note 4 at 13; re the Cohen Commission see *supra* note 12.

⁶² *Morton BCSC*, para 67.

⁶³ Exhibit E, *supra* note 21 at 3, citing *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Agriculture and Lands)*, 2010 BCSC 1699 (“*KAFN*”); see para 264 for disposition.

⁶⁴ RSBC 1996, c 50.

⁶⁵ *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Minister of Agriculture and Lands)*, 2012 BCCA 193 at paras 102, 108; leave to appeal to SCC refused, 34909 (November 15, 2012) (BCCA decision referred to hereinafter as “*KAFN appeal*”).

61. Despite the Submitters' mention of eight First Nations, the named plaintiffs in the *KAFN* case are Chief Robert Chamberlin "on his own behalf and on behalf of all members of the Kwicksutaineuk/Ah-Kwa-Mish First Nation."⁶⁶
62. The Secretariat must analyze the status of the *KAFN* case as part of its consideration of Article 14(2)(c), but is careful not to make any pronouncements about the Party's law.
63. Sections 9 and 10 of the *Class Proceedings Act* provide:
9. If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may
- (a) order the addition, deletion or substitution of parties,
- (b) order the amendment of the pleadings, and
- (c) make any other order that it considers appropriate.
10. (1) Without limiting section 8(3),⁶⁷ at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or 6 (1) are not satisfied with respect to a class proceeding.
- (2) If the court makes a decertification order under subsection (1), *the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in section 9 (a) to (c) in relation to each of those proceedings.*⁶⁸
64. From a reading of the above provisions and the judgments of Garson and Smith JJA, the Secretariat considers that the British Columbia Court of Appeal striking out the order certifying the proceeding as a class action amounts to a decertification of the proceeding as a class action pursuant to section 10.⁶⁹
65. The Secretariat is not aware of any further steps taken in the litigation subsequent to class decertification. Its current status is uncertain. The Secretariat has no information at the date of issuance of the present Determination that the proceeding is continuing, but Canada in any Response may shed further light on this proceeding.
66. Since both the *Morton* case and the Cohen Commission are concluded and the *KAFN* case appears not to be proceeding, the Secretariat considers based on the information currently before it, that the preparation of a factual record would not interfere with

⁶⁶ KAFN and KAFN appeal (style of cause).

⁶⁷ Subsection 8(3) provides: "The court, on the application of a party or class member, may at any time amend a certification order."

⁶⁸ [Italics added.]

⁶⁹ KAFN appeal, paras 102 (Hinkson JA concurring) and 108. Garson JA uses the phrase "strike out the order" and Smith JA, "rescind the order"; see also paragraph 69, quoting from *MacKinnon v National Money Mart Company* 2009 BCCA 103 at para 68: "A class action may be decertified at a later point, in which event the proceeding *may* be permitted to continue as an ordinary one: s. 10(2)" [italics added].

these other proceedings. As the Secretariat has noted in other Determinations,⁷⁰ the Secretariat is not a court or tribunal, and its Determinations are not rulings or judicial opinions.

67. The Secretariat considers that the preparation of a factual record is not likely to duplicate the outcome of the *Morton* case, which as noted above was a challenge to the constitutional jurisdiction of British Columbia in relation to fisheries. The preparation of a factual record is not likely to duplicate the Cohen Commission because, while that commission considered some of the same issues raised in the Submission, its ultimate focus was one particular species of Fraser River salmon. The *BC Salmon Farms* submission concerns several species whose life cycles span many watersheds in addition to the Fraser River.⁷¹ The Secretariat also considers that the purpose and possible outcomes of a federal inquiry and the Articles 14 and 15 process are sufficiently distinct that duplication is not a concern.
68. In the case of Guideline 7.5(b), the Submitters include persons and organizations from both Canada and the US. Some of the Submitters have taken significant actions at considerable cost that are now concluded. The Secretariat therefore considers that reasonable actions have been taken in the pursuit of private remedies prior to making the submission.

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

69. The Secretariat notes that the submission is drawn from a wide variety of published scientific journal articles and government reports, and does not make use of, let alone draw exclusively from, mass media reports.
70. The Secretariat thus finds that the Submission adequately addresses the matters set out in Article 14(2)(d).

IV. DETERMINATION

71. In light of the foregoing, and having considered the Submission and its documentation, the Secretariat determines that Submission SEM 12-001 (*BC Salmon Farming*) 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.
72. 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 section 35 and subsection 36(3) of the *Fisheries Act*.

⁷⁰ See for example SEM-07-001 (*Minera San Xavier*), Article 15(1) Determination (15 July 2009), para 44 (“*Minera San Xavier*”).

⁷¹ Submission, *supra* note 4 at 1.

73. In particular, but without limiting the generality of the foregoing paragraph, the Party may wish to include information about:
- salmon farming operations currently authorized, including their locations;
 - “[...] any conditions authorized [...]” by the Minister of Fisheries and Oceans or by regulations made by the Governor in Council, as provided in subsection 35(2), in subsection 36(4),⁷² and/or otherwise, in relation to salmon farming operations in coastal British Columbia; and/or
 - any relevant legislative change affecting the assertions.⁷³
74. 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.
75. Any response from the Government of Canada to the abovementioned Submission in accordance with Article 14(3) and new Guideline 19.2 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 **6 December 2013**. A copy of the Submission and its exhibits is being forwarded to the Party under separate cover.
76. 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: Dane Ratliff,
Director, Submissions on Enforcement Matters Unit

⁷² Subsection 35(2) of the Act provides “No person contravenes subsection [35](1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.” Subsection 36(4) provides “No person contravenes subsection [36](3) by depositing or permitting the deposit in any water or place of (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act; (b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection [36](5).”

⁷³ See, for example, *supra* note 30 with respect to recent amendments to the Act.

(original signed)

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

cc: Mr. Dan McDougall, Canada Alternate Representative, Environment Canada
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