

**Secretariat of the Commission for Environmental Cooperation**

**Article 15(1) Notification to Council that  
Development of a Factual Record is Warranted**

**Submitters:** Environmental Defence Canada  
Natural Resources Defense Council (US)  
Daniel T'seleie

**Represented by:** Dale Marshall, National Program Manager  
Environmental Defence Canada

**Party:** Canada

**Date of Receipt:** 26 June 2017

**Date of this determination:** 19 April 2018

**Submission I.D.:** SEM-17-001 (*Alberta Tailings Ponds II*)

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**I. EXECUTIVE SUMMARY**

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”)<sup>1</sup> provide for a process allowing any person or non-governmental organization to file a submission with the Secretariat of the Commission for Environmental Cooperation (“CEC”) asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat reviews these 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*<sup>2</sup> (the “Guidelines”). When the Secretariat determines that a submission meets the admissibility 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 the submission.<sup>3</sup>

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<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 <[www.cec.org/NAAEC](http://www.cec.org/NAAEC)>.

<sup>2</sup> *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Montreal: CEC, 2012) online: CEC <[www.cec.org/guidelines](http://www.cec.org/guidelines)>.

<sup>3</sup> Information regarding the various stages of the process, as well as previous Secretariat Determinations and Factual Records, can be found on the CEC's website at: <<http://www.cec.org/submissions>>. Reference to an “Article” throughout the present determination, unless otherwise stated, is to an article of the NAAEC.

2. On 26 June 2017, Environmental Defence Canada and the Natural Resources Defense Council (“U.S.”), along with Canadian resident Daniel T’seleie (the “Submitters”), filed SEM-17-001 (*Alberta Tailings Ponds II*) (hereinafter the “Submission”)<sup>4</sup> with the Secretariat pursuant to Article 14. The Submitters assert that the Government of Canada (“Canada”) is failing to enforce subsection 36(3) of the federal *Fisheries Act*,<sup>5</sup> in relation to alleged leakage of deleterious substances from tailings ponds into surface waters frequented by fish, or through groundwater and the surrounding soil into surface waters frequented by fish in northeastern Alberta. According to the Submission, tailings ponds are essentially holding ponds used to contain waste product comprised of water, sand, silt, and petrochemical waste from the oil sands mining process.<sup>6</sup> They assert that Canada has not “prosecuted any company” for any such incident of leakage, “nor has it pursued regulation governing tailings pond leakage.”<sup>7</sup> Additionally, the Submitters assert that Canada has relied upon the Alberta provincial government, under an administrative agreement with Alberta, to monitor, report, and investigate releases from tailings ponds that may contravene subsection 36(3) and that Alberta’s reliance on an allegedly “discredited” monitoring<sup>8</sup> is further evidence of Canada not enforcing the Act.<sup>9</sup>
3. On 16 August 2017, the Secretariat determined that the Submission meets the requirements of Article 14(1) of the NAAEC and requested a response from the Party in accordance with Article 14(2).<sup>10</sup> Canada submitted its response on 10 November 2017 (“response”).<sup>11</sup> The response generally explains<sup>12</sup> the results of Environment and Climate Change Canada’s (ECCC) enforcement of the pollution prevention provisions of the Fisheries Act in the Alberta oil sands regions, which consisted only of “proactive inspections” at oil sands tailings ponds between 2009 and 2013 and a return to a “reactive enforcement approach,” which is apparently the enforcement approach Canada has operated under since then. Canada also provides information about why no prosecutions have ever been undertaken against oil sands operators. Canada also discusses ongoing scientific research, separate from its enforcement branch, related to the identification of “oil sands processed water” (OSPW), as well as

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<sup>4</sup> SEM-17-001 (*Alberta Tailings Ponds II*) Submission under Article 14(1) (26 June 2017) <<https://goo.gl/4cLLT1>>, [Submission]

<sup>5</sup> RSC 1985, c F-14.

<sup>6</sup> Submission, p. 4.

<sup>7</sup> Submission, p. 2.

<sup>8</sup> Submitters acknowledge that this monitoring plan has been replaced by the Joint Oil Sands Monitoring Program (JOSM) but that “problems remain, including insufficient evidence to assess the full impacts of the oil sands...” Submission, p. 7.

<sup>9</sup> Submission, pp. 6-7.

<sup>10</sup> SEM-17-001 (*Alberta Tailings Ponds II*), Determination under Articles 14(1) (2) (16 August 2017), <<https://goo.gl/CJ3ttF>>

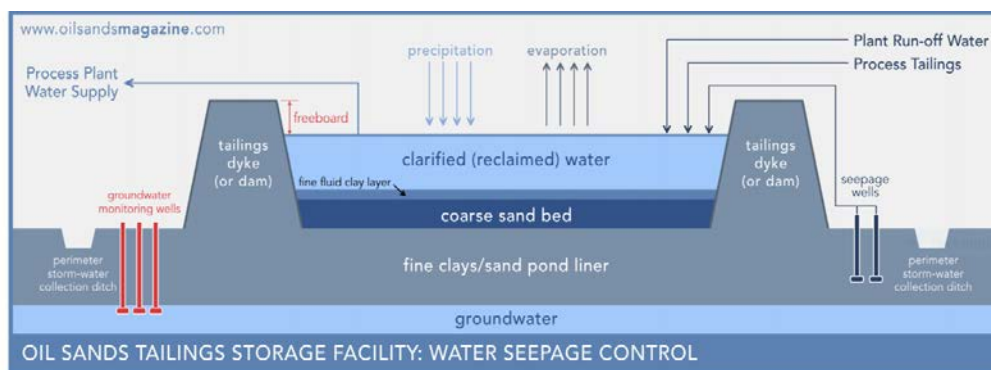
<sup>11</sup> SEM-17-001 (*Alberta Tailings Ponds II*), Response under Article 14(3) (10 November 2017), <<https://goo.gl/NDjJnZ>> [Response].

