

Secretariat of the Commission for Environmental Cooperation

REQUEST FOR INFORMATION For Preparation of a Factual Record Submission SEM 00-004 (B.C. Logging) January 2002

I. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (the NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the top environmental official from each country; a Joint Public Advisory Committee (JPAC), comprised of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of the NAAEC allows persons or non-governmental organizations in North America to inform the Secretariat, in a submission, that any NAAEC country (referred to as a Party) is failing to effectively enforce its environmental law. This initiates a process of review of the submission, which can result in the Council instructing the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Article 15(4) and 21(1)(a) of the NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available; submitted by the JPAC or by interested non-governmental organizations or persons; or developed by the Secretariat or independent experts.

On 16 November 2001, the Council issued Council Resolution 01-12, unanimously instructing 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." 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.

The Secretariat is now requesting information relevant to matters to be addressed in the factual record for the B.C. Logging submission, SEM-00-004. The following sections provide background on the submission and describe the kind of information requested.

II. The BC Logging submission

On 15 March 2000, David Suzuki Foundation and other groups (the Submitters) presented to the CEC Secretariat a submission in accordance with Article 14 of the NAAEC. The Submitters assert 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 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 will ensure compliance with the *Fisheries Act*. The Submitters contend that this approach amounts to a failure to effectively enforce provisions of the *Fisheries Act*.

With regard to private lands, the Submitters allege that the failure to effectively enforce occurs “particularly with respect to practices such as clearcutting to the streambanks of small streams and clearcutting landslide prone areas.”¹ 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*² is “sorely inadequate given its lack of enforceable standards” and lack of protection for small streams.³ 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 Cowichan Woodlands (TimberWest) of its private land in three areas in the Sooke watershed as “[o]ne particularly troubling example of private land logging. . . .”⁴ 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 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*.⁵

¹ Submission at 8.

² This regulation came into force 1 April 2000, after the date of the submission.

³ Submission at 9.

⁴ Submission at 8-9. See also Attachment 6 [referred to in the Submission as Attachment 5].

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

In its 4 July 2000 response, Canada asserts that it carried out investigations of TimberWest's logging operations from March to June 1999 in the Sooke River area, and, as a result of the investigation, sent TimberWest a warning letter dated 27 June 2000⁶ 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 does 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 now pending.

III. Request for information

The Secretariat requests information relevant to the facts concerning:

- (i) alleged violations of sections 35(1) and 36(3) 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(1) and 36(3) 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(1) and 36(3) of the *Fisheries Act* in the context of the two areas referenced in Council Resolution 01-12.

IV. Examples of relevant information

Examples of relevant information include the following:

1. Information on TimberWest's logging operations along the Sooke River or De Mamiel Creek; for example information on:
 - formal or informal plans TimberWest had for complying with the *Fisheries Act*;
 - clearcutting in riparian areas;
 - the extent to which standing trees were left in riparian areas;
 - yarding or falling of trees into or across streams; or
 - logging on steep or landslide-prone areas.

⁶ Annex 2 to the Response.

2. Information on the impact of TimberWest's logging operations along the Sooke River or De Mamiel Creek on fish and fish habitat, particularly on any harmful alteration, disruption or destruction of fish habitat within the meaning of *Fisheries Act* section 35(1) or any deposit of deleterious substances (including silt, sediment or debris) in waters frequented by fish within the meaning of *Fisheries Act* section 36(3).
3. Information on whether TimberWest's logging activity along the Sooke River or De Mamiel Creek area complied with British Columbia forest practices laws or regulations, and on whether the logging resulted in harmful alteration, disruption or destruction of fish habitat or in the deposit of deleterious substances in waters frequented by fish even though it complied with forest practices laws and regulations.
4. Information on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, sections 35(1) and 36(3) of the *Fisheries Act*, specifically ones that might apply to TimberWest's logging along the Sooke River and De Mamiel Creek.
5. Information on federal, provincial or local enforcement or compliance-related staff or resources available for enforcing or ensuring compliance with sections 35(1) and 36(3) of the *Fisheries Act* in connection with TimberWest's logging along the Sooke River and De Mamiel Creek.
6. Information on Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* sections 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas, including for example:
 - efforts to prevent violations, such as by placing conditions on or requiring modifications of the logging operations or providing technical assistance;
 - monitoring or inspection activity either during or after the logging operations;
 - warnings, orders, charges or other enforcement action issued to TimberWest;
 - actions to remedy impacts to fish habitat due to logging; or
 - coordination between different levels of government on enforcement and compliance assurance.
7. Information on the effectiveness of Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* section 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas, for example its effectiveness in:
 - remedying any violations of *Fisheries Act* sections 35(1) or 36(3) that occurred, or
 - preventing future violations of those provisions.

8. Information on barriers or obstacles to enforcing or ensuring compliance with *Fisheries Act* sections 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas
9. Any other technical, scientific or other information that could be relevant.

V. Additional background information

The submission, Canada's response, the determinations by the Secretariat, the Council Resolution, the overall plan to develop the factual record and other information are available in the Registry and Public Files section of Citizen Submissions on Enforcement Matters on the CEC website: <<http://www.cec.org>>. These documents may also be requested from the Secretariat.

VI. Where to Send Information

Relevant information for the development of the factual record may be sent to the Secretariat until 30 June 2002, to the following address:

Secretariat of the CEC
Submissions on Enforcement Matters Unit (SEM Unit)
393, rue St-Jacques west,
bureau 200
Montreal QC H2Y 1N9
Canada
Tel. (514) 350-4300

Please reference SEM-00-004 (B.C. Logging) in all correspondence.

For any questions, please send an e-mail to the attention of Geoffrey Garver, at info@ccemtl.org.