

Secretariat of the Commission for Environmental Cooperation

**Determination pursuant to Article 14(1) and (2)
of the North American Agreement on Environmental Cooperation**

Submitter(s): David Suzuki Foundation
Greenpeace Canada
Sierra Club of British Columbia
Northwest Ecosystem Alliance
National Resources Defense Council

Represented by: Sierra Legal Defence Fund
Earthjustice Legal Defence Fund

Concerned Party: Canada

Date Received: 15 March 2000

**Date of this
Determination:** 8 May 2000

Submission I.D.: SEM-00-004

I - INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement") provides that the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law, if the Secretariat finds that the submission meets the requirements in Article 14(1). On 15 March 2000 the Submitters filed a submission with the Secretariat pursuant to Article 14 of the NAAEC. The Secretariat has determined that the assertion in the submission that the Party is failing to effectively enforce the federal *Fisheries Act* meets the criteria in Article 14(1). The Secretariat has also determined that this assertion merits a response from the Party in light of the factors listed in Article 14(2). The other assertion contained in the submission, relating to NAAEC Articles 6 and 7, does not meet the Article 14(1) criteria. The Secretariat sets forth its reasons in Section III below.

II - SUMMARY OF THE SUBMISSION

The submission contains two basic assertions. First, the Submitters assert that the Party is failing to effectively enforce several provisions of the federal *Fisheries Act*, with a particular focus on ss. 35 and 36. Section 35(1) prohibits the harmful alteration, disruption or destruction of fish habitat in the absence of an authorization issued under s. 35(2).¹ Section 36 prohibits the deposit of deleterious substances in waters frequented by fish unless the deposit is authorized by regulation.² In addition, the Submitters assert that the Party is failing to effectively enforce specific Articles of the NAAEC, notably Articles 6 and 7.

The Submitters assert that ss. 35 and 36 of the federal *Fisheries Act* "are routinely and systematically violated by logging activities undertaken [in] British Columbia and no effective and appropriate enforcement action is being taken."³ The Submitters assert that logging operations cause harm to fish habitat and result in the deposition of deleterious substances in waters frequented by fish. They assert that, for example, "[e]cologically, current forest practices are contributing to the decline of fisheries and the extinction of fish stocks."⁴ The Submitters state as follows:

As more evidence is gathered from long-term studies in watersheds, a growing number of scientists note that clearcut logging and other land-use activities have profound, long-term impacts on streams, rivers and lakes and the fish populations that depend on them.⁵

The Submitters list and summarize different types of environmental damage that the Submitters claim are caused by logging, including: 1) loss of streamside vegetation; 2) altered water temperature; and 3) impacts on water quality and quantity.⁶ The Submitters assert that forestry activities such as clearcutting that occur adjacent to small non-fish bearing streams have a "reasonable potential" to affect downstream fish resources.⁷ With respect to this latter claim, the Submitters assert that the "cumulative effect of logging-related stream damage to non-fish bearing streams can be significant. . . . While the impact of increased sedimentation or higher temperatures may be minimal in any one stream, the cumulative effect of all tributaries flowing into fish streams can have significant negative

¹ Submission at 8.

² Submission at 8.

³ Executive Summary at iii.

⁴ Submission at 2.

⁵ Submission at 3. See also Submission at 5 (stating that "[l]ogging was one of the primary factors cited" in the decline in salmon numbers and in salmon health throughout coastal British Columbia).

⁶ Submission at 3-5.

