**Secretariat of the Commission for Environmental Cooperation**
**Determination in accordance with Article 14(1) and (2)**
**of the North American Agreement for Environmental Cooperation**

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| **Submitters:** | Fraser Riverkeeper Society (lead Submitter), and<br>Lake Ontario Waterkeeper,<br>Ottawa Riverkeeper,<br>Fundy Baykeeper,<br>Grand Riverkeeper,<br>Georgian Baykeeper,<br>Petitcodiac Riverkeeper,<br>David Suzuki Foundation,<br>T. Buck Suzuki Environmental Foundation,<br>Georgia Strait Alliance, and<br>Waterkeeper Alliance |
| **Concerned Party:** | Canada |
| **Date received:** | 07 May 2010 |
| **Date of this Determination:** | 16 December 2011 |
| **Submission I.D.:** | **SEM-10-003 (*Iona Wastewater Treatment*)** |

## I. INTRODUCTION

1. On 7 May 2010, the above listed Submitters filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") a submission[1] on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). Articles 14 and 15 of the Agreement provide for a process allowing any person or non-governmental organization to file a submission asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC*[2] (the "Guidelines"). When the Secretariat determines that a submission meets the criteria set out in Article 14(1), it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the NAAEC Party named in the submission. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in

[1] Submission SEM-10-003 (*Iona Wastewater Treatment*) (the "Submission").
[2] *See* Commission for Environmental Cooperation, *Bringing the Facts to Light* (Montreal: CEC, 2000) at 11; online: < http://www.cec.org/Storage/41/3331_Bringing%20the%20Facts_en.pdf >.

accordance with Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances prevail, it proceeds no further with the submission.[3]

2. This Determination contains the analysis of the Submission by the Secretariat in accordance with Articles 14(1) and (2) of the NAAEC and the Guidelines.

3. The Submitters assert that Canada is failing to effectively enforce subsection 36(3) of the *Fisheries Act*[4] (the "Act") "with respect to sewage discharges from the Iona Island Wastewater Treatment Plant [the 'Iona WWTP'], in Richmond, a suburb of Vancouver in British Columbia".[5]

4. Upon analysis of the Submission, the Secretariat finds that the Submission meets all of the admissibility requirements of Article 14(1), and in accordance with the criteria set out in Article 14(2), the Secretariat finds that the Submission warrants requesting a response from the Government of Canada. The Secretariat presents its reasons for this determination below, in accordance with Guideline 7.2.

## II. SUMMARY OF THE SUBMISSION

5. The Submitters assert that "Canada is failing to effectively enforce its environmental laws with respect to discharges of a substance deleterious to fish from the Iona WWTP".[6] The Submitters note that under the *Constitution Act, 1867*, the Canadian federal government has "exclusive legislative authority" for its sea coast and inland fisheries.[7] The Submitters posit that the law at issue in their Submission is an environmental law that the Secretariat may consider:

> The Fisheries Act (R.S.C. 1985, c. F-14) was enacted pursuant to this authority to regulate and protect Canada's fisheries. The Canadian Fisheries Act is a federal statute within the meaning of 'environmental law' set out in Article 45 of the NAAEC.[8]

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[3] Full details regarding the various stages of the process, as well as previous Secretariat Determinations and Factual Records, can be found on the CEC's website at: http://www.cec.org/citizen. References to the word "Article" throughout this determination, unless otherwise stated, refer to an article of the NAAEC. Use of the masculine implies the feminine, and vice-versa.

[4] RSC 1985, c F-14.

[5] Submission, *supra* note 1 at para 2.

[6] Submission, *supra* note 1 at para 4. The Submission also lists the sources of the wastewater (*ibid* at paras 11-12), and identifies the location of the discharge of the outfall as the Georgia Strait adjacent to the Fraser River estuary (*ibid* at para 15).

[7] Submission, *supra* note 1 at para 5.