<sup>12</sup> For a further description of Canada’s response, see section III of this determination below.

Canada's relationship with Alberta and the province's actions under its law and policies. In conclusion, Canada asserts that the information presented in its response shows that Canada is effectively enforcing the pollution prevention provisions of the Fisheries Act.<sup>13</sup>

4. The Secretariat has concluded that Canada's response leaves open central questions that the Submission raises regarding enforcement of section 36(3) in connection with discharges of deleterious substances to fish-bearing waters from oil sands tailings ponds. Specifically, the Secretariat determines that Canada's response does not provide sufficient information about why Canada did not undertake enforcement actions other than prosecutions nor about how the province of Alberta, under agreements with Canada, cooperates with and assists the Party to enforce the relevant provisions of the Fisheries Act. Consequently, in accordance with Article 15(1), the Secretariat hereby informs the Council that the Secretariat considers that the Submission, in light of the Party's response, warrants developing a factual record and, following Guideline 10.1, provides its reasons below.
5. To assist the reader the Secretariat includes Figure 1 below, which represents the general design and operation of an oil sands tailings pond; the figure does not represent any particular tailings pond.

**Figure 1. Oil Sands Tailings Storage Facility: Water Seepage Control**



Source: 2017 Oil Sands Magazine, Tailings Ponds 101, p.3, available at <http://www.oilsandsmagazine.com/technical/mining/water-management> (consulted on 18 April 2018).

<sup>13</sup> Response, p. 3.

## II. SUMMARY OF THE SUBMISSION

6. As noted above, the Submitters are two nongovernmental organizations—one Canadian and one US—as well as one individual residing in Canada. Additional information about the Submission and its assertions are incorporated into the discussion and analysis below, while supplemental information about the Submission can be found throughout the Secretariat’s Article 14(1)(2) determination.<sup>14</sup>

## III. SUMMARY OF THE RESPONSE

7. On 11 November 2017, Canada responded to the Submission. The response consists of an introduction, executive summary, and conclusion, and contains three main sections: Environment Canada and Climate Change (ECCC) Enforcement Activities under the Fisheries Act, Research for Water Quality Monitoring in the Alberta Oil Sands, and Provincial Policies and Regulations. Each of these three sections is summarized concisely below with additional information from the response included in the Analysis section (section IV) below.

### A. ECCC Enforcement Activities under the Fisheries Act

8. Under this section of its response, Canada provides an overview of the Fisheries Act and its provisions and describes how its enforcement branch is constituted.<sup>15</sup>
9. Regarding the enforcement activities that Canada has taken at oil sands tailings ponds under the Act, Canada’s response discusses the use of only one enforcement tool: inspections, which were carried out during the period May 2009 and May 2013 at seven oil sands sites in Alberta.<sup>16</sup> Canada characterizes these inspections (which include sampling of groundwater from monitoring wells) as part of its “proactive” inspections undertaken to determine if OSPW, or “tailings water,” was being deposited in contravention of the Act.<sup>17</sup> Canada notes that five of these seven sites were also referenced by the Submitter.

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<sup>14</sup> SEM-17-001 (*Alberta Tailings Ponds II*), Determination under Articles 14(1) and (2) (16 August 2017).

<sup>15</sup> Response, at 6-8. The Secretariat notes that this section of the response includes a summary of how Canada shares enforcement responsibility with the Department of Fisheries and Oceans (DFO), the statutory language of s. 36(3) of the Act, the definition of “deleterious substance,” and a general description of the structure of ECCC’s enforcement branch, including its Prairie and Northern region, which includes Alberta and has 30 enforcement officers.

<sup>16</sup> Response, Annex 2: ECCC, List of On-Site Inspections Conducted at Oil Sands Tailings Pond in Alberta Between 2009 and 2014 (November 2017) <<https://goo.gl/H9Kg6S>> (consulted on 12 March 2018). See also description of oil sands production area in Alberta at <<https://goo.gl/nBSRnr>> (consulted on 12 March 2018).

<sup>17</sup> Monitoring sites summarized in Response, pp. 9-13.

10. Of the samples taken by ECCC enforcement officers at these seven sites, Canada's response shows that at six sites there were at least 15 samples taken which showed elevated concentrations of chemicals and compounds above the Canadian Council of Ministers of the Environment (CCME) Guidelines. These guidelines are a voluntary set of science-based goals established by the government of Canada to provide guidance on maintaining the quality of aquatic and terrestrial ecosystems.<sup>18</sup> The substances for which exceedances were registered included naphthenic acids, ammonia, arsenic, zinc, chloride, as well as at least one instance of OSPW in a monitoring well.<sup>19</sup>
11. Canada's response also states that in carrying out its enforcement authorities under the Act, enforcement officers consider, among other factors, the "nature of the violation, effectiveness in achieving the desired result, and consistency in enforcement"<sup>20</sup> and consult the *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (November 2001).<sup>21</sup>
12. Canada's response notes the range of enforcement actions available under the Fisheries Act: inspections; investigations; warnings and directions; recommendations to the Minister to issue orders to provide plans or other information; recommendations to the Attorney General to seek an injunction; or recommendations for prosecutions.<sup>22</sup> Canada notes that "[t]o take an enforcement action, an enforcement officer needs reasonable grounds to believe that an offence has occurred."<sup>23</sup>
13. Canada's response indicates that, after inspections were completed and analyzed, "enforcement officers, after consulting in depth with ECCC scientists, determined that they did not have reasonable grounds to believe that there was a violation of the pollution prevention provisions of the Act"<sup>24</sup> and thus took no other enforcement actions, such as "initiating investigations or recommending prosecutions."<sup>25</sup> Canada further states that the primary reason for this conclusion was the "inability to differentiate whether the source of deleterious substances in the bitumen influenced groundwater was anthropogenic or naturally

