

**SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL  
COOPERATION PURSUANT TO ARTICLE 14 OF THE  
*NORTH AMERICAN AGREEMENT  
ON ENVIRONMENTAL COOPERATION***

*Submitted by:*

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British Columbia Wildlife Federation  
Trail Wildlife Association  
Steelhead Society  
Trout Unlimited (Spokane Chapter)  
Sierra Club (U.S.)  
Pacific Coast Federation of Fishermen's Association  
Institute for Fisheries Resources**

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## **THE SUBMITTING PARTIES**

This submission is jointly made by the following organizations from Canada and the United States separately represented by the Sierra Legal Defence Fund (S.L.D.F.) and the Sierra Club Legal Defense Fund (S.C.L.D.F.):

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~ a non-profit association of First Nations in B.C. with the mandate to advance and protect the interest of First Nations' people in sound fisheries management.

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~ a fish and game club located in Trail, B.C. concerned about the health of fisheries resources in the Columbia River system.

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## I. SUMMARY OF THE SUBMISSION

This submission, made pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC), identifies the failure of the Canadian Government (the “Federal Government”) to enforce s. 35(1) of the *Fisheries Act*, and to utilize its powers pursuant to s. 119.06 of the *National Energy Board Act*, to ensure the protection of fish and fish habitat in British Columbia’s rivers from ongoing and repeated environmental damage caused by hydro-electric dams.

B.C. Hydro (“Hydro”), a crown corporation wholly owned by the government of the Province of British Columbia (the “Provincial Government”), builds, owns, maintains and operates a system of hydro-electric dams across B.C. The regular operation of these dams causes consistent and substantial damage to fish and fish habitat.

Sections 35(1) and 40(1) of the *Fisheries Act* make it an offence to carry on any work that results in the harmful alteration of fish habitat. Hydro has consistently and routinely violated section 35(1). The Department of Fisheries and Oceans (“DFO”), the federal department responsible for the administration of that Act, has only laid two isolated charges pursuant to sections 35(1) and 40(1) against Hydro since 1990, despite clear and well documented evidence that Hydro’s operations have damaged fish habitat on numerous occasions.

In addition, Canada’s failure to enforce environmental laws governing hydropower production creates market opportunities for Hydro in the U.S. As a result of an array of U.S. environmental laws, U.S. hydropower operations have been and are being adapted to incorporate conservation measures to protect fish passage. Hydro’s operations, in contrast, are exempted from the application of Canadian environmental laws by the Federal Government’s failure to enforce the *Fisheries Act*. This exemption gives Hydro an unfair competitive advantage over U.S. hydropower producers: while conservation measures implemented in the U.S. impose some constraints on the ability of U.S. hydropower producers to meet market demands, Hydro is free to operate without those constraints.

The Federal Government also has the jurisdiction to regulate the exportation of electricity from the provinces, and has created the National Energy Board (the “NEB”) to review and determine applications to export electricity. Pursuant to s. 119.06 of the *National Energy Board Act* the NEB must consider the impact of the exportation on the environment. The NEB, however, recently refused to examine the environmental impacts of the production of electricity for exportation, despite receiving evidence of those impacts from the B.C. Wildlife Federation.

The NEB based its decision in large part on the existence of provincial laws that “actively regulate” the environmental impacts of Hydro’s operations. In fact, there are no provincial laws that regulate or minimize the environmental impacts of hydroelectric operations. The *Water Act*

is the only provincial statute that regulates Hydro's use and diversion of water from river systems, and Hydro has at least one licence under that Act for each of its dams. The Province has chosen not to exercise its jurisdiction to control the environmental impacts of those licences. The majority of those licences make little if any provision for water flows necessary to protect fish and fish habitat. Hydro has also exceeded its licence limits for several dams on repeated occasions, causing further harmful alteration of fish habitat. In choosing to ignore this evidence, the NEB invalidly refused to exercise its mandatory statutory jurisdiction to examine the environmental impacts of the production of power for export.

The Submitting Parties submit that the failure of the Federal Government to enforce s.35(1) of the *Fisheries Act* against Hydro, and to exercise its regulatory power to examine the environmental impacts of the production of power for export, has two significant consequences. It permits and condones the ongoing destruction of fish and fish habitat in B.C., and it distorts the hydropower market and undermines the purposes of the NAAEC.