⁷ Submission at 5.

impacts on fish habitat."⁸ The Submitters list a number of specific areas where they assert logging operations have caused and/or are causing harm to fish and fish habitat.⁹

While the Submitters state that "[r]egulation of logging and fisheries in British Columbia is a complex jurisdictional issue,"¹⁰ the Submitters claim that Canada has jurisdiction, and the responsibility, to protect fish and fish habitat. The Submitters assert that the jurisdiction of the federal and provincial government is concurrent -- "the legitimate exercise of one government's jurisdiction does not oust the jurisdiction of the other."¹¹ The Submitters claim that the provisions of the *Fisheries Act* addressing harm to fish habitat and deposition of deleterious substances "empower DFO to address the damage to fish and fish habitat resulting from activities permitted under provincial legislation or undertaken on private lands."¹² They assert that "[t]he powers of DFO are . . . both preventative and remedial."¹³ The Submitters review several provisions of the *Fisheries Act* that provide the legislative framework for protection of fish and fish habitat. As noted above, they refer to ss. 35 and 36. The Submitters also cite s. 40, which creates an offence for contraventions of ss. 35 and 36. In addition, they cite s. 37, which empowers the minister to require plans and specifications if someone proposes, or is carrying on, a work or undertaking that results, or is likely to result, in a violation of either s. 35 or s. 36 and to require modifications to the work or undertaking or restrict its operation if a violation is occurring or is likely to occur.¹⁴

In addition to discussing federal jurisdiction and responsibility, the Submitters indicate that the provincial government has jurisdiction over most aspects of logging. They state that in 1995 the Province of British Columbia introduced the Forest Practices Code.¹⁵ The Submitters assert that the Code is "aimed at regulating forestry practices on public lands,"¹⁶ but that the Code "has no application on private land."¹⁷

The Submitters' assertion that Canada is failing to effectively enforce the *Fisheries Act* with respect to the harm to fish habitat and deposition of deleterious substances

⁸ Submission at 5.

⁹ See e.g., Submission at 5, 6, 8-9 and Attachments 2, 6, and 8.

¹⁰ Submission at 1.

¹¹ Submission at 1.

¹² Submission at 8.

¹³ Submission at 8.

¹⁴ Executive Summary at iii.

¹⁵ Submission at 1.

¹⁶ Submission at 1.

¹⁷ Submission at 1. In support of their assertion that Canada is failing to effectively enforce the *Fisheries Act* in leaving the protection of fish habitat to the provincial government, the Submitters assert that the BC government "promised that it [the Code] would eventually apply to private land" but "this promise was never kept. . . ." The Submitters state that the BC Government has proposed the "Private Land Forest Practices Regulation" in place of the Code but the Submitters assert that this Regulation "is sorely inadequate." Submission at 9.

allegedly caused by logging operations extends to logging on public and private lands. The Submitters assert: "In spite of the clear legislative authority to address damage to fish habitat from logging, the Government of Canada is not enforcing its laws against damage from logging on private lands and smaller streams on public lands."¹⁸ Elaborating on this assertion, the Submitters state as follows:

After the introduction [in 1995] of the *Code*, DFO, the federal government agency responsible for the enforcement of the *Fisheries Act*, effectively withdrew from the regulation of logging activities. This occurred even though the federal government's legislative mandate had not changed, and that logging activities are routinely permitted under the *Code* which violate the *Fisheries Act*. Furthermore, the Government of Canada is failing to enforce the *Fisheries Act* against damage occurring from logging on private lands where no effective provincial environmental protections apply.¹⁹

With respect to logging on private lands, the Submitters identify TimberWest's logging of its private land in the Sooke watershed as "[o]ne particularly troubling example of private land logging. . . ."²⁰ The Submitters assert that TimberWest's logging practices have been particularly troubling in several respects. They assert that Timber West left an inadequate buffer, felled trees on the banks of the Sooke River below the high water mark, harvested trees from an island within the river, harvested a buffer strip left by a previous landowner to protect fish along a known fish stream, built roads without culverts across a salmon stream, and stacked woody debris within the stream channel of this creek.²¹ The

¹⁸ Executive Summary at iv.