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<sup>18</sup> See, Canadian Environmental Quality Guidelines <<https://goo.gl/LsSjJD>> (consulted on 19 March 2018).

<sup>19</sup> Response, pp. 10-13. The Secretariat notes that Canada's response is not clear as to which chemicals or compounds are the subject to CCME guidelines, as Canada's response also indicates that "no standards currently exist for acid-extractable organics, including naphthenic acids, which contribute to observed toxicity in bitumen-influenced waters." Response, p. 25.

<sup>20</sup> Response, p. 9.

<sup>21</sup> Id. This policy was established by the Department of Fisheries and Ocean and the ECCC. See: ECCC, *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (November 2001) <<https://goo.gl/poRzbS>> (consulted on 19 March 2018).

<sup>22</sup> Response, pp. 8, 19.

<sup>23</sup> Response, p. 9.

<sup>24</sup> Response, p. 13.

<sup>25</sup> Response, p. 15.

occurring.”<sup>26</sup> As a result, Canada states that it stopped conducting inspections of groundwater at oils sands sites and redirected its enforcement priorities to other national and regional issues “where resources could have a greater positive impact on the environment.”<sup>27</sup>

14. Additionally, Canada acknowledges that with respect to prosecutions, the minimum standard to lay a charge is reasonable grounds to believe that an offence has occurred, but that “for conviction [...] each element of an offense must be proven to the higher threshold of beyond a reasonable doubt.”<sup>28</sup> At a later point in its response, Canada reiterates this evidentiary standard and states “in a prosecution, significantly greater certainty is needed as the Crown must prove the accused guilty beyond a reasonable doubt.”<sup>29</sup> Canada further emphasizes this point when it states that “decisions taken by enforcement officers were based on facts and available information. A high threshold must be met for a conviction, namely proof beyond a reasonable doubt that an accused has committed an offence.”<sup>30</sup>
15. Finally, Canada’s response discusses two administrative agreements ECCC maintains with the province of Alberta. Because these agreements concern Canada’s relationship with Alberta, they will be discussed in subsection III(C).

#### **B. Research for Water Quality Monitoring in the Alberta Tar Sands**

16. In this section of its response, Canada provides general background information on how its Science and Technology Branch is responsible for scientific research activities related to water quality monitoring in the Alberta oil sands region. The Secretariat notes that this branch is not part of ECCC’s Enforcement branch but a separate organization within ECCC.<sup>31</sup> Canada notes that routine water quality monitoring in this area is conducted under the Joint Oil Sands Monitoring Program (JOSM), presumably under the administrative agreement discussed in paragraph 16.<sup>32</sup> The Secretariat notes that the JOSM replaced the Regional Monitoring Plan in 2012.<sup>33</sup>
17. Canada acknowledges that tailings ponds are designed and engineered to seep, as seepage (or leakage) provides “critical structural stability.”<sup>34</sup> Canada notes that the permeability of tailings ponds varies, with some having impermeable geological strata underneath but still resulting in some seepage, to more permeable underlying sediments resulting in higher rates

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<sup>26</sup> Response, p. 13.

<sup>27</sup> Response, p. 15.

<sup>28</sup> Response, pp. 13, 9.

<sup>29</sup> Response, p. 13.

<sup>30</sup> Response, p. 14.

<sup>31</sup> See, ECCC organizational chart available at: <<https://goo.gl/2dUTgw>> (consulted on 12 March 2018).

<sup>32</sup> Response, p. 21.

<sup>33</sup> See paragraph 2 and footnote 8, above.

<sup>34</sup> Response, p. 21.

of seepage. Natural groundwater can often dilute this seepage and oil sand operators construct interception trenches designed to collect seepage before it can reach surface waters.<sup>35</sup>

