
Secretariat of the Commission for Environmental Cooperation

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

Submitter(s): Environmental Defence Canada
Natural Resources Defense Council (U.S.)
Daniel T'seleie
Represented by: Dale Marshall, National Program Manager,
Environmental Defence Canada
Party: Canada
Date received: 26 June 2017
Date of the determination: 16 August 2017
Submission I.D.: SEM-17-001 (*Alberta Tailings Ponds II*)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement")¹ 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*² (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.³
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

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 *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>.

³ 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.

SEM-17-001 (*Alberta Tailings Ponds II*) (hereinafter the “Submission”)⁴ with the Secretariat pursuant to Article 14(1). The Submitters assert that the Government of Canada (“Canada”) is failing to enforce subsection 36(3) of the federal *Fisheries Act*,⁵ 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.⁶ They assert that Canada has neither “prosecuted any company” for any such incident of leakage, “nor has it pursued regulation governing tailings pond leakage.”⁷

3. The Secretariat notes that in 2010, a related submission, SEM-10-002 (*Alberta Tailings Ponds*),⁸ was filed with the Secretariat by some of the same Submitters, asserting similar claims. In that submission, the Secretariat determined that the submission met the admissibility criteria of Article 14(1) and that a response from Canada was merited under Article 14(2).⁹ After Canada’s response, which centered on a notification of a criminal complaint, the Secretariat concluded that the criminal complaint notified by Canada did not meet the definition of a pending proceeding under NAAEC Article 45(3)¹⁰ and recommended to the Council that the submission merited the development of a factual record.¹¹ In January 2015, the Council unanimously instructed the Secretariat not to prepare a factual record. In reasons accompanying the Council resolution, Canada and Mexico found that a criminal complaint constituted a pending proceeding under the NAAEC.¹²
4. For the reasons set forth below, the Secretariat has determined that the current Submission meets all the criteria for admissibility contained in Article 14(1) and, pursuant to the criteria set out in Article 14(2), finds that the Submission warrants a response from Canada. The Secretariat’s reasons for this determination are set forth below in Section II.

II. ANALYSIS

A. Article 14(1) Opening Paragraph

⁴ SEM-17-001 (*Alberta Tailings Ponds II*), Article 14(1) submission (26 June 2017), available at <<https://goo.gl/9WZmBG>> [Submission].

⁵ RSC 1985, c F-14.

⁶ Submission, at 4.

⁷ Submission, at 2.

⁸ SEM-10-002 (*Alberta Tailings Ponds*), available at <<https://goo.gl/EC1Gi5>>.

⁹ SEM-10-002 (*Alberta Tailings Ponds*), Articles 14(1)(2) Determination (11 December 2013), available at <<https://goo.gl/4E1A68>>.

¹⁰ SEM-10-002 (*Alberta Tailings Ponds*), Article 15(1) Notification to Submitters and Council regarding a proceeding notified by Canada (14 April 2014), available at <<https://goo.gl/fAfEir>>.

¹¹ SEM-10-002 (*Alberta Tailings Ponds*), Article 15(1) Notification to Council (29 July 2014), available at <<https://goo.gl/iTWafj>>.

¹² SEM-10-002 (*Alberta Tailings Ponds*), Reasons for Council Instructions under Council Resolution 15-01 (27 January 2015), available at <<https://goo.gl/goxiGN>>.

5. The opening paragraph of NAAEC Article 14(1) provides: “[t]he Secretariat may consider a submission from any non-governmental organization (“NGO”) 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).
6. In determining whether a submission meets the requirements of Article 14(1) of the NAAEC, the admissibility criteria are not intended to be an insurmountable procedural screening device.¹³ The Secretariat reviewed the Submission with that perspective in mind.

1. Submitters are NGOs and/or residents of North America

7. The Secretariat finds that because the two organizational Submitters are non-governmental organizations (“NGOs”) established in Canada and the United States and the individual is a resident of Canada, all the Submitters qualify under the NAAEC.¹⁴ There is no information in the Submission to suggest that the Submitters are affiliated with or under the direction of any government.