The Submitting Parties therefore request that the Commission prepare and publish a thorough factual record documenting the allegations contained in this Submission.

## **II. SUBMISSIONS**

### **A. FACTS**

#### **1. The decline in fish stocks throughout B.C.**

An alarming number of anadromous fish stocks in B.C. have either gone extinct, or are in a state of serious decline. A recent study by the American Fisheries Society concluded that 142 salmon stocks in B.C. and the Yukon have been extirpated, and 624 are at high risk of becoming extirpated. The study identified logging, urbanization and hydropower development as the primary factors contributing to most of the 142 documented stock extinctions (Slaney, Hyatt et al "Status of Anadromous Salmon and Trout in British Columbia and Yukon" in *American Fisheries Society*, Vol. 21, No. 10 (Tab 1)).

The extinction of fish stocks is an irreversible loss. Each stock possesses unique genetic information that determines the timing of its spawning runs, and that also dictates the stock's return to its original spawning bed. That genetic information is lost when a stock becomes extinct.

The decline in the fisheries has had a significant impact on communities and individuals which depend on fisheries for their livelihoods and cultural identities. First Nations, who enjoy a constitutionally protected aboriginal right to fish, and fisheries dependent communities up and down the coast have faced the severe decline, or loss, of a traditional livelihood. The harmful

alteration of fish habitat has reduced recreational fishing opportunities, and threatens the livelihoods of people working in the recreational fishing industry. Clearly, the preservation and enhancement of fish populations and habitat should be a top priority for the Federal Government.

## 2. The environmental cost of hydropower production

Hydro-electric dams operated by Hydro play a significant role in the alteration and destruction of fish habitat. Hydro owns and operates a province wide system of hydro-electric dams that controls and reduces the water flows in rivers at more than 70 locations in British Columbia, influencing a wide range of rivers and reservoirs that contain or support fish resources.

The operation of dams in British Columbia causes the harmful alteration of fish habitat in at least 7 ways:

- *Reduced Flows*: A reduction in the flow released downstream of a facility can result in decreased habitat quantity due to a reduction in stream volume and total wetted area in the stream. Reduced flows may also cause a change in stream temperature, depending on the depth of outflow to the reservoir thermocline and the exchange rate in the river.
- *Rapid Flow Fluctuation*: The rate of change of flow through a dam is known as the ramping rate. A ramping rate that is too high during flow increase may displace fish from favoured habitats, while a rapid decrease in flows can leave fish and benthic invertebrates (food sources) out of water or trapped in isolated pools. Rapid changes in flow can also disrupt fish spawning activity.
- *Inadequate Flushing Flows*: Inadequate flushing flows can reduce productivity by permitting sediment buildup. At higher discharges, a river reconditions its natural channel, and flushes out accumulated sediment. The limited and regulated flow regimes at many of Hydro's dams do not incorporate flushing flows.
- *Altered Water Quality*: When water is impounded, water temperature, dissolved oxygen content, total gas pressure, sediment and nutrient levels, pH and dissolved metal concentrations can all change. Aquatic organisms that depend on physical water parameters, including both fish and the species they feed on, can be adversely affected by these changes in water quality.

The flow of water over a dam spillway can also adversely impact water quality. When air mixed in water is subjected to high pressure, as when passing over a spillway into a plunge pool, the water may become supersaturated with gases, especially nitrogen. If these gases come out of solution within the bodies of fish, the resulting condition is

known as “gas bubble disease”: fish bladders burst, and other internal cavities expand, resulting in death or disfigurement.

Storage of water may affect water quality by creating a stagnant bottom layer of water that is deficient in oxygen, and by causing suspended sediments and nutrients to settle out. Storage of water can also alter water temperature, which can cause warming lethal to fish and a change in egg incubation rates which can cause eggs to hatch when conditions are not suitable for survival. Flows which lower temperatures may promote freezing of spawning beds and decrease production of benthic invertebrates.