18. Canada further states that its scientists continue to work on assessing environmental impacts of the oil sands in the Athabasca watershed and have, since 2014, made significant advancements in the development of an analytical toolbox to help distinguish between natural and anthropogenic sources of deleterious substances. Canada further states that these advances will support future enforcement efforts to assess compliance with s. 36(3) of the Act.
19. Canada's response also indicates that it believes that even with the processing and extracting of bitumen with a hot water wash with no chemical additives, the remaining liquid component of tailings (or oil sands processed water—OSPW) "has a similar composition to the groundwater that passes through the natural oil sands formation."<sup>36</sup> The response goes on to provide a summary of ECCC's research efforts on OSPW seepage, in an effort to ascertain if seepage is occurring beyond containment structures.<sup>37</sup>
20. Despite asserting that current science does not support an ability to distinguish between anthropogenic OSPW and what is naturally occurring in Alberta's oils sands area, Canada acknowledges that its 2014 research has recently been able to conclude that at least at two tailings ponds, differentiation between naturally occurring and man-made OSPW was possible and that OSPW was likely reaching the Athabasca River at one location. Canada notes, however, that this study "did not constitute proof of a violation of the pollution prevention provisions of the Fisheries Act."<sup>38</sup>
21. Canada notes that even more current research, which has yet to be peer reviewed, indicates that two groups of naphthenic acid compounds appear to be enriched significantly in OSPW and groundwater affected by OSPW seepage, as a result of the bitumen extraction process.<sup>39</sup> Further, Canada notes that it has preliminarily identified four other substances as unique to OSPW and OSPW groundwater and that work is being done to create custom analytical analysis tools so that samples can be analyzed for their presence. Such tools could be used, Canada asserts, to help provide enforcement officers in the future with reasonable grounds to believe a violation has occurred or "potentially prove beyond a reasonable doubt that OSPW is present in a given sample."<sup>40</sup> Canada states that these methods, including improved sampling methodology, once finalized will be "transferred to the [JOSM] Program and

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<sup>35</sup> Response, p. 21.

<sup>36</sup> Id.

<sup>37</sup> Response, p. 22.

<sup>38</sup> Id.

<sup>39</sup> Response, p. 23.

<sup>40</sup> Id.

federal and provincial enforcement agencies.”<sup>41</sup> Canada also notes that “while ECCC scientists have adopted [composite] sampling methodology, many in the research community and the industry have yet to agree and to adjust their collection methods.”<sup>42</sup>

22. Finally, Canada addresses research on the impacts of deleterious substances on aquatic life and ecosystems and states that, while chemicals in OSPW may be toxic, the impacts on the most sensitive organisms and biological endpoints have not yet been determined.<sup>43</sup>

### C. Provincial Policies and Regulations.

23. The final section of Canada’s response discusses Alberta’s oil sands strategy to develop its resources in an environmentally responsible way. Canada identifies a number of provincial documents, such as *Responsible Actions: A Plan for Alberta’s Oil Sands*, which Canada states includes specific goals for the environmental management of tailings ponds, particularly through a land-use planning framework established by the *Lower Athabasca Regional Plan (LARP)*.<sup>44</sup> The LARP and related frameworks establish provincial water quality limits and groundwater monitoring schemes that support water management agreements with oil sands operators. Canada also discusses the tailings management framework established in Alberta, whose purpose is, in part, to lower “fluid tailings volumes[...]to reduce the risk of seepage” with an overall goal of reclaiming all tailings ponds with 10 years of the end of mine life.<sup>45</sup>
24. In this section, Canada also discusses regulatory requirements in Alberta with respect to tailings ponds “and issues associated with any potential seepage.” These regulations are overseen by the Alberta Energy Regulator (AER), which Canada states has “comprehensive rules, regulations, and requirements in place for the safe design, construction, and operation of tailings ponds.”<sup>46</sup> Canada also discusses AER’s *Directive 085: Fluid Tailings Management for Oil Sands Mining Projects*,<sup>47</sup> which “establishes application and reporting requirements that operators must meet in order to demonstrate that all fluid tailings will be ready to reclaim with 10 years of the end of mine life.”<sup>48</sup> Canada also notes that the approval process for each mine under Alberta’s Water Act establishes requirements for monthly reporting of the volume of OSPW collected by a mine’s recapture system and requires operators to “make efforts to

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<sup>41</sup> Id.

<sup>42</sup> Response, p. 24

<sup>43</sup> Response, pp. 24-27.

<sup>44</sup> Response, p. 28.

<sup>45</sup> Response, p. 30.

<sup>46</sup> Response, p. 31.

<sup>47</sup> Available at: Directive 085 Fluid Tailings Management for Oil Sands Mining Projects <<https://goo.gl/P2LCPH>> (consulted on 12 March 2018).

<sup>48</sup> Response, p. 31.



manage seepage through containment systems (the extent of which is dependent on local geology).”<sup>49</sup>

25. Canada notes that since 1994 all newer tailings ponds “naturally seep from their dykes, but all the seepage is intercepted and pumped back to the recycle water system. These newer ponds are often equipped with interception walls or barrier walls—in-ground obstacles made of special clay that stops seepage from progressing further to other water bodies. If it is necessary to enhance the interception system, additional pumps are installed downhill of tailings ponds to deplete ground waters and prevent seepage progression. Everything is closely monitored using numerous groundwater wells. New monitoring and interception wells are installed whenever necessary as mandated by the AER.”<sup>50</sup>
26. Regarding the two administrative agreements with Alberta, Canada provides the following information. The first agreement is a notification agreement with respect to environmental occurrences.<sup>51</sup> According to Canada, the purpose of this agreement is to establish a streamlined system for persons required to notify Canada and Alberta of environmental emergencies and occurrences under various federal statutes, including an unauthorized deposit of a deleterious substance under the Fisheries Act.<sup>52</sup>
27. The second agreement, which came into force and effect on 1 September 1994, is specifically related to cooperation activities under s. 36(3) of the Act and allows the coordination of regulatory activities between ECCC and the Province of Alberta’s Department of Environment and Parks (AEP).<sup>53</sup> Canada notes that this agreement does not represent a delegation of enforcement authority under the Fisheries Act from Canada to Alberta. The agreement allows the parties to “develop complementary and cooperative monitoring programs with provisions for information sharing. Such programs can be used to evaluate and detect trends in environmental quality and to determine the effectiveness of pollution control programs.”<sup>54</sup> The agreement also provides for coordination of inspections activities and investigation and enforcement activities, including the sharing of technical and compliance data.<sup>55</sup> Canada notes that “it is committed to cooperating with the province of Alberta to manage oil sands responsibly and promote compliance with environmental laws, including the pollution prevention provisions of the Act” and that, while Alberta does not enforce federal law, “an effective working relationship with Alberta is central to the enforcement of federal and

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<sup>49</sup> Response, p. 32.