[8] *Ibid*. See also Exhibit 15: Greater Vancouver Regional District, *Caring for Our Waterways: Liquid Waste Management Plan, Stage 2,* Discussion Document (Burnaby, B.C.: GVRD, May 1999) [Exhibit 15] at 3-1, which contains the subject heading "Jurisdictional Aspects of Liquid Waste Management" and the subheading "Legislative Foundations", providing an overview of federal, provincial and municipal

6. The Submitters cite the Act in connection with tidal waters of the Fraser River and Georgia Strait, noting that subsection 36(3) of the Act provides that it is an offence to deposit or permit the deposit of a deleterious substance in water frequented by fish, unless authorized by regulation.[9] The Submitters further point out that section 78.1 of the Act provides that each day a contravention of the Act is committed constitutes a separate offence.[10] The Submitters note that according to subsection 40(2) of the Act, the maximum penalty upon summary conviction, is a fine of $300,000 per day such an offence occurs.[11]

7. The Submitters assert that on "approximately 25 monthly testing days between the years 2001 and 2009, Metro Vancouver discharged primary treated sewage effluent that was acutely toxic to fish from the Iona WWTP into Georgia Strait",[12] in an area "immediately adjacent to the Fraser River estuary" through which an abundance of salmonids pass annually.[13]

8. Metro Vancouver (formerly the Greater Vancouver Regional District ("GVRD")) is, according to the submission, a federation of municipalities and has electoral areas in Greater Vancouver, British Columbia ("B.C."). The Submitters note that Metro Vancouver directs the Greater Vancouver Sewerage and Drainage District ("GVSDD"):

> While strictly speaking a separate legal entity from Metro Vancouver, the GVSDD shares the same Board of Directors and is functionally part of Metro Vancouver. Metro Vancouver and the GVSDD operate five wastewater treatment plants in the Greater Vancouver area, including the Iona Island Wastewater Treatment Plant ("Iona WWTP") situated in the City of Richmond, just north of the Vancouver International Airport.[14]

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jurisdiction over water quality in the Greater Vancouver Regional District. Throughout this Determination, the word "exhibit", refers to an exhibit of the Submission.

[9] Submission, *supra* note 1 at para 6.

[10] *Ibid* at para 23.

[11] *Ibid* at para 6, Exhibit 7: *Statement of John Werring, Registered Professional Biologist* (undated) [Exhibit 7] at para 9.

[12] Submission, *supra* note 1 at para 28. See also Exhibit 7, *supra* note 11 at paras 12-14 (John Werring, expert fish biologist, obtained laboratory reports filed with the GVRD, and test findings from GVRD's public website, concluding that the effluents from the Iona WWTP had failed Acute Lethality Tests. Mr. Werring noted the effluents were acutely toxic to fish at the time of discharge on at least fifteen separate occasions from 2001 to 2006. The dates the expert listed were: 9 July 2001; 14 August 2001; 3 June 2003; 7 October 2003; 6 May 2004; 1 June 2004; 18 August 2004; 3 May 2005; 1 June 2005; 7 July 2005; 13 September 2005; 20 July 2006; 14 August 2006; 12 September 2006; and 11 October 2006).

[13] Submission, *supra* note 1 at para 15.

[14] *Ibid* at para 8; Exhibit 3: Greater Vancouver Regional District (Quality Control Division), *2001 Quality Control Annual Report for Greater Vancouver Sewerage & Drainage District, Volume I* [Exhibit 3] at 61.

9. The Submitters further note that the Iona WWTP is one of five wastewater plants operated by Metro Vancouver in the Greater Vancouver area that discharges wastewater.[15] According to the Submitters, two of the plants, Iona and Lions Gate, "discharge to Georgia Strait and First Narrows respectively and provide primary treatment (solids removal) only".[16] The three remaining plants, so the Submitters, −the Annacis Island, Lulu Island and Northwest Langley− "discharge secondary treated wastewater into freshwater in the Fraser River Estuary".[17]

10. The Submitters state that "[p]rimary treatment is a mainly mechanical process that removes only 30 percent of [biochemical oxygen demanding substances ("BOD")] and approximately 50 percent of [total suspended solids ("TSS")].[18] The Submitters maintain that three of the other four plants use secondary treatment, which is:

> [A] treatment system that includes a biological process to remove organic matter from, and reduce the toxicity of, the wastewater effluent. The biological process employed by secondary treatment removes up to 90 percent of biochemical oxygen demanding substances (BOD) and of total suspended solids (TSS).[19]

11. According to the Submitters, the Fraser River and the tidal waters are "waters frequented by fish".[20] The Submitters also claim that the "Fraser River is one of the world's most productive salmon rivers and the Georgia Strait is well known as both a commercial and sport fishery".[21]

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[15] Submission, *supra* note 1 at para 56; Exhibit 16: Greater Vancouver Regional District (Quality Control Division), *2003 Quality Control Annual Report for Greater Vancouver Sewerage & Drainage District, Summary Report* [Exhibit 16] at item 1.0.