- *Entrainment*: Fish that inhabit waters in the proximity of power intakes or spillways run the risk of being drawn into turbines or over spillways. For fish that become entrained in turbines, mortality or severe wounding may result from contact with rudder blades. In addition, death may result from the sudden water pressure drop as water passes through the turbine, which can result in impacts similar to those of gas bubble disease.
- *Flow Diversion*: Diversion of water from one stream for use in power generation in another basin can cause the harmful lowering of flows and interfere in the ability of fish to identify and return to home streams when spawning.
- *Reservoir Drawdown*: Drawdown of a storage reservoir typically reduces productivity in the shallow, littoral areas of the lake by periodically drying out these areas. This results in mortality of aquatic vegetation and bottom-dwelling organisms that comprise the aquatic food chain. In lakes with fish species that spawn along the shorelines, reservoir drawdown may either prevent spawning or result in the stranding of eggs depending on the extent and timing of the drawdown. Many fish species depend on tributary habitat for spawning and/or rearing, and decreased lake levels may inhibit tributary access for these species. Finally, reservoir drawdown may reduce water quality due to wave-induced mobilization of sediment in the drawdown zone.

Lewis, Naito et al *Fish Flow Studies Project - Fish Flow Overview Report*, March, 1996 at pp. 2-4 (Tab 2); Department of Fisheries and Oceans, 1991, “*Impacts of the Operation of Existing Hydroelectric Developments of Fisheries Resources in British Columbia* ” Vols. I (Tab 3) and II (Tab 4).

A study of existing diversions has shown that the removal of more than 30% of mean monthly flows results in a significant loss of fish and fish productivity. Hydro’s operations frequently



result in the diversion of more than 30% of the mean monthly flows on many B.C. rivers (see the review of Hydro's dam operations contained in Appendix A to this submission).

Mundie, *Overview of Effects of Pacific Coast River Regulation on Salmonids and the Opportunities for Mitigation* in American Fisheries Society Symposium 10:1-11, 1991 at p. 6 (Tab 5).

Specific instances of Hydro's operations harming fish and fish habitat are well known to both Hydro and government agencies. Some examples are:

- **Keenleyside Dam/ Norns Creek fan:** in its own *Fish Flow Studies Project - Fish Flow Overview Report* (Tab 2), Hydro states that the operation of its Keenleyside Dam is known to dewater whitefish habitat and cause mortality. Additionally, the complete shut down of flows at that dam in April, 1990 dewatered and stranded rainbow trout and kokanee fry on the downstream Norns Creek fan (*Report*, p. 18).
- **Cranberry Creek:** In the summer of 1996 Hydro dewatered Cranberry Creek south of Revelstoke, B.C., killing and stranding rainbow trout over a ten kilometre section of the creek. A Provincial Ministry of Environment, Lands and Parks memorandum regarding the incident notes that Hydro was in compliance with its water licence (which makes no provision for minimum flows for fish) at the time, and that similar situations exist elsewhere (Ministry of Environment, Lands and Parks Information Issue dated Sept. 4, 1996,(Tab 6)).
- **Revelstoke Dam:** This facility, which provides power during peak periods, causes enormous variation in downstream flow rates. Discharge from the power plant ranges from 0 to 1600 m<sup>3</sup>/s daily. The fluctuating water flow disrupts spawning, strands fish and prevents fish from utilizing the upper portions of the river reach.
- **Cheakamus River:** Downstream fish populations have declined since project operations began, including the extinction of wild pink salmon. These populations are negatively impacted by the lack of adequate stream flows and rapid fluctuations of flows. Past spills have led to incidents of stranding in the river. During the lowest flow periods, flows are reduced by 50 to 85 percent.
- **Shuswap Falls Project:** Low winter flows have substantial negative impacts upon downstream incubating eggs, and spawning areas have become dewatered. Rapid flow fluctuations also have a negative impact on fish. The configuration of the dam has led to increased sediment levels. Reservoir fluctuations affect benthic productivity and reduce access to Sugar Lake tributaries.
- **Downton Lake:** In May, 1996 Hydro substantially drained the Downton Lake reservoir. A report prepared by an independent environmental auditor appointed by the Provincial

Government concludes that the draw down was deliberate, and caused “substantial fish mortality”. The report also notes that similar incidents have occurred in the past at both Downton Lake and other reservoirs (*Interim Report of the Special Environmental Auditor With Respect to the Draining of Downton Reservoir in 1996*, June 1996, p. 2, (Tab 7)).

The Submitting Parties are unaware of any charges laid against Hydro with respect to these incidents.