<sup>50</sup> Id.

<sup>51</sup> Response, p. 19. The agreement is available at: Canada-Alberta Environmental Agreement <<https://goo.gl/S8SnBi>> (consulted on 12 March 2018).

<sup>52</sup> Response, p. 20.

<sup>53</sup> Id. This administrative agreement is available as Annex 5 to Canada’s Response at <<https://goo.gl/Nj57UH>> (consulted on 12 March 2018).

<sup>54</sup> Administrative agreement, at section 5.2.

<sup>55</sup> Id.

provincial environmental laws.”<sup>56</sup> Finally, Canada notes in its response that inspections conducted by ECCC as a result of referrals from Alberta are published annually in the *Fisheries Act Annual Report*.<sup>57</sup>

#### IV. ANALYSIS

28. The Secretariat considers that the Submission, in light of Canada’s response, warrants developing a factual record because it leaves open central questions regarding whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in regard to oil sands tailings ponds in northeast Alberta. The specific reasons for the Secretariat’s recommendation are set forth below.

##### A. Canada’s enforcement of the Fisheries Act

29. As Canada notes in its response, under the NAAEC a Party has not failed to effectively enforce its environmental law where the inaction of agencies of the Party reflects a reasonable exercise of its discretion in respect to investigatory, prosecutorial, regulatory, or compliance matters.<sup>58</sup> The question for the Secretariat is whether, given the information provided by Canada in its response, its decisions with respect to enforcing the pollution prevention provisions of the Act are a reasonable exercise of its enforcement discretion or whether additional information is needed for the development of a factual record.

30. The Submission asserts that Canada is not effectively enforcing ss. 36(3) of the *Fisheries Act* by failing to adequately monitor, investigate, and prosecute any party operating tailings ponds.<sup>59</sup> The Submission further asserts that despite the failure of Canada to investigate, Canada is aware of seepage of tailings ponds through its participation in the environmental assessment process for new oil sands projects reviewed under the Canadian Environmental Assessment Act.

31. Canada’s response regarding its enforcement provides general information primarily related to inspections undertaken from 2009 until 2013 and statements about why prosecutions were not subsequently recommended. Although Canada’s response briefly mentions other enforcement tools available to it under the Act, such as investigations, inspector warnings, or Ministerial orders, the response does not provide specific information about whether Canada used these

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<sup>56</sup> Response, p. 19.

<sup>57</sup> Response, p. 20; the annual report can be found at <<https://goo.gl/yLdkxn>> (consulted on 12 March 2018).

<sup>58</sup> NAAEC, Article 45(1). Canada asserts that it has met this standard because from 2009 to 2014, it allocated significant resources to enforcement activities, including inspections and analysis of over 600 samples. It states that its decision to stop this approach, for the reasons stated in its response, was consistent with Article 45 and a reasonable exercise of its discretion. Response, pp. 14-15.

<sup>59</sup> Submission, at 2.

tools, considered using these or about why Canada chose not to pursue such enforcement actions.

32. Under the pollution prevention provisions of the Fisheries Act, Canada has a panoply of enforcement options available to it. Enforcement officers can:

- (a) conduct inspections under s. 38(3);
- (b) obtain a warrant to conduct a search under s. 39(1);
- (c) conduct a search without a warrant in exigent circumstances under s. 39(4);
- (d) take remedial or corrective measures, including issuing warnings and directions, under s. 38(7.1);
- (e) recommend that the Minister of Environment and Climate Change issue an order requiring that a person provide plans or other information under s. 37(1);<sup>60</sup>
- (f) recommend that the Attorney General seek an injunction from a court to stop an alleged violation under s. 41(4); and/or
- (g) recommend a file for prosecution to the Public Prosecution Service of Canada.

33. These enforcement tools are generally consistent with NAAEC Article 5(1) which lists the types of government enforcement action that are illustrative of a Party effectively enforcing its environmental law, such as monitoring compliance and investigating suspected violations through onsite inspections, providing for search and seizure, and issuing administrative orders including orders of a preventative, curative, or emergency nature. Under the Act, with respect to inspections, search warrants, and remedial measures, the stated standard is whether there are reasonable grounds to believe that a violation of the Act has occurred.<sup>61</sup> With respect to Ministerial orders, the statute provides only that if an undertaking, such as a tailings pond, is likely to result in a deposit of a deleterious substance, the Minister may issue an order to gather additional information<sup>62</sup>. Canada's response acknowledges these enforcement tools and the standard that must be met in order to use them as part of an enforcement proceeding. Canada states "[e]nforcement actions, such as issuing a direction under s. 38(7.1) of the Act, only require officers to have reasonable grounds to believe that a violation of the Act has occurred"<sup>63</sup> and, "[t]o take an enforcement action, an enforcement officer needs reasonable

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<sup>60</sup> If the Minister believes, based on information received as a result of a s. 37(1) order that a violation is likely to occur, the Minister may also require modifications or additions to an undertaking under s. 37(2).