2. Environmental law in question

8. The next criteria to determine are whether the Submitter has identified an “environmental law” and whether the Submitter has alleged that a Party is “effectively failing to enforce” that law.
9. The laws in question cited in the Submission are subsections 3 and 4 of section 36 of the Fisheries Act.¹⁵ Subsection 3 (Deposit of deleterious substance prohibited) provides:

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.¹⁶

10. Subsection 4 (*Deposits authorized by regulation*) provides:

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;
- (b) a deleterious substance of a class and under conditions — which may include conditions with respect to quantity or concentration — authorized under regulations made under subsection (5)

¹³ See SEM-97-005 (*Biodiversity*), Determination under Article 14(1) (26 May 1998); SEM-98-003 (*Great Lakes*), Determination under Article 14(1)(2) (8 September 1999).

¹⁴ The Submitters have requested that telephone numbers of Daniel T’seleie and NRDC be kept confidential. In accordance with Article 11(8)(a) of the Agreement and Guideline 7.1, the Secretariat will safeguard this information.

¹⁵ Submission, at 2.

¹⁶ *Fisheries Act* (R.S.C., 1985, c. F-14), section 36(3).

applicable to that water or place or to any work or undertaking or class of works or undertakings;
or

- (c) a deleterious substance the deposit of which is authorized by regulations made under subsection (5.2) and that is deposited in accordance with those regulations.¹⁷

11. Generally, the definition of “environmental law” under the NAAEC¹⁸ includes any law that is designed to prevent the release or discharge of any pollutant or contaminant. The Secretariat finds that the primary purposes of both subsections 36(3) and 36(4) of the *Fisheries Act* appear to be pollution prevention. Indeed, the Secretariat has previously considered that said provisions of the *Fisheries Act* meet the NAAEC definition of environmental law in past submission determinations, including the prior related submission SEM 10-002 (*Alberta Tailings Ponds*);¹⁹ further, enforcement of the *Fisheries Act* has been examined in several factual records.²⁰

3. The alleged failure to effectively enforce the *Fisheries Act*

12. The next question to determine is whether the Submitter is asserting that Canada is effectively failing to enforce the *Fisheries Act*, including whether this failure is ongoing.
13. Submitters assert generally that the Government of Canada is “failing to effectively enforce...the *Fisheries Act* with respect to the leaking of deleterious substances from oil sands tailings ponds into surface waters and the groundwater of Northeast Alberta.”²¹ Specifically, the Submitters maintain that Canada “has neither prosecuted any company for documented surface water contamination, nor has it pursued regulation governing tailings

¹⁷ *Fisheries Act* (R.S.C., 1985, c. F-14), section 36(4). Submitters assert that the “Governor in Council has not made any regulations pertaining to oil sands mining, oil sands tailing ponds or any effluent types released by those operations. Therefore, there are no regulatory exemptions from the requirements of subsection 36(3) of the *Fisheries Act* that are relevant to oil sands mining or tailings ponds resulting from oil sands mining.” Submission, at 3. See also, discussion at paragraph 13, *infra*. For purposes of this determination, the Secretariat assumes this is a correct statement.

¹⁸ NAAEC Article 45 defines the term “environmental law” as follows:

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

(i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,

(ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or

(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory,

but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

[(b)...]

(c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.”

¹⁹ SEM-10-002 (*Alberta Tailings Ponds*), Article 14(1) Determination (3 September 2010), available at <<https://goo.gl/dpKsbA>>.

²⁰ See, for example, SEM-98-004 (*BC Mining*), SEM-03-001 (*Ontario Power Generation*), and SEM-03-005 (*Montreal Technoparc*).

²¹ Submission, at 1.

pond leakage.”²² Further, the Submitters contend that Canada has not “made any regulations pertaining to oil sands mining, oil sands tailings ponds or any effluent types released by those operations. Therefore, there are no regulatory exemptions from the requirements of subsection 36(3) of the *Fisheries Act* that are relevant to oil sands mining or tailings ponds resulting from oil sands mining.”²³ Finally, the Submitters claim that subsection 36(3) also “clearly prohibits the *indirect* deposition of deleterious substances and has a preventative element of prohibiting deposition ‘in any place where a deleterious substance ...may enter any such water’²⁴[emphasis in original].”