These six specific incidents illustrate the nature and extent of the damage to fish and fish habitat caused by Hydro’s operations across the Province. A comprehensive review of the impact of Hydro’s dams is found at Appendix A to this Submission.

Hydro itself has concluded that many of its projects violate the *Fisheries Act* with regard to inadequate instream flows and rapid fluctuation of flows.

The federal *Fisheries Act* clearly states that any unauthorized activity that kills fish or affects fish habitat in any way contravenes the *Act*. Many reports, both internal and external to BC Hydro document in detail the impacts that sudden changes in downstream flowrates can have on fish and fish habitat. It is clear that some BC Hydro facilities then contravene the *Act*.

BC Hydro, Safety and Environment, *Environmental Management System for Aquatic Resources*, June 1995, Instream Flows Chapter, p. 3 (Tab 8)

Hydro has also admitted that entrainment and passing fish over spillways violate the *Fisheries Act*:

Several of B.C. Hydro’s plants entrain fish on a regular basis...B.C. Hydro may also be in violation of the *Fisheries Act* for allowing fish to pass over spillways, for fish may be injured or killed as they impact on the dam infrastructure.

*Ibid*, “Fish Passage - Downstream Chapter”, p. 3.

Hydro has further admitted that operation of reservoirs can contravene the *Fisheries Act*:

Every time a fish is killed or fish habitat destroyed because of BC Hydro’s operations, the federal *Fisheries Act* is contravened. As mentioned above, reservoir drawdowns often expose fish habitat, strand fish in isolated pockets and increase erosion that may harm spawning habitat.

*Ibid*, “Reservoir Management Chapter”, p. 3.

While Hydro does require licences pursuant to the Provincial *Water Act* for its operations, less than 7% of those licences contain any measures to protect the environment, such as minimum

instream flow requirements (Sigma Engineering, *Environmental Compensation Status* report prepared for Hydro, May 1990, Executive Summary, (Tab 9)). Reports funded by DFO and the Provincial Ministry of Environment also show that Hydro has frequently violated the terms of some of its water licences (Ward & Associates Ltd., *Water Releases at the Cheakamus Power Plant: A Review of Licenced Operation Diversions*, June 1996, (Tab 10); Ward & Associates, *Water Diversion and Storage at Ten Sites: Review of Licenced Operations Progress Report*, August 1996, (Tab 11)).

## 2. Market Opportunities Created by U.S. Regulation of Hydropower Production to Protect Fish

In the United States, hydropower production in the Pacific Northwest is subject to an intricate array of important, common sense environmental regulation designed to ensure that hydropower production does not come at the expense of fish, their habitat and the economies that depend on them. Since the 1970s, federal statutes have afforded fish and wildlife “equal consideration” in the planning and development of hydropower projects (*Fish and Wildlife Coordination Act*, 16 U.S.C. §§ 661-666c). The 1980 *Northwest Power Act*, 16 U.S.C. §§ 839-839h, goes further and ensures fish and wildlife “equitable treatment” in the development and operation of Columbia River hydropower systems. Under the *Northwest Power Act*, the Pacific Northwest Electric Power and Conservation Planning Council must create a “program to protect, mitigate, and enhance” the Columbia River Basin’s fish and wildlife “to the extent affected by the development and operation” of the Basin’s hydropower system (16 U.S.C. § 839b(h)(1)(A), (h)(10)(A)). The Council has been held to these obligations by U.S. courts (see *Northwest Resource Information Center, Inc. v. N.W. Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994), cert. denied, 116 S. Ct. 50 (1996)).

As in British Columbia, the development and operation of the hydropower system is largely in governmental hands. Thus, two federal agencies -- the Army Corps of Engineers (“Corps”) and the Bureau of Reclamation -- operate the federal dams on the Columbia River and its tributaries, and another federal agency -- the Bonneville Power Administration (“BPA”) -- markets and distributes the power generated at these dams. As federal agencies, the Corps, Bureau and BPA are subject to the *National Environmental Policy Act* (“NEPA”), 42 U.S.C. § 4332, which requires federal agencies to prepare environmental impact statements on major federal actions significantly affecting the environment. In accordance with NEPA, the Corps has prepared environmental impact statements on flow improvement measures undertaken to protect Columbia River salmon, and the BPA has prepared environmental impact statements on its long-term power sale contracts that affect the use of water within the Basin. Moreover, the three federal agencies are conducting an in-depth environmental review of the

Columbia River dam and reservoir system operations to determine what changes need to be made to protect fish, while maintaining other uses of the system.

