



Memorandum

Date: 4 November 2013

To: Dan McDougall
Assistant Deputy Minister
International Affairs Branch
Environment Canada

From: Irasema Coronado, Ph.D.
Executive Director
Commission for Environmental Cooperation

Re: **SEM-12-001 (*BC Salmon Farms*)**
Article 21 Request for Information

The Secretariat has received Canada's letter of 4 October 2013 (the "letter"),¹ which states that Canada has reviewed the Determination of 12 September, 2013² "pursuant to Article 15(1)."³ In the letter, Canada identifies its purpose as providing the Secretariat "with information regarding pending legal proceedings, in accordance with NAAEC Article 14(3) and Guideline 9.2 [...], [information] which we believe warrant[s] terminating the submission process."⁴

In order to complete its determination on the next step in the process, the Secretariat hereby requests information as described below, pursuant to Article 21(1) of the NAAEC. Article 21(1) reads:

21(1) On request of the Council or the Secretariat, each Party shall, in accordance with its law, provide such information as the Council or Secretariat may require, including:

¹ Letter from Dan McDougall, Assistant Deputy Minister, International Affairs Branch, Environment Canada to Irasema Coronado, Executive Director, CEC Secretariat (4 October 2013) (the "letter").

² SEM-12-001 (*BC Salmon Farms*), Article 14(1) and (2) Determination (12 September 2013) (the "Determination").

³ The Determination was issued pursuant to Articles 14(1) and (2) of the NAAEC; a Party Response is issued pursuant to Article 14(3), not Article 15(1). It is therefore unclear how Canada considers its letter to be "pursuant to Article 15(1)".

⁴ Letter at 1.

(a) promptly making available any information in its possession required for the preparation of a report or factual record, including compliance and enforcement data; and

(b) taking all reasonable steps to make available any other such information requested.

The Parties have provided information pursuant to an Article 21 request by the Secretariat subsequent to the issuance of a Party Response on numerous previous occasions.⁵

In the letter, Canada refers to *Kwicksutaineuk/Ak-Kwa-Mish First Nation v British Columbia* (the “KAFN case”),⁶ as “an action in which the Government of Canada was enjoined [sic] as a defendant. Canada’s records indicate that the representative action of Chief Chamberlin on behalf of the KAFN has not been discontinued.”⁷ The mention of discontinuance does not take into account a separate issue raised in the Determination, namely that the KAFN case apparently cannot proceed without a change of parties and/or a change to the pleadings.⁸

The 4 October, 2013 letter further states that another Submitter, Alexandra Morton, filed an action in Federal Court against the federal Minister of Fisheries and Oceans on 7 May, 2013, seeking judicial review of the Minister’s decision to authorize salmon farm operations in British Columbia (the “Morton case”).

Canada also expresses concern in the letter that “proceeding with the *BC Salmon Farms* submission [...] would result in the duplication [of] and/or interference with these domestic legal actions,” and “would conflict with Canada’s commitment, under Article 6 of the Agreement, to ensure that persons with a legally recognized interest are given appropriate access to legal proceedings and that requests for investigations receive due consideration under Canadian law.”⁹

⁵ See, for example, SEM—97—002 (*Rio Magdalena*), Article 21 Request (13 September 1999), SEM—97—003 (*Quebec Hog Farms*), Article 21 Request (16 February 1998), and SEM—98—003 (*Great Lakes*), Article 21 Request (24 March 2000).

⁶ *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Agriculture and Lands)*, 2010 BCSC 1699, rev’d 2012 BCCA 193, aff’d (leave to appeal to SCC refused), 34909 (November 15, 2012).

⁷ Letter at 1.

⁸ Determination, paras 59-65.

⁹ Letter at 2. Article 6(2) reads: “6. 2. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party’s environmental laws and regulations.” Article 6 (3)(c) reads: “6.3. Private access to remedies shall include rights, in accordance with the Party’s law, such as: [...] (c) to request the competent authorities to take appropriate action to enforce that Party’s environmental laws and regulations in order to protect the environment or to avoid environmental harm; [...].”

The Secretariat finds that while Canada's letter "*informs* the Secretariat" of possible pending proceedings, it does not "*explain*," as provided in Guideline 9.6, how "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," in the respective contexts of the KAFN and Morton cases. The Secretariat considers that the word "explain" in Guideline 9.6 entails providing reasoning. The public has often cited the need to provide reasons in the SEM process as a way to enhance the transparency and credibility of the process.¹⁰ The Secretariat therefore requests a reasoned explanation from the Party as to how the KAFN and Morton cases meet the Article 45(3) definition of "judicial or administrative proceeding," including how these cases were "initiated by a Party," how they are being pursued "in a timely manner" and "in accordance with the Party's law," and how they concern the same subject-matter as the assertions raised in the Submission.¹¹

The Secretariat also requests an explanation of how, in practice, preparation of a factual record "would result in the duplication [of] and/or interference with these domestic legal actions,"¹² and of which Secretariat actions in developing a factual record would result in duplication and/or interference with judicial actions in any ongoing proceedings as defined by Article 45(3).

The Secretariat moreover requests any additional information that would assist it in determining how, as Canada maintains in the letter, proceeding with the Submission would in practice conflict with Canada's Article 6 commitments, since the proceedings referenced by Canada have in fact already been accessed.

The Secretariat would appreciate your reply within 30 working days of this request, and no later than **17 December 2013**.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

Irasema Coronado, Ph.D.
CEC Executive Director

¹⁰ See, for example, Letter from the Humane Society International to the Joint Public Advisory Committee dated 17 May 2012, available at < http://www.cec.org/Storage/137/16214_SEM-Modernization-HSI-cmnts.pdf > (last viewed 1 November 2013).

¹¹ See, for example, SEM—00—004 (*BC Logging*), Article 15(1) Notification (27 July 2001) at 16-17, and other examples of Canadian Submissions cited therein; see also SEM—09—002 (*Wetlands in Manzanillo*), Article 15(1) Notification (19 August 2013) at paras 77-83.

¹² Letter at 2. See for example, SEM—07—001 (*Minera San Xavier*), Article 15(1) Determination (15 July 2009), at paras 26 to 49.

c.c. Mr. Dan McDougall, Canada Alternate Representative
Ms. Michelle DePass, US Alternate Representative
Mr. Enrique Lendo, Mexico Alternate Representative
Mr. Dane Ratliff, Director, Submissions on Enforcement Matters Unit, CEC