¹⁹ Submission at 1. See also Attachment 12, p. 17 (containing the statement that "MacMillan Bloedel's assertion that adherence to the Forest Practices Code will fulfill their commitment to maintain fish, fish habitat and riparian attributes is not the Department of Fisheries and Ocean's position, particularly with regard to small streams. The best-management practices set out in the Code are not adequate to deal with the issues of falling and yarding away, and retaining non-merchantable and deciduous trees, especially in old-growth forests.") The excerpt from the Dovetail Consulting report provided in the Attachment attributes this point to a person named Cowan. Mr. or Ms. Cowan's affiliation is not identified in the excerpt. The report describes itself as a "summary of a two-day workshop" "the purpose of which was to consult with scientists to obtain their input on ecological aspects of MacMillan Bloedel's BC Coastal Forest Project." The report indicates that 14 scientists were invited to the workshop to act as an expert panel. Scientists were nominated by environmental organizations and by MacMillan Bloedel and representatives from several environmental organizations, MacMillan Bloedel and Weyerhaeuser attended as well. The report indicates that the comments summarized do not necessarily represent a consensus of the scientific panel or the workshop participants. Attachment 12 at i. The submission indicates that Dovetail Consulting prepared the report for DFO and the report is dated March 5, 1999.

²⁰ Submission at 8-9. See also Attachment 6 [referenced in the submission as Attachment 5], containing correspondence between DFO and the Sierra Legal Defence Fund relating to, inter alia, TimberWest logging in the Sooke watershed area.

²¹ Submission at 8-9. See also Attachment 6.

Submitters assert that these actions threaten fish and fish habitat²² and they claim that "[a]lthough DFO has been made aware of these activities, it has taken no action against TimberWest."²³ The Submitters also assert that, although requested to do so by the Submitters, DFO has not used its power under s. 37(2) of the *Fisheries Act* to formally request plans and specifications from TimberWest and to order modifications to TimberWest's operations as necessary.²⁴

With respect to logging on public lands, the Submitters provide examples of three types of activities that they assert are "routinely permitted under the Code" even though they "frequently result in damage to fish and fish habitat."²⁵ The Submitters assert that "[e]ven though this damage is foreseeable, DFO is not enforcing the *Fisheries Act* in these instances."²⁶ The Submitters identify "falling and yarding across fish habitat" as one such activity.²⁷ The submitters claim that this activity "causes immediate and direct damage to fish and fish habitat."

Falling and yarding causes the erosion and de-stabilization of streambanks, transport of sediment and wood downstream, and the disruption or destruction of critical habitat features. Thus, the practice is contrary to both section 35 of the *Fisheries Act*. . . and also contrary to section 36(3). . . . However, despite the damaging nature of the practice, falling and yarding across streams is routinely allowed across fish habitat.²⁸

The Submitters identify "logging landslide-prone lands" as a second type of activity that occurs. The submission describes landslides and the harm they may cause to fish habitat in violation of ss. 35 and 36 of the *Fisheries Act* as follows:

Landslides can prove highly destructive to fish habitat. Those landslides that do reach fish habitat introduce silt and sediment and other woody debris while also damaging habitat features and blocking fish habitat. And even those landslides that do not reach fish streams can have detrimental impacts as sedimentation is often increased and waterflow patterns in a watershed

²² Correspondence between Sierra Legal Defence Fund and Department of Fisheries and Oceans, attached as Attachment 6 [referenced as Attachment 5].

²³ Submission at 9 and see e.g., Attachment 6.

²⁴ See note 22 above.

²⁵ Submission at 10.

²⁶ Submission at 10.

²⁷ The submission defines falling trees across fish habitat as "cutting down trees such that they will fall across fish bearing streams." It defines "yarding trees" as "dragging trees that have been cut down across fish bearing streams." Submission at 10 and Attachment 2 at 19.