The listing of three salmon stocks under the U.S. *Endangered Species Act* (“ESA”) in 1991 and 1992 added another layer of environmental regulation. Under the ESA, federal agencies, like the Corps, Bureau and the BPA, must ensure, in consultation with expert fish and wildlife agencies, that their actions, including hydropower operations, will not jeopardize the continued existence of any threatened or endangered species or adversely modify such species’ critical habitat (16 U.S.C. § 1536(a)(2)). Pursuant to this mandate, the Columbia River hydropower operations have undergone close scrutiny by the National Marine Fisheries Service -- an expert fisheries agency -- to assess their effects on threatened and endangered salmon stocks (see *Pacific Northwest Generating Co-op v. Brown*, 822 F. Supp. 1479 (D. Or. 1993), *aff’d in part, rev’d in part*, 38 F.3d 1058 (9th Cir. 1994); *Idaho Department of Fish & Game v. National Marine Fisheries Service*, 850 F. Supp. 886 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995)).

Together, these laws are precipitating changes in hydropower operations. Thus, no longer may reservoirs be drained during the winter to produce power when the demand is greatest; instead, water must be stored for fish passage during the spring and summer salmon migration to sea. Moreover, in the spring and summer, water must be passed over the spillways without going through the turbines to provide safer juvenile fish passage, and flows must be augmented to increase water velocity and thereby assist the smolts in moving downstream. Water passed over the spillways does not produce electricity. While augmented flows can produce additional power, this power production occurs in the spring and summer when demand in the Pacific Northwest is down. Essentially, the U.S. hydropower system is beginning to internalize the environmental costs of power production by tailoring the hydropower operations to fish, as well as power production, needs. In addition, BPA must contribute some of its revenues to fund conservation and mitigation measures called for in the Pacific Northwest Electric Power and Conservation Planning Council’s fish and wildlife program (16 U.S.C. § 839b(h)(10)-(11)).

Hydro is turning the U.S. agencies’ prudent fishery conservation strategies into an economic boon. When U.S. power producers are augmenting flows for the spring and summer salmon migration, Hydro is purchasing the excess power while storing water in its own reservoirs that could be used to augment flows in B.C. rivers at the exact time when juvenile fish need greater flows for safe fish passage. Conversely, when the U.S. hydrosystem cannot meet the winter demand for power because water is being stored for spring fish needs, Hydro is producing power for export to take advantage of the U.S. market, rather than storing water needed for the spring salmon migration.

Sound conservation measures implemented in the U.S. to preserve and protect fish and fish habitat are therefore creating a market opportunity for Hydro. Hydro intends to pursue that opportunity: its 1996 Annual Report projects a doubling of power exports from 2427 GW.h in

fiscal year 1996, to 5000 GW.h per year in fiscal years 1997 through 1999 (*Connection - B.C. Hydro 1996 Annual Report* at pp. 40-41 (Tab 12)). While the increase in power exports fattens Hydro's profit margin, it comes at the expense of fish and fish habitat in B.C.

The disparity in enforcement of environmental laws in the U.S. and British Columbia, and Hydro's exploitation of the market opening created by U.S. conservation measures, may spur U.S. power producers to advocate for weaker enforcement of U.S. environmental laws governing hydropower production. The conservation measures being implemented in the United States have been resisted vigorously by both the federal agencies and the principal U.S. consumers of cheap hydropower. See, e.g., *Pacific Northwest Generating Co-op v. Brown*, 822 F. Supp. 1479 (D. Or. 1993), *aff'd in part, rev'd in part*, 38 F.3d 1058 (9th Cir. 1994). Indeed, legislative proposals that would exempt BPA from certain environmental requirements have surfaced periodically.

The creation of NAAEC was spurred by a fear that liberalized trade would precipitate a downward spiral in terms of environmental regulation. Alarms sounded particularly with respect to border areas where one country could relax its enforcement of environmental standards to give its producers a competitive advantage in an era of open borders. Canada's failure to enforce its environmental laws governing hydropower production in the face of the integration of conservation measures into the U.S. hydropower system creates precisely the type of inequities and distorted incentives the NAAEC was designed to guard against.

