

Reasons for Council Instructions Regarding Submission SEM-17-001 (*Alberta Tailings Ponds II*)

Pursuant to its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation responsible for overseeing the implementation of the *North American Agreement on Environmental Cooperation* (“NAAEC”), the Council of the Commission for Environmental Cooperation (the “Council”) hereby makes public its reasons for the instructions to the Secretariat for the preparation of a factual record regarding SEM-17-001 (*Alberta Tailings Ponds II*).

1. The Secretariat’s Article 15(1) Notification

In its Article 15(1) notification issued on 19 April 2018 (the “15(1) notification”), the Secretariat notified the Council that the development of a factual record was warranted regarding the Submitters’ assertions of a failure to effectively enforce subsection 36(3) of the federal *Fisheries Act* in relation to the 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.

2. The Council’s Instruction to the Secretariat

In Council Resolution 18-01, the Council unanimously instructed the Secretariat to prepare a factual record strictly regarding the following aspects of the submission:

- a) The state of the publicly available peer-reviewed science on identifying differences between naturally-occurring bitumen-influenced water and anthropogenic oil sands process-affected water;
- b) Alberta’s relationship with Canada with respect to the assertions and specific sites referred to in the submission, as well as other specific sites mentioned in Canada’s response; and
- c) How the Oil Sands Monitoring Program (formerly the Joint Oil Sands Monitoring Program) is carried out and how it fits into Canada’s enforcement of the *Fisheries Act*.

3. Explanation of the Council’s Reasons

Article 45(1)(a) of the NAAEC

1. Article 45(1)(a) of the NAAEC provides that a Party has not failed to effectively enforce its environmental law where the action or inaction in question “reflects a reasonable exercise of [the Party’s] discretion in respect of investigatory, prosecutorial, regulatory or compliance matters”. Guideline 9.4 of the *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Guidelines) provides that if a Party informs the Secretariat in its response that it is not failing to effectively enforce its environmental law pursuant to Article 45(1)(a), the Party response should provide sufficient information to explain

how the Party's action or inaction reflects a reasonable exercise of discretion. Guideline 9.5 further provides that the Secretariat is to "consider whether the Party has included sufficient information" to this effect.

2. In its response, Canada explained the enforcement actions it has taken pursuant to Subsection 36(3) of the *Fisheries Act* in relation to tailings ponds in northeastern Alberta. Canada described proactive inspections it has undertaken in relation to specific tailings ponds, including all of the specific sites identified in the submission, the results of those inspections, the inability to conclude there were reasonable and probable grounds to believe a violation of subsection 36(3) of the Act had occurred, and the reasons why Canada then redirected proactive enforcement efforts toward other priorities while ECCC's scientific research in relation to tailings ponds continued. In the Council's view, Canada's response provided sufficient information concerning its reasonable exercise of discretion under Article 45(1)(a) and Guidelines 9.4 and 9.5.

Use of enforcement tools other than prosecutions under the *Fisheries Act*

3. The Secretariat's 15(1) notification recommends developing a factual record in connection with the "use of enforcement tools other than prosecutions". The Council notes that, as indicated in Canada's response, Canadian law requires reasonable grounds to believe an offence has occurred in order to take an enforcement action. The Council further notes Canada's explanation that other enforcement tools, such as those identified by the Secretariat in its 15(1) notification, were not available to enforcement officers because of a lack of reasonable grounds to believe that an offence had occurred. In its response,¹ Canada distinguishes the relevant legal standards for undertaking enforcement actions (reasonable grounds) and securing a conviction (beyond a reasonable doubt). The Council notes that Canada has exercised its enforcement authority by conducting proactive inspections under the Act to serve the purpose of assessing compliance and is of the view that it would not be appropriate for the Secretariat to comment on how legal standards of proof should be met in relation to the Parties' domestic legal enforcement activities.
4. In the Council's view, a Party is not required to pursue every enforcement tool available to meet the standard of "effective enforcement" under the NAAEC. In the matter at hand, it is not clear to the Council what new or additional information could have been gathered by the authorities of Canada that would have resulted in a different outcome had they resorted to other tools of enforcement. As Canada explained in its response, the *Fisheries Act* allows the Minister of Environment and Climate Change to request information relating to activities that are likely to result in the deposit of deleterious substances, and based on such information, the Minister may resort to orders "where a

¹ Response, at pp. 13-14.

violation has occurred or is likely to occur”.² As Canada further explained, enforcement officials in this matter were challenged by a lack of analytical tools to assess whether seepage from tailings ponds is occurring into water frequented by fish and thus is actionable under the *Fisheries Act*. In the Council’s view, it is not proper for a factual record to speculate on whether the discretionary powers of the Minister under the Act should have been pursued.

State of the Research

5. The Council recognizes the Secretariat’s view that there is public interest in the scientific research associated with the environmental impacts of oil sands development. While Canada’s Response included the latest available information at the time the Response was provided, the factual record may explore any publicly available information on the state of the research with respect to identifying the differences between naturally-occurring and anthropogenic bitumen-influenced water to provide greater clarity on this matter under the submission.

Relationship with Alberta

6. The Council notes it would not be appropriate for the factual record to address Alberta’s regulatory authorities since Alberta’s environmental laws are not the subject of the assertions contained in the submission. The Council agrees, however, with the Secretariat’s recommendation for the factual record to address Alberta’s relationship with Canada in enforcing subsection 36(3). This examination should focus exclusively on the assertions raised in the submission rather than a broad review of Alberta’s role in relation to all enforcement actions under the *Fisheries Act*.

² Response Annex 1, *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act*, at pp. 21.