[16] *Ibid*.

[17] Exhibit 16, *supra* note 15 at item 8.2.

[18] Submission, *supra* note 1 at para 13.

[19] *Ibid* at para 14.

[20] *Ibid* at para 16. See also Exhibit 7, *supra* note 11 at para 6, where the exhibit notes that:

> [t]he Strait of Georgia ecosystem includes diverse marine, estuarine and terrestrial environments that provide habitat to a wide range of species. This ecosystem includes the Sturgeon Banks and the Fraser River estuary which encompasses the estuarine zones of the North Arm, Main Arm and Main Stem of the Fraser River. These areas are extremely important migration routes for juvenile and returning adult salmon. To leave or reach the river, the fish must cross the Sturgeon Banks and pass by the area where the Iona discharge takes place. The Fraser River estuary is also a rearing area for various salmon and trout. There are 14 fish species using the lower Fraser River that are migratory, six species having periodic migration and 18 species that are not known to migrate regularly.

[21] Submission, *supra* note 1 at para 15. See also Exhibit 7, *supra* note 11 at paras 7-8, where the exhibit states that "[t]he Fraser River is home to one of the largest wild salmon runs in the entire world. <u>The waters of the Strait of Georgia are fish-bearing waters.</u> The three channels of the Fraser River also are used for irrigation, secondary-contact recreation (fishing, boating) and by industry for transportation" [emphasis added].

12. According to the Submitters, the Iona WWTP wastewater is collected from a variety of domestic and industrial sources such as "the domestic sewage collected from approximately 600,000 people in Vancouver, the University Endowment Lands and areas within the City of Burnaby, and the City of Richmond".[22] The Submitters note that "the facility also receives storm water from combined sewage areas".[23] Further, the Submitters state that the Iona WWTP also "receives wastewater from industrial and commercial sources, including wastewater from dental offices, printing facilities, laboratories, photofinishers, recreation facilities, automotive businesses, dry cleaners, car wash facilities, U-Brew/Wine premises, carpet cleaning services, and funeral homes"[24], and "the Iona facility receives industrial wastes trucked in from Metro Vancouver and other areas."[25]

13. The Submitters note that each Metro Vancouver treatment plant holds an operational certificate ("OC") from the Government of B.C., through its Ministry of Environment,[26] which allows the wastewater facilities "to operate and discharge treated effluent into receiving waters".[27] The Submission states that soon after the Ministry approved Metro Vancouver's Liquid Waste Management Plan ("LWMP")[28], on April 23, 2004, the Ministry issued OC ME-00023 to the GVSDD for operation of the Iona WWTP.[29]

14. The Submission includes information alleging that according to requirements set out in the OC, Metro Vancouver must monitor effluent toxicity at each of its wastewater

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[22] Submission, *supra* note 1 at para 11.

[23] *Ibid*; Exhibit 3, *supra* note 14 at 20.

[24] Submission, *supra* note 1 at para 12; Exhibit 6: *Liquid Waste Regulatory Program*, online: Metro Vancouver <http://public.metrovancouver.org/services/permits/Pages/sewerage.aspx> [Exhibit 6] (the program emanates from GVS&DD's municipal Sewer Use Bylaw No. 299 (adopted May 25, 2007), which authorizes users to discharge effluent from commercial, institutional and industrial (non-domestic) facilities).

[25] Submission, *supra* note 1 at para 12; Exhibit 6, *supra* note 24.

[26] See Submission, *supra* note 1 at para 9. Operational Certificates are issued under the provisions of the *Waste Management Act* (RSBC 1996, c 482), repealed by the *Environmental Management Act* (SBC 2003, c 53), which came into force on July 8, 2004 (see Exhibit 3, *supra* note 14 at item 1.0, para 2). Although the OC is issued under a B.C. law, the letter enclosing OC ME-00023 states that "[i]t is also the responsibility of the Operational Certificate Holder to ensure that all activities conducted under [the OC] are carried out with regard to the rights of third parties, and comply with other applicable legislation that may be in force" (Exhibit 2: Operational Certificate ME-00023, issued by the Ministry of Water, Land and Air Protection to the Greater Vancouver Sewerage and Drainage District for Iona Island WWTP, April 23, 2004 [Exhibit 2] at 1 (OC)).