## **B. THE FAILURE TO ENFORCE THE *FISHERIES ACT***

Section 35(1) of the *Fisheries Act* states:

“No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.”

Section 35(2) states that no person contravenes subsection (1) if that person causes the alteration, disruption or destruction of fish habitat by any means authorized by the Minister of Fisheries and Oceans (the “Minister”) or under regulations made under the Act. Section 40(1) makes a contravention of s. 35(1) a summary conviction or indictable offence.

Section 35(1) is the sole legislative provision applicable to B.C. that explicitly protects fish habitat. B.C. has no laws or regulations of its own that require the protection of fish habitat. The provincial *Water Act* creates a regulatory scheme to manage the use and exploitation of water in B.C. It is not a piece of environmental legislation, and it does not address or protect any environmental or fisheries values.

Section 35(1) therefore performs a critical and unique role in the protection of fish habitat in B.C. It is the only means by which individuals and companies may be held responsible for harming fish habitat, and the penalties specified under s. 40(1) are the only penal deterrent to activities that harm fish habitat under either the Federal and Provincial regulatory regimes.

As the facts stated above demonstrate, Hydro's operations result in significant damage to, and degradation of, fish habitat on a repeated and consistent basis. The Minister has not issued any authorizations pursuant to s.35(2) of the *Fisheries Act* that permit Hydro to damage fish habitat, nor are there any regulations under the Act that exempt Hydro from complying with s. 35(1).

DFO, the agency primarily responsible for the administration and enforcement of the *Fisheries Act*, including s. 35(1), is aware of these facts, and has received frequent correspondence from various Submitting Parties identifying both general concerns regarding the impact of hydropower production on fish habitat, and specific evidence that Hydro has contravened s. 35(1) (Tabs 13). DFO, however, has failed, and continues to fail, to enforce s. 35(1) against Hydro.

DFO has only laid two charges under s. 35(1) against Hydro since 1990. In light of the clear and overwhelming evidence of Hydro's violations of that section, and the clear evidence of a decline in fish populations and habitat, this enforcement record reveals a consistent failure by the Federal Government to effectively enforce s. 35(1) against Hydro, not a reasonable exercise of prosecutorial discretion.

### **C. THE FAILURE OF THE NEB TO ADDRESS THE ENVIRONMENTAL IMPACTS OF POWER PRODUCTION**

In addition to its jurisdiction over fish and fish habitat, the Federal Government also has jurisdiction over the exportation of energy from Canada. Under the *National Energy Board Act*, the Federal Government has created the NEB to receive and determine applications to export energy from Canada.

Pursuant to s. 119.06 of the *National Energy Board Act*, the NEB may recommend to the Minister of Natural Resources that an application be subjected to a public review process. In determining whether to make that recommendation, the NEB is directed by s. 119.06(2) to consider "the impact of the exportation on the environment" and to "avoid the duplication of measures taken in respect of the exportation by the applicant and the [provincial government]".

The NEB's statutory mandate to examine the environmental effects of the exportation of energy plays a critical role in addressing the environmental impacts of the production of electricity for export. As the Supreme Court of Canada noted in *Quebec (A.G.) v. Canada (N.E.B.)* [1994] 1 S.C.R. 159, the NEB is the only forum in which the environmental impact of the production of electricity for export is addressed.

In early 1996 the B.C. Wildlife Federation attempted to persuade the NEB to exercise this power to recommend a public review of an application by Powerex Corp. (“Powerex”), a wholly owned subsidiary of Hydro, to export power to an industrial user in Washington State. B.C. Wildlife Federation submitted materials and evidence regarding the environmental impacts of power exports, including evidence that:

“Non-power uses impacted by fluctuating reservoir elevations and downstream flows include resident fish and wildlife, irrigation, water quality and temperature, anadromous fish, cultural resources, navigation and transportation.”

The NEB failed to address the issue of the environmental impacts of the proposed export, relying in large part on the fact that the Province was “actively regulating the activity at issue”. As stated above, there are no Provincial laws or regulations that apply to the environmental impacts of the production of hydropower. In fact, 93% of the water licences held by Hydro make no provision for the release and maintenance of water flows necessary to conserve fish populations. However, the NEB somehow reasoned its way to the conclusion that “the evidence tended to show that the Province was active with respect to ensuring appropriate operation of hydroelectric stations, and was taking steps to promote the public interest in this regard” (Decision of the NEB dated September 13, 1996, pp. 6-9 (Tab 14)).