<sup>61</sup> Canadian courts appear to have found that inspections done for purposes of ensuring compliance with the law are not subject to any standard unless they "cross the Rubicon" and become investigations or searches. See, *R v Jarvis*, 2002 SCC 73. Thus, inspectors may not need to meet any kind of standard in order to carry out an inspection.

<sup>62</sup> Canadian courts have suggested that the standard for use of this authority is ministerial discretion. See, *Comeau's Sea Foods Ltd. v. Canada*, 1997, 1 SCR 12, at 36-37; *Friends of the Oldman River Society v. Canada*, 1992, 1 SCR 3, at 48-49.

<sup>63</sup> Response, p. 13.

grounds to believe that an offence has occurred.”<sup>64</sup> Canada acknowledges that it considers inspections to be an enforcement activity: “Enforcement officers carry out two main enforcement activities: inspections and investigations.”<sup>65</sup>

34. As noted in Canada’s response, the inspections at six of seven tailings ponds resulted in at least 15 occurrences of elevated levels of chemicals or compounds exceeding CCME guidelines. Yet after these inspections, Canada’s response states “enforcement officers, after consulting in depth with ECCC scientists, determined that they did not have reasonable grounds to believe that there was a violation of the pollution prevention provisions of the Act.” There are questions as to how Canada reached this conclusion, given that prior to undertaking inspections, officers apparently had reasonable grounds to believe an offence had occurred but afterwards, despite the exceedances, Canada states that they did not. Canada does not explain why this is the case.<sup>66</sup> Based on the information in its response, Canada apparently repeated the same types of inspections in 2009, 2010, 2011, 2012, and 2013. Canada’s response similarly does not provide any information about whether it considered altering the manner of its inspections, such as their locations or the types of inspections conducted, to gather additional information that may have been relevant to determining compliance with the pollution prevention provisions of the Act.
35. Additionally, Canada’s response does not indicate why these inspection results did not lead to the consideration or use of other enforcement tools available to Canada (other than prosecutions), particularly ones focused on gathering additional information. These enforcement options include ministerial orders, under which Canada could have obtained a very wide scope of information from oil sands operators to enable the Minister to determine whether there is or is likely to be a deposit of a deleterious substance. Similarly, Canada’s response does not provide any information about whether search warrants were considered, or even inspector warnings or directions.<sup>67</sup> The response also does not provide any information about whether Canada considered ways it could refocus its enforcement strategy away from inspections to obtain additional, new, or different information. A factual record could provide information which would shed light upon these issues. The Secretariat also notes that the Fisheries Act allows for prosecution of more than just s. 36(3) violations. For example, the Act allows Canada to prosecute an entity that fails to respond to a ministerial order to gather information. This is a very powerful incentive for a recipient of such an order to comply. Canada’s response does not address this issue.

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<sup>64</sup> Response, p. 9.

<sup>65</sup> Response, p. 8.

<sup>66</sup> But see discussion at paragraph 35, below.

<sup>67</sup> For example, a spike in a groundwater reading could be considered an “occurrence” under ss. 38(6) and (7.1), allowing an inspector to require an operator to conduct additional sampling, analysis or measurements and report such results by issuing a direction.

36. Canada's response appears to justify its decision to suspend enforcement after inspections by focusing solely on prosecutions and stating that "[t]he primary reason for these determinations [not to proceed] was an inability to differentiate whether the source of deleterious substances in bitumen influenced groundwater samples was anthropogenic or naturally occurring."<sup>68</sup> Canada further states "as documented and explained above, the decisions taken by enforcement officers were based on facts and available information. A high threshold must be met for a conviction, namely proof beyond a reasonable doubt that an accused has committed an offence." Thus, Canada implies that because a violation could not be proved, it could not take any subsequent enforcement actions after inspections, including prosecutions. To the Secretariat, these statements appear to indicate that Canada may be conflating the standard for taking an enforcement action (reasonable grounds to believe) with the higher standard a prosecutor's evidence must meet should a prosecution be laid (beyond a reasonable doubt). A factual record could provide information which could clarify these issues.
37. Canada's response also discusses its ongoing scientific research regarding the ability to differentiate between naturally-occurring and man-made OSPW, particularly its 2014 study and an ongoing study which has not yet been peer-reviewed.<sup>69</sup> Canada states that in the near future this information could assist enforcement officers in pursuing actions under the Fisheries Act as well as inform information under the JOSM (see discussion below). The Secretariat believes a factual record could be used to gather additional information related to this and other research and more fully inform the public about the current state of research in this area.
38. Consistent with the enforcement principle in NAAEC Article 37, the Secretariat underscores that its recommendation to Council to prepare a factual record should not be construed as questioning Canada's decision not to seek prosecutions under the Fisheries Act or to undertake specific environmental law enforcement activities regarding specific sites in its territory. Canada's enforcement decisions are sovereign. Rather, the Secretariat determines that Canada's response results in central open questions remaining regarding why Canada is not using enforcement tools *other than prosecutions* available to it under the Fisheries Act.<sup>70</sup> The

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<sup>68</sup> Response, p. 13.