[27] Submission, *supra* note 1 at para 9: Operational Certificates were first issued in April 2002 by the Ministry under the provisions of the *Environmental Management Act* (SBC 2003, c 53).

[28] Submission, *supra* note 1 at para 33: the Province officially approved Metro Vancouver's LWMP. With this approval Metro Vancouver has until the year 2020 to upgrade its facility to include secondary treatment.

[29] *Ibid* at para 34. See Exhibit 2, *supra* note 26. EC advised that although an Operational Certificate was issued, subsection 36(3) of the *Fisheries Act* still applied (*Ibid* at 1 (OC)).

treatment plants[30] using a standardized test known as the "Acute Lethality Test" ("ALT"):

> The Acute Lethality Test determines whether discharge is deleterious by measuring the rate of mortality of the fish that have been placed into the effluent for a 96 hour period. As summarized by the British Columbia Provincial Court, the Acute Lethality Test "involves placing 10 juvenile trout in a tank of the effluent to be tested. If over 50% of the fish die within 96 hours, the effluent is deemed to be acutely lethal. The test then measures how much the effluent needs to be diluted in order for 50% of the fish to survive. If any dilution is required, the discharge is deemed to have failed the test and to be acutely lethal to fish.[31]

The Submitters further note that in 1999, Metro Vancouver stated that:

> The *Fisheries Act* prohibits the discharge of deleterious substances into fish-bearing waters and protects fish habitat. Over the years the courts have determined that discharges that are acutely toxic to fish, based on the 96 hour fish bioassay test, are deemed to be deleterious.[32]

15. The Submission sets out that Iona OC is administered by the Lower Mainland Regional Office and it includes requirements for monitoring and reporting.[33] The Submitters note that in accordance with the Iona OC, Metro Vancouver reports in writing on test findings and test failures to the relevant provincial authority based on a GVRD program entitled the "Iona Deep-Sea Outfall Monitoring Program".[34] The Submitters cite a 2001 Metro Vancouver Report that states "[e]ffluent toxicity levels at Iona are not regulated for compliance purposes but toxicity monitoring is a

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[30] Submission, *supra* note 1 at para 20. In its *2003 Quality Control Annual Report for the GVSDD (Summary Report)*, the GVRD states that "[u]nder the present permit requirements, the GVRD [now Metro Vancouver] is required to monitor effluent toxicity at each of the wastewater treatment plants using a standardized test for acute toxicity", namely the 96-hour LC50 Acute Lethality Test (Exhibit 16, *supra* note 15 at 4).

[31] Submission, *supra* note 1 at para 18. See generally Exhibit 13: *Chapman v British Columbia*, 2007 BCPC 85 at para 5, 28 CELR (3d) 99 [Exhibit 13].

[32] Submission, *supra* note 1 at para 19, citing Exhibit 15, *supra* note 8 at 3-1.

[33] Submission, *supra* note 1 at para 8: Exhibit 2, *supra* note 26 at 2 (letter), and at 5-8 (OC). For facility objectives, see Exhibit 3, *supra* note 14 at item 1.0. GVSDD's objective is described as "to attain ongoing compliance with the permit parameters including sewage quality parameters. Ongoing compliance, coupled with a lack of demonstrated environmental impacts in the area of discharges provides justification for maintaining sewage treatment at current levels and avoiding costly upgrades".