The NEB, the only federal regulatory tribunal with the jurisdiction to examine the environmental impacts of the production of power for export, has therefore explicitly refused to exercise that jurisdiction. The result: neither the Federal nor Provincial governments are regulating the impact of power generated for export on fish and fish habitat. In light of Hydro’s stated plans to double power exports by the year 1999, this can only result in a worsening of the impact of Hydro’s operations on fish and fish habitat.

#### **D. EFFORTS TO HAVE THE FEDERAL GOVERNMENT ENFORCE THE LAW**

##### 1. The Fisheries Act

Member groups of the B.C. Wildlife Federation and the Steelhead Society have each corresponded frequently with Federal elected officials, including the Minister of Fisheries and Oceans, and DFO officials regarding the impact of Hydro’s operations on fish and fish habitat. They have drawn DFO’s attention to specific instances where Hydro’s operations have arguably contravened s. 35(1), and have urged that DFO enforce that section against Hydro. Copies of samples of that correspondence are attached at Tab 13 of this Submission.

##### 2. The NEB

The *National Energy Board Act* provides that a party may appeal a decision of the NEB to the Federal Court of Appeal with leave of that Court. The B.C. Wildlife Federation applied for leave to appeal the decision of the NEB on the grounds that the NEB erred in failing to address the environmental effects of the production of energy for export, and the Federal Court of Appeal denied leave without reasons. There is no further effective appeal of the denial of leave to appeal. The decision of the Federal Court of Appeal effectively immunizes the NEB's decision from review, thereby leaving the Applicant with no further avenue of domestic recourse.

## **E. THE CONCERNS OF THE SUBMITTING PARTIES**

### **1. The Submitting Parties Represented by S.L.D.F.**

The B.C. Aboriginal Fisheries Commission represents First Nations across B.C. that have a strong and deeply rooted cultural and economic relationship with, and dependence on, fishing. While the right of First Nations to fish is constitutionally protected in Canada, that right will be an empty one if fish stocks continue to dramatically decline. Many First Nations' coastal communities also depend significantly on the fisheries for their continued economic viability.

The B.C. Wildlife Federation, Steelhead Society and Trail Wildlife Association represent groups and individuals who fish recreationally on many of B.C.'s rivers. They share a common interest in the preservation and enhancement of B.C.'s fish stocks.

The Spokane Chapter of Trout Unlimited represents local fishers who are concerned about the impacts of the operations of Canadian dams on transboundary resident fish in the Columbia River system.

### **2. The Submitting Parties represented by S.C.L.D.F.**

The Sierra Club is a U.S. environmental organization that works to protect the natural environment, including fish runs in the Pacific Northwest. The Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources represent commercial fishing interests along the Pacific Coast. All three organizations have worked to ensure effective enforcement of U.S. environmental laws which require adaptation of the U.S. hydropower system to protect fish. Their efforts are being undermined by Hydro's failure to implement comparable measures. In addition, the economic interests of the U.S. commercial fishing industry in healthy Canadian fish stocks are being harmed by Hydro's failure to incorporate conservation measures into its hydropower production activities.

All Submitting Parties, therefore, share a strong common interest in ensuring that the Federal Government enforces and applies laws that protect fish habitat in B.C.



**F. THE ISSUES RAISED IN THIS SUBMISSION MERIT THE PREPARATION OF A FULL FACTUAL RECORD**

1. This submission is within the jurisdiction of the NACEC

The Submitting Parties are all “non-governmental organizations”, as defined by Article 45(1), who are located in either Canada or the U.S.

Section 35(1) of the *Fisheries Act* is an “environmental law” within the meaning of Articles 14 and 45(2)(a) of the NAAEC. The primary purpose of the section is clearly to protect fish through the protection of their habitat. The purpose of the Submitting Parties in making this Submission is to promote the enforcement of environmental laws, and not to harass Hydro.