14. In addition, to bolster its assertion that the Government of Canada is not effectively enforcing subsection 3 of the *Fisheries Act*, the Submitters reference the intergovernmental agreement signed by Canada and the Government of Alberta entitled “*Administrative Agreement for the Control of Deposits of Deleterious Substances under the Fisheries Act*” (the “Administrative Agreement”).²⁵ The Submitters state that this agreement, created under both federal and provincial law, “is a mechanism for the federal Minister of the Environment to carry out his/her responsibilities and is a subsidiary agreement under an environmental law.”²⁶ The Submitters also note that the Administrative Agreement “designates Alberta Environment as the lead agency in responding to and investigating releases [that may contravene subsection 36(3) of the *Fisheries Act*] within Alberta” but that the federal government maintains enforcement responsibility.²⁷ The Submitters assert that under the Administrative Agreement the federal government has relied on the Alberta government to monitor, report, and investigate illegal releases from tailings ponds and that Alberta relies on “industry self-reporting of tailings leakage.”²⁸ Additionally, the Submitters assert that monitoring is further delegated under the Canada-Alberta Joint Oil Sands Monitoring (JOSM) program, which the Submitters contend is still not effective in carrying out an effective monitoring program.²⁹

²² Submission, at 2.

²³ Submission, at 3.

²⁴ *Id.*

²⁵ Submission, at 6; Appendix XIV: Canada-Alberta Administrative Agreement for the Control of Deposits of Deleterious Substances under the Fisheries Act, available at <<https://goo.gl/Ln9i55>>.

²⁶ Submission, at 6.

²⁷ *Id.* Submitters acknowledge that under the agreement the federal government “will continue to have the responsibility to conduct inspections, investigations, and prosecutions under the Fisheries Act and that Environment Canada [sic] has a positive obligation to investigate alleged contraventions of the Fisheries Act.”

²⁸ Submission, at 6; Appendix XV: Follow-up on Committee Hearings,” (20 March 2009) (responses of Alberta Environment and Environment Canada to questions posed by the Chair of the House of Commons Standing Committee on the Environment and Sustainable Development), available at <<https://goo.gl/XWQfbJ>>. Although Alberta is a signatory of the NAAEC and its provincial laws could be considered “environmental laws” under the NAAEC, submitters do not explicitly assert that the Province of Alberta is failing to effectively enforce a provincial environmental law, and the Secretariat does not construe the submission in this manner.

²⁹ Submission, at 7. In the submission, Submitters reference an expert panel convened under the JOSM and a report it issued in February of 2016 to answer the question “what progress has JOSM implementation made in improving the scientific integrity of environmental monitoring of the impacts of oil sands development, and can it be demonstrated?” See, Submission, endnote 18.

15. As we did in a prior determination to a related submission, the Secretariat does not consider this administrative agreement to be a “regulation” of Canada but only a mechanism or implementation device related to the submitter’s assertion that Canada is not effectively enforcing the *Fisheries Act*.³⁰
16. Based on the assertions of the Submitters and the alleged lack of evidence that Canada has taken any enforcement actions with respect to the leaking from tailings ponds associated with oil sands mining, the Secretariat finds that the submission concerns alleged ongoing failures of enforcement relating to the *Fisheries Act*. Because the assertions qualify for review under the submissions on enforcement matters process, the Secretariat finds that the submission meets the opening paragraph of Article 14(1).
17. If a submission meets the opening paragraph of Article 14(1), the Secretariat then must determine if it meets the remaining admissibility criteria of Article 14(1)(a)-(f).

B. Article 14(1) criteria

(a) [Whether] the submission is: “in writing in a language designated by that Party in a notification to the Secretariat;

18. The Secretariat finds that the Submission to the Secretariat is in English, one of the three official languages of the NAAEC.