[34] Submission, *supra* note 1 at para 22. See Exhibit 16, *supra* note 15 at 8 (the monitoring program is the GVRD's longest running outfall receiving environment monitoring program. The report notes that annual monitoring has been carried out for 18 years, two years of pre-discharge monitoring and 16 years of post-discharge monitoring).

requirement of the Iona permit".[35]

16. The Submitters recall that in the year 2000, Environment Canada ("EC") conducted an inspection of the Iona WWTP and found "the discharge to be acutely lethal to fish and a contravention of the *Fisheries Act*".[36]

17. With respect to Metro Vancouver's proposed LWMP, the Submitters further indicated that EC informed Metro Vancouver that

> [t]he LWMP was not completely consistent with *Fisheries Act* requirements. EC indicated that it 'intends to conduct further inspections at the facilities to verify compliance with the Fisheries Act and to take appropriate enforcement action should the violations continue.' Letters continued throughout early 2001, but compliance with Fisheries Act requirements was not achieved in the view of EC.[37]

18. The Submitters allege the treatment plant was routinely discharging primary treated effluent that failed to meet toxicity standards.[38] The Submitters note that Canadian authorities have documented the violations of the *Fisheries Act* found at the Iona WWTP such that EC, the relevant federal authority, issued warnings to Metro Vancouver.[39] The Submitters assert that "[e]vidence of the violations has been communicated in writing to these authorities by non-governmental groups and by the authorities themselves, both online and in communications to other governmental bodies".[40] The Submitters highlight a warning that EC issued to Metro Vancouver

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[35] Exhibit 3, *supra* note 14 at 21.

[36] Submission, *supra* note 1 at para 29. See Exhibit 22: Letter from the Environmental Protection Branch, Pacific and Yukon Region, to Ken Cameron, Manager, Policy and Planning Department, Greater Vancouver Regional District (14 June 2001) [Exhibit 22].

[37] Submission, *supra* note 1 at para 29; Exhibit 22, *supra* note 36.

[38] Submission, *supra* note 1 at paras 28, 30. For example, in 2001 and 2002, EC inspectors took samples from the Iona WWTP. Three of six samples taken failed the 96 hour LC50 Acute Lethality Test. See also Exhibit 38: Environment Canada, *2001 Annual Compliance Report Summary Highlights Pacific and Yukon Region* [Exhibit 38] at 11-12, where EC stated that the "failures … have been acknowledged by [Metro Vancouver] and they recognize the fact that they are not in compliance with the general prohibitions of the [*Fisheries Act*]". Regarding effluent levels in the Operational Certificate ME-00023, see Exhibit 2, *supra* note 26.

[39] Submission, *supra* note 1 at paras 29-30. See Exhibit 22, *supra* note 36; Exhibit 38, *supra* note 38 at 11-12; and Exhibit 23: Letter from Nick Russo, Environment Canada, to George Puil and Johnny Carline, Greater Vancouver Regional District (20 March 2001) [Exhibit 23], regarding a warning of an alleged violation of Subsection 36(3) of the *Fisheries Act*.

[40] Submission, *supra* note 1 at para 27. See also Exhibit 18: Letters and Monitoring Reports from Staff, Greater Vancouver Sewerage and Drainage District, showing 96-hour Rainbow Trout Bioassay LC50 test results, 2001-2004 [Exhibit 18]; Exhibit 19: Letters and Monitoring Reports from Staff, Greater Vancouver Sewerage and Drainage District, showing 96-hour Rainbow Trout Bioassay LC50 test results, 2005-2006 [Exhibit 19]; Exhibit 20: Letters and Monitoring Reports from Staff, Greater Vancouver

stating:

> [F]urther steps will be considered by Environment Canada if you do not take the necessary action to prevent the release of a deleterious substance.[41]

19. According to the Submitters' expert,[42] the Iona WWTP OC allows sewage effluent to be discharged at the rate of 1,530,000 $m^3$/day.[43] The Submitters' expert also noted that all the toxicity test failures reported at the Iona WWTP resulted from a lack of dissolved oxygen in the effluent[44] and that "[i]f secondary treatment facilities were implemented, up to 90% of the BOD would be removed."[45] The Submitters provide additional documentation on the expert findings alleging that the primary cause of fish mortality at Iona was due to low dissolved oxygen.[46] The documentation in the Submission states that on 4 April 2002, B.C. officially approved Metro Vancouver's LWMP and gave Metro Vancouver until the year 2020 to upgrade to secondary treatment.[47]

20. Further, the Submitters and their expert rely on legal interpretations of the ALT advising that Canadian courts have allegedly accepted a failure of the ALT as evidence that discharges have been deleterious to fish contrary to subsection 36(3) of the *Fisheries Act*.[48]

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Sewerage and Drainage District, showing 96-hour Rainbow Trout Bioassay LC50 test results, 2007-2009 [Exhibit 20]; Exhibit 22, *supra* note 36; Exhibit 23, *supra* note 39; Exhibit 24: Letter from Don Fast, Environment Canada, to Diane M. Clairmont, City of Vancouver (15 May 2001) [Exhibit 24]; and Exhibit 38, *supra* note 38.

