

Secretariat of the Commission for Environmental Cooperation

Overall Plan to Develop a Factual Record

Submission I.D.:	SEM-00-004
Submitter(s):	David Suzuki Foundation Greenpeace Canada Sierra Club of British Columbia Northwest Ecosystem Alliance Natural Resources Defense Council
Represented by:	Sierra Legal Defence Fund Earthjustice Legal Defense Fund
Party:	Canada
Date of this plan:	14 December 2001

Background

On 15 March 2000, the Submitters identified above presented to the Secretariat of the Commission for Environmental Cooperation (CEC) a submission in accordance with Article 14 of the North American Agreement on Environmental Cooperation (NAAEC). The Submitters assert, *inter alia*, that Canada is failing systemically to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* in connection with logging operations on public and private land in British Columbia. They claim logging activities that are likely to have harmful impacts on fish and fish habitat are allowed province-wide on public and private lands in British Columbia under provincial forestry laws and regulations and that, in reliance on these provincial laws and regulations, Canada has scaled back its review of whether logging plans will ensure compliance with the *Fisheries Act*. They contend that this approach amounts to a failure to effectively enforce the *Fisheries Act*. The Submitters describe TimberWest's logging in three areas in the Sooke watershed as examples of a logging operation on private land that resulted in *Fisheries Act* violations as to which Canada's enforcement response was ineffective.

On 16 November 2001, the Council decided unanimously to instruct the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, “for the assertions set forth in submission SEM-00-004 that Canada is failing to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* at the Sooke River and at the De Mamiel Creek.”¹ The Council directed the Secretariat, in developing the factual record, to consider whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

Under Article 15(4) of the NAAEC, in developing a factual record, “the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”

Overall Scope of the Fact Finding:

The Submitters assert that neither British Columbia nor Canada effectively ensures that logging on public or private land in British Columbia complies with the *Fisheries Act*. With regard to private lands, they allege that this failure to effectively enforce occurs “particularly with respect to practices such as clearcutting to the streambanks of small streams and clearcutting landslide prone areas.”² They assert that British Columbia’s *Forest Practices Code* does not apply to private land and that British Columbia’s *Private Land Forest Practices Regulation*³ is “sorely inadequate given its lack of enforceable standards” and lack of protection for small streams.⁴ Specifically, they contend that the regulation provides no protection along streams less than 1.5 metres wide, nominal protection along larger streams, and no meaningful restrictions on clearcutting landslide-prone lands. Consequently, the Submitters contend, Canada’s reliance on the regulation as a means for ensuring compliance with the *Fisheries Act* amounts to a failure to effectively enforce the *Fisheries Act*.

The Submitters cite logging by TimberWest of its private land in three areas in the Sooke watershed as “[o]ne particularly troubling example of private land logging. . . .”⁵ Two of these three areas are the Sooke River and De Mamiel Creek areas referenced in Council Resolution 01-12. The Submitters claim that while Canada has been made aware of these activities, it has taken no action against TimberWest. The Submitters further contend that, although requested to do so by the Submitters, Canada has not used its power under section 37(2) of the *Fisheries*

¹ Council Resolution 01-12.

² Submission at 8.

³ This regulation came into force 1 April 2000, after the date of the submission.

⁴ Submission at 9.

⁵ Submission at 8-9. See also Attachment 6 [referred to in the Submission as Attachment 5].

Act to formally request plans and specifications from TimberWest and to order modifications to TimberWest's operations as necessary to comply with the *Fisheries Act*.⁶

In its response, Canada asserts that it carried out investigations of TimberWest's logging operations in the Sooke River area from March to June 1999, and, as a result of the investigation, sent TimberWest a warning letter dated 27 June 2000⁷ indicating that although the riparian zone had been compromised, there was insufficient observable evidence to proceed with a charge under either section of the *Fisheries Act*. The letter also indicated that the site would require monitoring in the future and that Canada would proceed with a further investigation if it appeared that harm to fish habitat would likely occur. Canada asserts that a subsequent inspection on 4 July 2000 did not reveal any harmful impact on fish habitat at the site.

Canada did not comment in its response on the Submitters' assertions about logging in the area of De Mamiel Creek because the logging was being investigated as a potential offence under the *Fisheries Act*. Council Resolution 01-12 indicates that the Government of Canada informed the Council that no judicial or administrative proceedings regarding De Mamiel Creek are pending.

To prepare the factual record, the Secretariat will gather and develop information relevant to the facts concerning:

- (i) alleged violations of sections 35 and 36 of the *Fisheries Act* in connection with the two areas that are referenced in Council Resolution 01-12;
- (ii) Canada's enforcement of sections 35 and 36 of the *Fisheries Act* in connection with the two areas referenced in Council Resolution 01-12; and
- (iii) whether Canada is failing to effectively enforce sections 35 and 36 of the *Fisheries Act* in the context of the two areas referenced in Council Resolution 01-12.

Overall Plan:

Consistent with Council Resolution 01-12, execution of the overall plan will begin no sooner than 14 January 2002. All other dates are best estimates. The overall plan is as follows:

- Through public notices or direct requests for information, the Secretariat will invite the Submitters; JPAC; community members; the regulated community; and local, provincial and federal government officials to submit information relevant to the scope of fact-finding

⁶ See Attachment 6 [referred to in the Submission as Attachment 5].

⁷ Annex 2 to the Response.

outlined above. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested non-governmental organizations or persons or the JPAC to provide relevant information to the Secretariat (section 15.2 of the *Guidelines*). **[January 2002]**

- The Secretariat will request information relevant to the factual record from federal, state and local government authorities of the Canada, as appropriate, and shall consider any information furnished by a Party (Articles 15(4) and 21(1)(a) of the NAAEC). **[January 2002]** Information will be requested relevant to the facts concerning:
 - (i) alleged violations of sections 35 and 36 of the *Fisheries Act* in connection with the two areas that are referenced in Council Resolution 01-12;
 - (ii) Canada's enforcement of sections 35 and 36 of the *Fisheries Act* in connection with the two areas referenced in Council Resolution 01-12; and
 - (iii) whether Canada is failing to effectively enforce sections 35 and 36 of the *Fisheries Act* in the context of the two areas referenced in Council Resolution 01-12.
- The Secretariat will gather relevant technical, scientific or other information that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. **[January through April 2002]**
- The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record. **[January through June 2002]**
- The Secretariat, as appropriate, will collect relevant technical, scientific or other information for the preparation of the factual record, from interested non-governmental organizations or persons, the JPAC or independent experts. **[January through June 2002]**
- In accordance with Article 15(4), the Secretariat will prepare the draft factual record based on the information gathered and developed. **[June through September 2002]**
- The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5). **[end of September 2002]**
- As provided by Article 15(6), the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. **[November 2002]**
- The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7).

Additional information

The submission, the Party's response, the Secretariat determinations, the Council Resolution, and a summary of these are available in the Registry on Citizen Submissions in the CEC home page www.cec.org or upon request to the Secretariat at the following address:

Secretariat of the CEC
Submissions on Enforcement
Matters Unit (SEM Unit)
393 St-Jacques St. West,
Suite 200
Montreal QC H2Y 1N9
Canada