(b) [Whether] the submission clearly identifies the person or organization making the submission;

19. The Secretariat finds that the Submission meets this criterion, as the identity of the Submitters is clear.

(c) [Whether] the submission provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;

20. Regarding this criterion, Guideline 5.3 states that a submission “must contain a succinct account of the facts on which such an assertion is based and must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission is based.”
21. The Submission contains 15 pages of the actual submission, including 26 endnotes, as well as 22 annexes, totaling over 1,110 pages, some of which are summarized and discussed throughout this determination.
22. The Submission includes information and documentation grouped into the following subject matter categories: oil sands tailing ponds leakage, the effects of tailings ponds

³⁰ See, SEM 10-002 (Alberta Tailings Ponds), Article 14(1) and (2) Secretariat Determination under Article 14(1) and 14(2) (December 11, 2013), at 9-10. available at: <<https://goo.gl/8LckKf>>.

leakage; the failure of Canada to conduct monitoring, and the failure of Canada to effectively enforce the *Fisheries Act*. These groupings of information are discussed below.

23. Regarding oil sands tailing ponds and leakage, the Submission briefly describes how tailings ponds are used to contain the waste by-product of the extraction of petroleum found in rock strata or in sand and clay, as it is generally found in eastern Alberta. According to the Submitter, this waste by-product can include a variety of substances that are deleterious to fish, including ammonia, benzene, cyanide, arsenic, copper, and iron.³¹ The Submitters also include recent information, which, they assert, estimates that all tailings ponds in this geographic area cover a surface area of at least 220 square kilometers, with the volume exceeding 1 trillion litres.³² The Submitters contend that because tailings ponds are often constructed from earthen materials and are not lined, leakage often occurs, despite the efforts of some oil companies to deploy a range of measures to recapture it.³³ In another report included in the submission, the Submitters estimated in 2008 that tailings ponds were leaking at a rate of four billion litres each year.³⁴ Further, the Submitters include documentation regarding specific oil sands operations from which contaminated tailings water reached surface waters.³⁵ Additionally, the Submitters include information regarding a 2014 study, which suggests that “oil sands process-affected groundwater is reaching the [Athabasca] River system.”³⁶
24. Regarding the effects of oil sands tailings ponds leakage, the Submitters reference several scientific studies³⁷ which assess the types of contaminants found in the tailings ponds, and

³¹ Submission, at 1.

³² Submission, at 4.

³³ *Id.* Submitters include a December 2008 study done in conjunction with a private consultant, which attempts to quantify seepage from existing and proposed oil sands mining operations, using information from environmental impact assessments, where available. Submission, Appendix II: Jeremy Moorhouse, “Appendix I — Methodology and Sample Calculations” (Pembina Institute, December 2008) available at: <<https://goo.gl/qkq4gX>> [Appendix II].

³⁴ Submission, at 4, Appendix II *supra* note 32 and Appendix III: Matt Price, “1 Million Litres a Day: The Tar Sands’ Leaking Legacy,” (Environmental Defence, December 2008), available at: <<https://goo.gl/m8T4Sn>> [Appendix III]

³⁵ Submission, at 4, Appendix IV: Joint Panel Report, EUB Decision 2004-009, Shell Canada Limited, Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant, and Water Pipeline in the Fort McMurray Area, February 5, 2004, page 43, available at: <<https://goo.gl/HTzsH4>>; Appendix V: Jim Barker et al., “Attenuation of Contaminants in Groundwater Impacted by Surface Mining in Oil Sands, Alberta, Canada” (University of Waterloo) November, 2007 available at: <<https://goo.gl/MV4FUm>>, and Appendix VI: Golder Associates, “Beaver Creek Profiling Program: 2008 Field Study (Final Report)” (Golder Associates, February 2009), available at: <<https://goo.gl/UUJE9N>>.

³⁶ Submission, at 5 and Appendix XXI: Richard Frank et al., “Profiling Oil Sands Mixtures from Industrial Developments and Natural Groundwaters for Source Identification,” in 48 *Environmental Science and Technology* 5, (2014), pp. 2660–2670 <<https://goo.gl/Ukxtvx>>. The Secretariat notes that the Athabasca River originates in Jasper National Park in the Columbia icefield and traverses a northeasterly path of 1,231 kilometres through or adjacent to provincial parks as well as the Athabasca oil sands deposits.