[41] Submission, *supra* note 1 at para 31; Exhibit 23, *supra* note 39 at item "Conclusion". See also Exhibit 22, *supra* note 36 at 2.

[42] See generally Exhibit 7, *supra* note 11.

[43] *Ibid* at para 5. See also Exhibit 2, *supra* note 26 at item 1.1.1 (OC).

[44] Submission, *supra* note 1 at para 58; Exhibit 7, *supra* note 11 at para 16.

[45] Submission, *supra* note 1 at para 58. See also Exhibit 7, *supra* note 11 at paras 25-27, where using data from the GVRD reports, the expert compared chemical waste removal efficiency in sewage treatment plants with and without secondary sewage treatment operations. The expert found that Annacis Island WWTP which has both primary and secondary treatment removed waste at a rate of 92.6%, and Iona WWTP, with primary treatment only, had 31.6% waste removal efficiency. Lions Gate WWTP, another primary treatment-only facility had 15% waste removal efficiency. This led the expert to conclude that if "Iona were upgraded to secondary sewage treatment, the effluent discharged from this plant would be far less toxic to marine life than it is today".

[46] Exhibit 16, *supra* note 15 at 5, 31 ("The results of an acute toxicity identification study (TIE) conducted by EVS Consultants in late 2000 were presented at an intergovernmental workshop held in March, 2001. The findings of this study confirmed that Iona effluent samples failed to meet acceptable toxicity levels mainly because of the high DO [dissolved oxygen] demand of the effluent").

[47] Exhibit 25: Letter from Joyce Murray, British Columbia Minister of Water, Land and Air Protection, to George Puil, Chair and Director, Greater Vancouver Regional District **(**4 April 2002) [Exhibit 25] at 2, item 5(a), regarding approval of the proposed Liquid Waste Management Plan.

[48] Submission, *supra* note 1 at para 19; Exhibit 7, *supra* note 11 at para 11; Exhibit 15, *supra* note 8 at 3-1. See also *Municipal Sewage Regulation*, BC Reg 129/99, s 9, online: canlii < http://www.canlii.org/en/bc/laws/regu/bc-reg-129-99/latest/bc-reg-129-99.html>.

21. The Submitters provide information on the OC General Requirements which include "Emergency Procedures" as follows:

> 2.3 In the event of an emergency which prevents compliance with a requirement of this operational certificate, that requirement will be suspended for such time as the emergency continues or until otherwise directed by the Regional Waste Manager provided that:
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> a. Due diligence was exercised in relation to the process, operation or event which caused the emergency and that the emergency occurred notwithstanding this exercise of due diligence;
> b. The manager is immediately notified of the emergency, and
> c. It can be demonstrated that everything possible is being done to restore compliance in the shortest possible time.
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> Notwithstanding (a), (b), and (c) above, the manager may require the operation to be suspended or production levels to be reduced to protect the environment while the situation is corrected. [49]

Moreover, the documents provided show that the OC also prohibits exceeding of limits in the General Requirements section:

> 2.2 The discharge of effluent which has bypassed the designated treatment works is prohibited unless the approval of the Regional Waste Manager is obtained and confirmed in writing.[50]

22. The Submitters assert "[t]he Canadian government has failed to prevent the ongoing and continuous discharges of a deleterious substance into our waterways".[51] The Submitters state that as residents of Canada, the submitting organizations and their members are directly and personally affected by the harm from the loss of "beneficial uses of our natural resources" as these resources "continue to be degraded".[52]

23. The Submitters cite section 62 of the *Fishery (General) Regulations*[53] authorizing the allocation of proceeds in private prosecutions by citizens:

[49] Exhibit 2, *supra* note 26 at item 2.3 (OC).
[50] *Ibid* at item 2.2 (OC).
[51] Submission, *supra* note 1 at para 55.
[52] *Ibid*.
[53] SOR/93-53, online: canlii <http://www.canlii.org/en/ca/laws/regu/sor-93-53/latest/sor-93-53.html>.