<sup>69</sup> Response, pp. 22-23. Canada also includes information regarding ongoing research on the impacts of deleterious substances on aquatic life and ecosystems, which it indicates has not yet been specifically determined (see paragraph 21 of this determination). The Secretariat appreciates this information but notes that under the language of s. 36(3) of the Fisheries Act, which is a strict liability statute, as long as the substance deposited is deleterious, as defined in the Act, the actual harm or impact of that substance on aquatic or other life need not be proven for purposes of a violation. The issue is also discussed in the submission, at 3 and Annex 1, including a citation to an Ontario legal decision.

<sup>70</sup> The Secretariat would like to note that it does not read the scope of the submission narrowly and relating only to the failure of Canada to prosecute entities for violating s. 36(3). In addition to asserting that Canada has failed to prosecute, the submission also avers that Canada has failed to monitor and to investigate alleged contraventions of the Fisheries Act. Submission, at 6. Additionally, the submission references the

Secretariat believes that a factual record could be used to gather additional information related to the enforcement of s. 36(3) of the Fisheries Act, including the use of associated enforcement tools and authorities, with respect to oil sands tailings ponds in Alberta.

**B. Canada's Agreements with Alberta and its Role in Enforcing the Fisheries Act and Regulating Tailings Ponds**

39. Canada's response discusses its relationship with Alberta and describes Alberta's role in a number of undertakings relating to the Fisheries Act and tailings ponds, including under applicable provincial law. As discussed above, Canada also maintains two procedural agreements with Alberta: one concerning notifications of environmental occurrences and the other relating specifically to how regulatory activities involving the pollution prevention provisions of the Fisheries Act are handled between the federal and provincial governments.<sup>71</sup> Canada provides only general descriptions of these agreements and notes that the notification agreement provides a streamlined process regarding environmental emergencies and occurrences related to a number of Canadian laws, including the Fisheries Act.<sup>72</sup> With respect to the Fisheries Act administrative agreement, Canada notes that it represents "the coordination of regulatory activities between the federal and provincial levels in an effort to provide coherence where regulatory requirements are duplicated at the federal and provincial levels for the regulated sector. It does not result in the delegation of the enforcement of ss. 36(3) of the Act to the province of Alberta."<sup>73</sup> Canada also states that "[n]otification regulations and agreements allow provinces to inform federal enforcement officers when a breach of the pollution prevention provisions might have occurred, and is standard practice with every province and territory."
40. Aside from these general statements and attaching the agreements to the response, Canada provides no specific information on the regulatory authority of AEP, the type of information or how it is collected by Alberta, how and when that information is shared with Canada, whether Canada reviews this information collected by Alberta on a routine basis, or how Canada may use this information in its enforcement of the Fisheries Act with respect to tailings ponds. Canada also does not address whether this information informed its inspections of tailings ponds from 2009 to 2013. This is the case, even though the agreements themselves represent that they are related to compliance and enforcement activities under the Fisheries Act and Canada, in its response, emphasizes the important role the province plays in the regulation of

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Canada/Alberta Administrative Agreement and asserts that Canada relies on Alberta which relies on industry self-reporting, resulting in a failure of Canada to adequately enforce s. 36(3). Submission, at 6-7.

<sup>71</sup> Response, p. 19. These are the *Canada-Alberta Environmental Occurrences Notification Agreement* and the *Administrative Agreement for the Control of Deposits of Deleterious Substances under the Fisheries Act*.

<sup>72</sup> Response, p. 20.

<sup>73</sup> Id.

tailings ponds.<sup>74</sup> A factual record could be used to gather this information regarding these issues.

41. The Secretariat notes that the Submission includes a document obtained from Canada in which Environment Canada (now ECCC) responded to a Parliament inquiry regarding Alberta's role in s. 36(3) of the Fisheries Act with respect to tailings ponds: "To date, ECCC has not received a referral from Environment Alberta indicating that they suspect any possible Fisheries Act violations."<sup>75</sup> In its response to the current Submission, Canada does not indicate whether this is still the current state of affairs, but it does state that "[i]nspections conducted by ECCC as a result of referrals from Alberta are published in the *Fisheries Act Annual Report*."<sup>76</sup> In the Secretariat's review of these annual reports, the only information one can glean is the overall number of ECCC inspections and investigations related to the Fisheries Act but not which of these were related to tailings ponds.<sup>77</sup> Similarly, the annual reports indicate the number of "incidents" which Alberta reported to Canada related to the Fisheries Act and how many inspections were subsequently carried out by Canada, but the information does not show how many of these provincial reports were related to tailings ponds. Further, the annual reports do not discuss the type of information which is reported by Alberta to Canada. A factual record could gather this information regarding these issues.
42. Canada also discusses the JOSM Program and indicates that Alberta's Department of Environment and Parks (AEP) and ECCC's Science branch jointly conduct water quality monitoring efforts to "advance scientific understanding of the impacts of bitumen influenced waters."<sup>78</sup> The response, however, does not indicate how the JOSM monitoring results are factored into the enforcement of the Fisheries Act, particularly since ECCC's Science branch is not part of ECCC's enforcement branch. Neither does the response indicate how the JOSM information factors into the administrative agreements discussed above. Nor is any information provided by Canada about the development of the JOSM, Canada's role in that process, how the JOSM is implemented, or how the JOSM figures into its compliance and enforcement of the Fisheries Act, except as otherwise stated in its response. The Secretariat notes that the JOSM was developed because of concerns about its predecessor, the Regional Monitoring Plan, an issue raised by the Submitter but not specifically addressed by Canada.<sup>79</sup>

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<sup>74</sup> Annex 3 of the agreement, at paragraph 3.2, specifically addresses inspection and enforcement coordination and notes that although the parties will conduct joint investigations of alleged contraventions of both federal and provincial legislation, Alberta will be the lead party in any joint investigations unless otherwise agreed upon by the parties.