³⁷ Submission, at 5-6; Appendix X: Erik W. Allen, “Process water treatment in Canada’s oil sands industry: I. Target pollutants and treatment objectives,” *Journal of Environmental Engineering and Science*, 7:123-138, 2008, available at: <<https://goo.gl/RT12ix>> [Appendix X]; Appendix XI: “Naphthenic Acids in Athabasca Oil Sands Tailings Waters Are Less Biodegradable than Commercial Naphthenic Acids,” Angela C. Scott et al, *Environ. Sci Technol.* 2005, 39, 83888-8394, available at: <<https://goo.gl/uUYJ9H>>;

note that the levels found exceed water quality guidelines and, moreover, that such exceedances could contribute to chronic toxicity in reclaimed aquatic environments.

25. With respect to the failure of Canada to conduct monitoring, the Submitters include the aforementioned administrative agreement with the Province of Alberta and argue that the monitoring program envisioned by this agreement, as well as the two monitoring implementation programs subsequently instituted, has resulted in a failure to conduct effective monitoring and enforcement investigations.³⁸ Most notably, the Submitters reference a 2016 expert panel report that assesses the scientific integrity of the JOSM program undertaken by Canada and Alberta.³⁹ Although the report is more focused on the scientific integrity of the monitoring process than the impacts of leakage of tailing ponds or any enforcement associated with that leakage, it does note in its recommendations that Canada and Alberta should “better define and document specific policy and scientific goals” for monitoring the oil sands; “conduct more comprehensive data analysis and interpretation;” and enhance transparency by making more data publicly available and preparing a “results report that interprets and integrates results for air, water, wildlife contaminants and biodiversity.”⁴⁰
26. Regarding information in the Submission concerning the alleged failure by Canada to effectively enforce the *Fisheries Act*, in addition to the information summarized above in paragraphs 12-16, the Submitters include information concerning the environmental assessment process conducted for new oil sands mines under the *Canadian Environmental Assessment Act*.⁴¹ This information, the Submitters contend, shows that the mining companies themselves predict tailings leakage into surface waters and water quality impacts.⁴² Further, the Submitters contend there are other instances in which Canada is aware of the potential or actual contamination of surface and groundwaters, yet still has not taken any type of enforcement action.⁴³
27. The Secretariat thus finds that the Submission meets the requirements of Article 14(1)(c), as it provides sufficient information and supporting documentation to allow the Secretariat to properly review the assertion that the Party has allegedly failed to enforce subsection 36(3) of the *Fisheries Act* concerning contaminated process water from tailings ponds which may be leaking into surface and groundwater in northeast Alberta.

Appendix XII: E. N. Kelly et al., “Oil sands development contributes polycyclic aromatic compounds to the Athabasca River and its tributaries” (December 2009) Proceedings of the National Academy of Sciences, available at: <<https://goo.gl/q9csFp>>, and Appendix XIII: Erin Kelly et al., “Oil sands development contributes elements toxic at low concentrations to the Athabasca River and its tributaries” in (September 114, 2010) 107 Proceedings of the National Academy of Sciences 37, 16178-16183, available at <<https://goo.gl/My8vES>>.

³⁸ Submission, at 7.

³⁹ Submission, at 7 and endnote 18: Expert Panel on Assessing the Scientific Integrity of the Canada-Alberta Joint Oil Sands Monitoring, “Assessing the Scientific Integrity of the Canada-Alberta Joint Oil Sands Monitoring (2012-2015),” at 45-48, available at: <<https://goo.gl/D2v7Cg>>.

⁴⁰ *Id.*

⁴¹ Submission, at 4 and Appendix III *supra* note 34.

⁴² Submission, at 7.

⁴³ Submission, at 9.