This submission provides clear evidence that the Federal Government is failing to enforce s. 35(1). That failure is not the result of a “reasonable exercise of ... discretion in ... prosecutorial, regulatory or compliance matters” or of “*bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.”

Both the Provincial and Federal Governments have recognized and stated that fish stocks in B.C. are in crisis, and that fish habitat protection is a critical step toward the protection and enhancement of fish stocks. Section 35(1) is the only regulatory provision applicable to B.C. that protects fish habitat. Hydro’s operations consistently cause harm to fish and fish habitat, a fact which is well known to government agencies, including DFO.

Despite this evidence, Hydro has only been charged twice under s. 35(1) since 1990. This lack of enforcement is not the result of an allocation of resources to enforcement regarding other environmental matters of higher importance - the crisis in the West Coast fisheries is one of the highest priority environmental issues in B.C.

Nor is this lack of enforcement a reasonable exercise of prosecutorial discretion. The Federal Government has enforced s. 35(1) against other individuals whose actions have caused single incidents of damage that pale in comparison to that caused by Hydro throughout B.C. on an ongoing basis. In *R. v. Heinrich*, (B.C.S.C.), Kamloops Reg., November 21, 1995 Hunter J. upheld convictions under s. 35(1) entered against a retired couple who had built a small dam on their property that subsequently broke, causing harm to fish and fish habitat. While the Federal Government therefore appears willing to enforce s. 35(1) against some individuals, its failure to enforce that section against Hydro amounts to an effective exemption of Hydro from compliance with the law.

Various of the Submitting Parties have communicated in writing to DFO regarding this issue, and copies of that correspondence are found at Tabs 12 and 13 to this Submission.

2. The submission merits a request that the Federal Government respond

The Applicants submit that this submission meets the criteria identified in Article 14(2) as guiding the CEC's decision regarding requesting a response from the Federal Government.

The Submitting Parties have already identified the harm caused to each of them by the Federal Governments failure to enforce its own laws under the heading "The Concerns of the Submitting Parties".

This submission raises issues that advance the goals identified in Article 1 of NAAEC:

- its purpose is to foster the protection of an important environmental resource for the benefit of present and future generations (1(a)).
- it promotes sustainable development based on the enforcement of mutually supportive environmental laws to protect fish and fish habitat in Canada and the U.S. (1(b)).
- it promotes cooperation between governments, regulatory agencies and industry groups in Canada and the U.S. to protect and conserve a shared fisheries resource (1(c)).
- it identifies and seeks to avoid a trade distortion caused by the differential enforcement of environmental laws (1(d)).
- it seeks to enhance compliance with, and enforcement of, environmental laws (1(e)).

The Submitting Parties have pursued all available "private remedies". Various Parties have urged DFO to enforce the *Fisheries Act*, to no effect. Canadian citizens also possess the common law right to initiate private proceedings to prosecute offences under the *Fisheries Act* (and other legislation) where the Federal or Provincial Government fails to act (these proceedings are called "private prosecutions"). S.L.D.F., acting on behalf of various Canadian Submitting Parties, has filed private prosecutions under the *Fisheries Act* on three occasions. In each instance, the Provincial Attorney General took over and ended the proceedings without going to trial and securing a conviction.

The common law right of concerned citizens to bring private prosecutions cannot, therefore, relieve the Federal Government from the obligation to enforce its own laws. It is the government, not private citizens, that has the resources to successfully identify and prosecute s. 35(1) offences, and when private prosecutions are initiated, they are routinely taken over and stayed by the Attorney General.

The B.C. Wildlife Federation has tried to persuade the NEB to review the environmental effects of the production of power for export, and was unsuccessful. The B.C. Wildlife

Federation's application for leave to appeal that decision was also unsuccessful. There are no additional legal avenues available to the Submitting Parties.

Finally, the submission is not based primarily on "mass media reports". Substantial original documentation evidencing and supporting the allegations made in this submission is included.

The Submitting Parties seek to have the Federal Government enforce its own laws in order to ensure the protection and enhancement of fish habitat and populations. At present, the Federal Government is effectively exempting Hydro from the application of those laws. This results not only in damage to the environment, but in a distortion of the international power market between B.C. and the U.S. caused by the differences in enforcement of environmental laws on either side of the border. The Submitting Parties submit that it is precisely this kind of failure to enforce environmental laws that NAAEC was designed to address.