²⁸ Submission at 10 and see e.g., Attachment 2 at 5, 20-21, and Attachment 14.

may also be altered. Logging that causes landslides may therefore violate both sections 35 and 36(3) of the *Fisheries Act*.²⁹

The Submitters assert that logging using a clearcutting approach, the "logging method most likely to cause landslides," occurs in a significant number of instances where the logging is planned for landslide-prone lands.³⁰

The third type of logging activity harmful to fish habitat that the Submitters identify involves "clearcutting riparian areas." The Submitters describe the impacts of such clearcutting as follows:

The clearcutting of riparian areas has significant negative effects on fish and fish habitat. The removal of trees and vegetation in riparian areas leads to bank destabilization and increased streambank erosion, alterations in water temperature (particularly increased warming of streams which can be lethal to fish), greater fluctuations in water flows (which can cause water levels to be both dangerously high, during storm events and snowmelt periods, and dangerously low, during periods of low precipitation such as summer), decreased water quality (through introduction of sediment and logging debris) and the removal of sources of large woody debris.³¹

The Submitters assert that a substantial amount of clearcutting of riparian areas occurs.³²

²⁹ Submission at 10 and Attachment 8 at 7. For the purposes of s. 36(3) a substance is deleterious if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of the water so that the water is rendered deleterious to fish (*R. v. MacMillan Bloedel (Alberni) Ltd.* (1979), 47 C.C.C. (2d) 118 (B.C.C.A.). Depending on the circumstances, silt and sand can be deleterious substances (*R. v. Jourdain*, [1999] B.C.J. No. 1186 (Prov. Ct.); *R. v. British Columbia Hydro and Power Authority* (1997), 25 C.E.L.R. (N.S.) 52 (B.C.S.C.); *R. v. Jack Cewe Ltd.* (1983), 13 C.E.L.R. 91 (B.C.Co. Ct.).

³⁰ Submission at 11 and see e.g., Attachment 8 at 3-4, 8-10, 15, 17-20, and Attachment 14.

³¹ Submission at 10-11 and see e.g., Attachment 2 at 16 and Attachment 8.

³² Submission at 11-12 and see e.g., Attachment 2 at II, 2, 5, and Attachment 14. In addition to its coverage of this type of alleged harm in the submission and attachments, subsequent to filing the submission, the Submitters submitted to the Secretariat two letters from DFO to the BC Ministry of Forests in which DFO expresses the concern that "current logging practices in this province rarely provide riparian leave strips or setbacks that adequately protect these streams." The letter continues: "Given the current practice and the importance of such streams, we wish to confirm that the federal Fisheries Act, and specifically the requirements not to harm fish habitat or deposit deleterious substances into fish-bearing waters, continue to apply to the practice of logging adjacent to small streams in this province." See letter dated 28 February 2000 from D.M. Petrachenko, Director General, Pacific Region, DFO, to Lee Doney, Deputy Minister, Ministry of Forests. This letter states that DFO will send a letter to the province "outlining interim standards that we [DFO] deem acceptable to meet fish habitat objectives." The DFO letter also indicates that the Department believes that a review of the riparian provisions of the *Forest Practices Code* is required. The Submitters included one of these letters setting out the interim standards. The Submitters state that the interim standards include S4, S5 and S6 riparian management zone retention levels

The Submitters' claim appears to be that there is a failure to effectively enforce ss. 35 and 36(3) of the *Fisheries Act* because, in part, "[e]ven though the functioning of the *Forest Practices Code* does not assure compliance with the *Fisheries Act*, the Government of Canada seems to have simply left the protection of fish and fish habitat to the provincial government. . . ."³³ The Submitters assert that this strategy is a failure to effectively enforce because, *inter alia*, some fish habitat (*e.g.*, private lands) are not regulated by the Code and because violations of the *Fisheries Act* continue to occur with respect to fish habitat subject to regulation under the Code. The Submitters assert that "[u]nder Canadian law, the fact that an activity is also subject to provincial regulation does not justify a reduction in the enforcement of federal legislation."³⁴

The Submitters assert that a failure to effectively enforce exists because "[n]ot only has DFO stopped active involvement in the planning process, it is failing to take remedial action after damage has occurred."³⁵ With respect to the latter claim, the Submitters state that "DFO statistics for the last three years in BC show that only one prosecution . . . for the type of activities outlined in this complaint has been brought."³⁶ They continue that "[t]hat prosecution was abandoned by DFO due to delay in pursuing the charges."³⁷ The Submitters assert that DFO has brought charges "outside the logging context" for removal of trees from riparian areas. They claim that "[a] number of charges have been brought against homeowners who have removed riparian vegetation, or where riparian vegetation has been removed as part of an industrial project."³⁸ The Submitters assert that "there is no justifiable reason for DFO to distinguish between homeowners and forestry companies."³⁹