(d) [Whether] the submission appears to be aimed at promoting enforcement rather than at harassing industry;

28. The Secretariat finds that the Submission satisfies this criterion as it appears to be aimed at promoting enforcement of the laws rather than at harassing an individual company or the industry.⁴⁴ Although the Submission concerns the oil sands industry in general, and specific companies are mentioned in the Submission, it is clear that the purpose of the Submission is to correct a perceived environmental harm by promoting effective enforcement of the *Fisheries Act*. Moreover, the Submitters have included copies of correspondence demonstrating that they have contacted, over the course of a number of years, Canada requesting enforcement.⁴⁵ The Secretariat also finds that the Submission is focused on the alleged acts and omissions of the Party.

(e) [Whether] the submission indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any;

29. As previously mentioned,⁴⁶ the Secretariat finds that the Submitter has communicated with Canada on this matter numerous times and has included the Party's responses. For this reason, the Secretariat finds that the Submission meets this admissibility criterion.

(f) [Whether] the submission is filed by a person or organization residing or established in the territory of a Party.

30. The Submission is filed by two nongovernment organizations, Environmental Defence, located in Ottawa, Ontario (Canada), and the Natural Resources Defense Council, located in New York, New York (United States), as well as a Canadian resident, all established in or residing in the territories of two Parties to the NAAEC. The Secretariat finds that the submission satisfies the requirements of Article 14(1) (f).

31. Having reviewed the Submission with reference to the environmental law in question, the assertions in SEM-17-01 and the admissibility requirements, the Secretariat finds that the Submission meets the criteria of Article 14(1) and proceeds to determine whether the Submission merits requesting a response from the Party pursuant to Article 14(2) of the Agreement.⁴⁷ In this context, the Secretariat is guided by the following four criteria and whether:

⁴⁴ See, Guideline 5.4(a), which provides that to determine whether a submission is aimed at promoting effective enforcement and not at harassing industry, the Secretariat will consider 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." No such circumstances exist here.

⁴⁵ Submission, at 10 and Appendix XIX: Correspondence between the Submitter Environmental Defence and Environment Canada (January 2009–March 2010), available at: <<https://goo.gl/XL4BtN>>.

⁴⁶ *Id.*

⁴⁷ Guideline 7.1 provides:

C. Article 14(2) criteria

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

32. As the Secretariat notes in this determination, the Submitters comprise two non-governmental organizations and one person who resides in Canada. The Submission asserts that the nongovernmental Submitters are organizations “whose members include over 2.7 million individuals who have a shared interest in protecting the ground and surface waters of Canada and North America, including the reduction and elimination of pollution from industry.”⁴⁸ Regarding the individual submitter, the Submission states he “is a person who has lived, hunted, and fished downriver from the oil sands.”⁴⁹ Further, the Submitters contend that the “harm that the contaminants found in tailings ponds can do is not in dispute, and ...contaminants like naphthenic acids are very long-lived, with their toxic legacy extending into many decades. Given the amount of tailings being generated, the scale of the problem is of national and international concern.”⁵⁰
33. Submitters also include in their Submission a scientific article that compiles the results of several studies relating to the toxicity of oil sands processing water and the effect on fish such as trout (a fact that has been known for years), as well as identifying more recent research on chronic toxicity affects.⁵¹
34. In considering harm, the Secretariat notes the importance and character of the resource in question—groundwater and surface waters.⁵² The Secretariat concludes from the foregoing that the Submission alleges harm to the Submitters in accordance with Article 14(2) (a) and that any such alleged harm could be due to the alleged failure to enforce subsection 36(3) of the *Fisheries Act*.

(b) The Submission ... raises matters whose further study in this process would advance the goals of this Agreement;

35. The Submission states that it raises matters that would advance the goals of the NAAEC.⁵³ As the Secretariat has established in previous determinations, allegations of widespread patterns of ineffectual or non-enforcement, as inferred by the Submitters’ assertion that there has been no enforcement despite alleged violations of subsection 36(3), are well-

Where the Secretariat determines that the submission meets the criteria set out in Article 14(1) of the Agreement, the Secretariat will determine whether the submission merits requesting a response from the Party concerned. The Secretariat will accordingly notify the Council and the Submitter.