<sup>75</sup> Submission, at 9; Appendix XV: Environment Canada, Follow-up on Committee Hearings (20 March 2009), at 7.

<sup>76</sup> Response, p. 20.

<sup>77</sup> The Secretariat acknowledges that the information Canada presents in its response regarding inspections may answer this question.

<sup>78</sup> Response, p. 21.

<sup>79</sup> Submission, at 7.

43. While Canada's response does discuss the use of water quality monitoring data in the context of its effort to build an analytical toolbox, which one day it hopes will assist enforcement officers in being able to prove a s. 36(3) violation, it is not clear whether this scientific research work has any other direct relationship to current compliance and enforcement activities related to the Fisheries Act and tailings ponds. In fact, in reviewing the JOSM document itself,<sup>80</sup> the Secretariat notes that nothing in it references its connection to enforcement. The Secretariat believes a factual record could gather information with respect to Alberta's JOSM work and whether and how that work is incorporated into Canada's enforcement of the Fisheries Act.
44. As summarized above, the last section of Canada's response deals with Alberta provincial regulations and policies related to tailings ponds, focused primarily on the role of the Alberta Energy Regulator (AER) in regulating the operation of tailings ponds. Canada's response, however, does not provide specific information about how AER's work relates to ECCC's work under the Fisheries Act or how any AER related information is utilized by Canada in the enforcement of s. 36(3) of the Fisheries Act. The Secretariat notes that the AER's mandate includes approval and regulation of the operation of all aspects of energy facilities and not just oil sands tailings ponds operations. A factual record could be used to gather this information.
45. The Secretariat notes that, pursuant to Canadian law, Alberta is a signatory province under the NAAEC, and its environmental laws could qualify as environmental laws under the NAAEC. Alberta's provincial laws are not, however, the subject of the submission because the Submitter did not raise them as part of its assertion that Canada is not effectively enforcing its environmental laws. They are referenced in this determination for discussion purposes and their relationship to Alberta's cooperation with Canada under the Fisheries Act.

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<sup>80</sup> Information about the JOSM can be found at: Canada-Alberta oil sands environmental monitoring <<https://goo.gl/Kwa4YU>> (consulted on 12 March 2018); The Joint Canada/Alberta Implementation Plan for Oil Sands Monitoring Annual Report <<https://goo.gl/PQmj8t>> (consulted on 12 March 2018); and Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring <<https://goo.gl/mGF6Po>> (consulted on 12 March 2018).



## V. RECOMMENDATION

46. For the foregoing reasons, the Secretariat considers that Submission SEM-17-001, in light of Canada's response, warrants the development of a factual record and hereby so informs the Council. Because the Submission and Response leave open central questions, a factual record will assist in considering whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in regard oil sands tailings ponds in Alberta, as the Submitters allege. It is not clear from the Response whether Canada is *currently* effectively enforcing the pollution prevention provisions of the Fisheries Act, other than through the scientific research of its Science branch.
47. As discussed above in detail, a factual record is warranted to develop and present the following information regarding the following matters in relation to effective enforcement of section 36(3) of the *Fisheries Act* in regard to deposits of deleterious substances from oil sands tailings ponds:
- a) the use of enforcement tools other than prosecutions under the Fisheries Act, particularly after samples collected by inspections indicated exceedances, including:
    - i. information collection tools, such as inspector directions and orders, Ministerial orders, and search warrants;
    - ii. the consideration of refocused inspection strategies to obtain additional or new information;
    - iii. how legal standards needed to be met to implement enforcement actions relate to evidentiary standards needed to prove a conviction;
    - iv. specific information about tailings ponds enforcement included in the Fisheries Act annual reports ECCCC Canada sends to Parliament; and
    - v. the state of the research on identifying differences between naturally-occurring and man-made OSPW.
  - b) ECCCC's relationship with Alberta, including AEP, under the joint administrative agreements related to the enforcement of the pollution prevention provisions of the Fisheries Act, or under other authorities, including:
    - i. AEP's regulatory authority relating to monitoring of tailings ponds, the type of information collected and maintained by Alberta under its authorities, how that information relates to Alberta's cooperation with Canada in the enforcement of the Fisheries Act, and when and how that information is shared with or reviewed by Canada, including the nature and scope of notifications of incidents and referrals made by Alberta to Canada under the Fisheries Act;

- ii. Alberta's role in assisting Canada in carrying out inspections and any other enforcement actions under the Act, including its role in any decision-making with Canada; and
  - iii. how the JOSM program is carried out and how it fits into Canada's enforcement of the Fisheries Act.
- c) the AER's regulatory authority relating to the regulation and operation of oil sands tailings ponds, including information it collects, and how this authority relates to Canada's enforcement of the Fisheries Act.

48. Accordingly, pursuant to Article 15(1), and for the reasons set forth in this notification, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by developing a factual record as recommended herein regarding the Submission. As set out in Guideline 19.4 of the Guidelines, "[t]he Council should vote on whether to instruct the Secretariat to prepare the factual record normally within 60 working days of receiving the Secretariat's recommendation" i.e., on or before 20 July 2018.

Respectfully submitted on this 19 day of April 2018.

*(original signed)*  
*per:* César Rafael Chávez  
Executive Director

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