The submission's second assertion is that the Party is failing to meet its commitments under Articles 6 and 7 of the NAAEC through its "consistent intervention

approaching 100%. The Submitters assert that they view this new development favorably, and they intend to monitor future logging plan approvals to determine whether they actually abide by the new interim standards contained in the letter.

³³ Submission at 12.

³⁴ Submission at 13.

³⁵ Submission at 12. It appears that the Submitters' assertion on the first point is that, at least in part, the Party is failing effectively to use its powers under s. 37 to proactively protect fish and fish habitat. Executive Summary at iii; Submission at 8; Attachment 6; Submitters' 31 March 2000 letter to the Secretariat. As noted above, s. 37 empowers the minister to require plans and specifications if someone proposes or is carrying on a work or undertaking that results or is likely to result in a violation of either s. 35 or s. 36 and to require modifications to the work or undertaking or restrict its operation if a violation is occurring or is likely to occur.

³⁶ Submission at 12.

³⁷ Submission at 12.

³⁸ Submission at 12.

³⁹ Submission at 13. The Submitters assert that Canada is motivated not to bring charges against BC forest companies for violations of the *Fisheries Act* because "those charges would undermine Canada's carefully cultivated message that Canadian forest products are 'sustainable and environmentally friendly' - a message Canada has spent considerable amounts of time, energy and tax dollars spreading." Submission at 15.

and staying of environmental prosecutions. . . ."⁴⁰ This assertion relates to the right that Canadian law creates for initiation of private prosecutions against violators of the *Fisheries Act*. The Submitters assert that "there have been 12 private prosecutions in British Columbia in the last 19 years, at least nine of which included charges under the *Fisheries Act*. Eleven of these private prosecutions have been stayed."⁴¹ The Submitters state that "it appears that environmental private prosecutions are being stayed as a matter of course, rather than after the reasonable exercise of discretion."⁴² The Submitters claim that this government conduct constitutes a failure to meet the obligations of Articles 6 and 7 of the NAAEC.⁴³

III - ANALYSIS

A. Article 14(1)

The assertion that Canada is failing to effectively enforce the cited sections of the *Fisheries Act* satisfies the criteria for further consideration contained in Article 14(1).⁴⁴ The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission "from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . ." The Submitters qualify as non-governmental organizations. Further, the assertion in the submission that the Party has failed to effectively enforce the federal *Fisheries Act*⁴⁵ focuses, as required, on a Party's asserted failure to effectively enforce the law, not on the effectiveness of the law itself.⁴⁶ Third, the submission's focus is on the asserted failure to effectively enforce "environmental laws." The *Fisheries Act* qualifies as an "environmental law" for purposes of the NAAEC in that its primary purpose is "protection of the environment, or the prevention of a danger to human life or health. . . ."⁴⁷ Finally, the submission focuses on asserted failures to enforce that are ongoing, thereby meeting the requirement in Article 14(1) that a submission assert that a Party "is failing" to effectively enforce its environmental law.

⁴⁰ Submission at 14.

⁴¹ Submission at 13-14.

⁴² Submission at 14.

⁴³ Executive Summary at iv; Submission at 14.

⁴⁴ The Secretariat has noted in previous Article 14(1) determinations that the requirements contained in Article 14 are not intended to place an undue burden on submitters. We review the submission with this perspective in mind. See e.g., Submission No. SEM-97-005 (26 May 1998); Submission No. SEM-98-003 (8 September 1999).

⁴⁵ See e.g., Executive Summary at iii.

⁴⁶ See SEM-98-003, Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (14 December 1998).

⁴⁷ Article 45(2)(a).