⁴⁸ Submission, at 12.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Submission, at 5, and Appendix X. See also, discussion at paragraph 23, *supra*.

⁵² See, for example, SEM 99-002 (*Migratory Birds*) Determination under Article 14(1)(2) (23 December 1999).

⁵³ Submission, at 12.

suited to the SEM process.⁵⁴ The Secretariat considers that the matters raised in the Submission could advance the NAAEC objectives alleged by the Submitters, and found in Article 1 of the NAAEC.⁵⁵

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

36. The Submitters contend that “there are no realistic private remedies available,” that some of the Submitters lack status for civil remedies, that remedies would be difficult to pursue because the evidentiary burdens require significant resources, and that pursuing individual prosecutions would “not address the systemic problem of persistent non-enforcement by the authorities.”⁵⁶
37. The Submitters also note that private prosecutions, or criminal prosecutions brought by an individual under Canadian criminal law, are generally beyond the financial capacity of most individuals and can incur great financial costs.⁵⁷ The Secretariat acknowledges that such remedies may be impractical or unrealistic, particularly in complex matters where, as the Submitters maintain, there may be numerous violations of federal law.⁵⁸
38. The Secretariat also notes that the Submitters have filed a prior submission with the Secretariat and attempted to pursue the NAAEC submissions process until the Council terminated the submission in 2015.⁵⁹ Further, the Submitters have communicated with Environment Canada in their efforts to seek enforcement of the law in question.⁶⁰
39. In light of the foregoing, the Secretariat finds that the Submission includes information regarding private remedies that have been pursued, in accordance with Article 14(2)(c).

(d) The Submission is drawn exclusively from mass media reports.

⁵⁴ SEM-99-001 (*Methanex*), Article 14(1)(2) Determination (30 March 2000) at 8; SEM-99-002 (*Migratory Birds*) Article 14(1)(2) Determination (23 December 1999) at 7; SEM-02-003 (*Pulp and Paper*) Article 14(1)(2) Determination (7 June 2002) at 9.

⁵⁵ Article 1 reads in part:

Article 1: Objectives. 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; ...
- (e) avoid creating trade distortions or new trade barriers;
- (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; ...
- (j) promote pollution prevention policies and practices.

⁵⁶ Submission, at 12.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See, discussion, *supra*, paragraph 3 and notes 10-11. The Submitter also communicated to the Canadian federal Environment Minister after Council's vote but never received a reply. Submission, at 11 and Appendix XXII: Letter from Environmental Defence to federal Environment Minister (27 May 2015).

⁶⁰ See, discussion at paragraph 27, *supra*.

40. The Submitters note that the Submission “is based primarily upon information obtained from governments, industry, and academic resources,”⁶¹ rather than on mass media reports.
41. The Secretariat finds that the Submitters’ assertion is true and that most of the documentation included in the Submission has not been drawn exclusively from mass media reports.

III. DETERMINATION

42. For the reasons given above, the Secretariat determines that Submission SEM-17-001 (*Alberta Tailings Ponds II*) meets the criteria in Article 14(1) of the NAAEC. Having also considered the factors in Article 14(2), the Secretariat further determines that the Submission warrants requesting a response from the Government of Canada.
43. In any response, the Party may wish to provide information concerning enforcement of subsection 36(3) of the *Fisheries Act* in the Alberta oil sands region, in relation to both direct and indirect deposits of deleterious substances from tailings ponds into water frequented by fish.
44. As set out in Article 14(3)(a), the Party may provide a response to the Submission within the thirty working days following receipt of the present Determination, *i.e.*, by 28 September 2017. In exceptional circumstances, the Party may give written notice of the extension of this period to sixty working days, *i.e.*, by 10 November 2017.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)
per: Robert Moyer
Director, Submissions on Enforcement Matters Unit

c.c.: Ms. Isabelle Bérard, Canada Alternate Representative
Ms. Jane Nishida, US Acting Alternate Representative
Mr. Enrique Lendo, Mexico Alternate Representative
Mr. César Rafael Chávez, CEC Executive Director
Submitters

⁶¹ Submission, at 12-13.