Article 14(1) lists six specific criteria relevant to the Secretariat's consideration of submissions. The Secretariat must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.⁴⁸

The submission meets these criteria. The submission is in English, a language designated by the Parties.⁴⁹ The submission clearly identifies the organizations making the submission.⁵⁰ Concerning the third criterion in Article 14(1), the submission provides sufficient information to allow the Secretariat to review the submission with respect to the assertions of a failure to effectively enforce the law cited.⁵¹ Among other things, the submission provides considerable information concerning the asserted violations of the *Fisheries Act* and it asserts that there has been a lack of adequate response by the government to such alleged violations.⁵²

The submission appears to be aimed at promoting enforcement rather than at harassing industry, as required by Article 14(1)(d). It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business.⁵³ The submission's statement concerning this issue is as follows:

This submission meets the threshold requirements established under Article 14(1):

...

⁴⁸ Article 14(1)(a)-(f).

⁴⁹ Article 14(1)(a), Guideline 3.2.

⁵⁰ Article 14(1)(b), Executive Summary at v.

⁵¹ Article 14(1)(c), Guideline 5.2, 5.3.

⁵² See e.g., discussion above at pp. 2-7.

⁵³ See Guideline 5.4(a).

Article 14(1)(d): The Submitting parties have a longstanding interest and involvement in the protection of the environment and, in particular, the effects of logging in British Columbia. The organizations do not have a financial interest in logging operations whether in British Columbia or elsewhere.⁵⁴

The submission meets the fifth criterion, contained in Article 14(1)(e), that it indicate that the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any. The submission states that it has communicated the issues raised in the submission with the Party. The submission also provides copies of correspondence it sent to the government, and correspondence it received in response.⁵⁵

Finally, the submission meets the requirement in Article 14(1)(f) that it be filed by a "person or organization residing or established in the territory of a Party."⁵⁶

The Submitters' second assertion is that Canada is failing to effectively enforce the NAAEC. The Submitters assert that, *inter alia*, government actions staying private prosecutions have "denied the right to bring private prosecutions against violators of the *Fisheries Act*, even though the *Fisheries Act* encourages citizen enforcement by granting a statutory right to one-half of all fines resulting from private prosecutions."⁵⁷ The Submitters appear to claim that these government actions violate Canada's obligations under Articles 6 and 7 of the NAAEC.⁵⁸

The Secretariat's view is that, as a general matter, to the extent that Articles 6 and 7 create obligations on the part of the Parties (Canada, Mexico, and the United States), the remedy for a Party's purported failure to fulfill its obligations lies with the other Parties. Article 14 of the NAAEC provides the exclusive process for non-governmental organizations and individuals relating to allegations that a Party is failing to enforce its

⁵⁴ Executive Summary at v.

⁵⁵ See Attachment 6 (containing correspondence between the Party and the Submitters); attachments to 31 March 2000 letter. See Guideline 5.5. After receiving the submission, on 30 March 2000 the Secretariat sent the Submitters a letter in which the Secretariat notified the Submitters that, pursuant to Guideline 3.10, there may be a minor error of form. In particular, the Secretariat informed the Submitters that Guideline 5.5 provides that the Submitter must include copies of any relevant correspondence with the relevant authorities. The Secretariat indicated that the submission contained certain correspondence between the Submitters and the Party, and it noted that one of these letters referenced earlier correspondence. The Secretariat requested that the Submitters supply this earlier correspondence if it is relevant. On 31 March 2000 the Submitters provided additional correspondence between DFO and the Sierra Legal Defence Fund that the Submitters indicated may be relevant to the submission.

⁵⁶ Executive Summary at v.

⁵⁷ Executive Summary at iv.

⁵⁸ Executive Summary at iv; Submission at 14-15. The Executive Summary, at iv, refers to Article 7 of the NAAEC, while the discussion at page 14 of the submission discusses Article 6. The discussion in the text is of equal relevance to each Article.

"environmental laws" effectively. Article 45 of the Agreement defines "environmental law" to mean "any statute or regulation of a Party, or provision thereof. . . ." The Secretariat has dismissed previous submissions on the ground that the particular international agreement involved did not qualify as "environmental law" as defined by the Parties. While Order in Council P.C. 1993-2196 authorized the Secretary of State for External Affairs to take the action necessary to bring the NAAEC into force for Canada under international law, as far as the Secretariat is aware Canada has not acted to make the NAAEC part of domestic law.

For the foregoing reason, the Secretariat dismisses this assertion. By making this determination, the Secretariat is not excluding the possibility that future submissions may raise questions concerning a Party's international obligations that would meet the criteria in Article 14(1).

B. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if the Secretariat finds that the submission meets the criteria in Article 14(1). The purpose of such a review is to determine whether to request that the relevant Party prepare a response to the submission. During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision based on the facts involved in a particular submission. Article 14(2) lists these four factors as follows:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.⁵⁹

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits a response from the Party. The Submitters assert that logging operations' violations of *Fisheries Act* ss. 35 and 36 cause substantial harm to the environment. Such assertions have been considered under Article 14(2)(a) for other

⁵⁹ Article 14(2).

submissions and they are relevant here as well.⁶⁰ We note that the Submitter claims that the harm allegedly sustained is due to the asserted failure to effectively enforce the environmental law involved and that the alleged harm relates to protection of the environment.⁶¹

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.⁶² The submission asserts that the failure to enforce is significant in scope. Further, as suggested above, the Submitters claim that effective enforcement would, *inter alia*, "foster the protection of an important environmental resource for the benefit of present and future generations," "promote[] sustainable development . . .," and "enhance compliance with, and enforcement of, environmental laws and regulations."⁶³

Third, the Submitters state that they "have pursued all available 'private remedies.'"⁶⁴ The Submitters indicate that various parties have "urged DFO to enforce the *Fisheries Act*. . . ."⁶⁵ Further, the Submitters state that they, and others, have brought prosecutions under the *Fisheries Act*. The Submitters assert that "in each instance, the Provincial Attorney General took over and stayed the proceedings"⁶⁶

Finally, the submission is not based exclusively on mass media reports. Instead, the Submitters include considerable documentation in support of their assertion that there is a failure to effectively enforce ss. 35 and 36(3) of the *Fisheries Act*.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that there is a failure to effectively enforce ss. 35 and 36(3) of the *Fisheries Act* merits requesting a response from the Party.

CONCLUSION

⁶⁰ In its Recommendation to the Council for the development of a factual record with respect to SEM-96-001 (*Comité para la Protección de los Recursos Naturales, A.C., et al.*), for example, the Secretariat noted: "In considering harm, the Secretariat notes the importance and character of the resource in question – a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC." The resources at issue in this submission are of substantial importance as well.

⁶¹ Guideline 7.4.

⁶² Article 14(2)(b).

⁶³ Submission at 15, referencing NAAEC Article 1(a), (b), and (g).

⁶⁴ Article 14(2)(c), Guideline 7.5, Submission at 13-15.

⁶⁵ Submission at 15.

⁶⁶ Submission at 15.

For the foregoing reasons, the Secretariat has determined that the assertion that Canada is failing to effectively enforce the *Fisheries Act* meets the requirements of Article 14(1) and merits requesting a response under Article 14(2). Accordingly, the Secretariat requests a response from the Government of Canada to this assertion within the time frame provided in Article 14(3) of the Agreement. The Secretariat has determined that the assertion that Canada is failing to effectively enforce the NAAEC does not satisfy the requirements of Article 14(1). A copy of the submission and of the supporting information is annexed to this letter.

(original signed)

David L. Markell

Director, Submissions on Enforcement Matters Unit

c.o. Ms. Norine Smith, Environment Canada (with annexes)

c.c. Mr. William Nitze, US-EPA

Mr. José Luis Samaniego, SEMARNAP

Mr. Randy Christensen,

Ms. Patti Goldman,

Ms. Janine Ferretti, Executive Director