> Where an information is laid by a person [other than a fishery officer or a fishery guardian employed by the Government of Canada or a provincial government]… relating to an offence under the *Act*, the payment of the proceeds of any penalty imposed arising from a conviction for the offence shall be made (a) one half to the person; and (b) one half to the Minister.[54]

24. The Submitters state that in late 2006, a private prosecution pursuant to section 504 of the *Criminal Code of Canada* ("Criminal Code")[55] was filed with respect to the matter raised in the submission, i.e., the Iona WWTP discharges into Georgia Strait, which are waters frequented by fish.[56] The allegation concerned the *Fisheries Act* and the circumstance that between 1 January 2005 and 30 November 2006, "the three accused parties [the GVRD, GVSDD and the Province of British Columbia] contravened Subsection 36(3) of the *Fisheries Act* at the Iona WWTP".[57] The Submission states that the Attorney General, representing Canada, formally intervened in the case and entered a stay of prosecution.[58] According to the federal prosecutor, the charges were stayed because "the public interest did not require this prosecution to be pursued" and no "reasonable prospect of conviction" existed.[59]

25. The Submitters add that:

> [A] decision by the AG to stay a criminal or quasi-criminal proceeding is generally not reviewable by Canadian courts without evidence of 'flagrant impropriety' on the part of the AG. This standard may be met

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[54] Submission, *supra* note 1 at para 7.

[55] RSC 1985, c C-46.

[56] Submission, *supra* note 1 at para 35. Mr. Chapman swore an Information (50766-1) in a court in Richmond (B.C.). The case was later assigned the style of cause: *Chapman v Her Majesty the Queen in right of the Province of British Columbia* ["*Chapman v B.C.*"].

[57] *Ibid*, at para 36. The information allegation was: "*Her Majesty in the Right of the Province of British Columbia and Greater Vancouver Regional District and Greater Vancouver Sewerage and Drainage District, between January 1, 2005 and November 30, 2006, at the Iona Island Wastewater Treatment Plant situated at 1000 Ferguson Road in the City of Richmond in the Province of British Columbia did unlawfully deposit or permit the deposit of a deleterious substance, to wit sewage, in a place under conditions where the deleterious substance entered water frequented by fish, to wit, the Strait of Georgia, contrary to Section 36(3) of the Fisheries Act (R.S., c. F-14) and did thereby commit an offence contrary to Section 40(2) of that Act"* [emphasis in original] (Exhibit 13, *supra* note 31 at para 1 (also available on canlii: <http://canlii.ca/s/utk2>)).

[58] Submission, *supra* note 1 at para 40. Under Subsection 579(1) of the *Criminal Code*, the Attorney General may direct a stay in a proceeding: "The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated". See Exhibit 31: *Chapman v British Columbia*, Transcript: Proceedings at Pre-Trial Conference (BC Prov Ct), McKinnon J (18 November 2008) [Exhibit 31] at 5.

[59] Submission, *supra* note 1 at para 40. See Exhibit 31, *supra* note 58 at 5.

> with 'proof of misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence.' Intervention by the AG can rarely, if ever, be successfully challenged.[60]

The Submitters note the decision to stay charges "demonstrates a failure of the government to enforce, or allow to be enforced, its environmental laws" because the Canadian government intervened to oppose the information in the private prosecution by having the charges stayed.[61] The Submitters list Canada's legal options when a citizen initiates a private prosecution:

> [T]he government has four options. They can do nothing, allowing the case to proceed through the courts; intervene, joining the informant in the prosecution; intervene and prosecute the case themselves; or intervene and stay the case. In the Iona WWTP case, the Canadian government intervened to the exclusion of the informant, took over the prosecution, and stayed the charges.[62]

26. The Submitters allege that as a result of the Attorney General's decision to stay charges, "Metro Vancouver [continues] to discharge sewage effluent that is acutely toxic to fish on a regular basis",[63] and that such decision likely forestalled the installation of a secondary treatment at the Iona WWTP.[64] According to the Submitters, "violations of the *Fisheries Act* have continued since the prosecution was stayed, causing additional harm to the environment".[65]

27. The Submitters allege that Metro Vancouver continues to discharge sewage effluent harmful to fish, and the violations have been and are ongoing and will likely continue to 2020, the time-limit accorded to the GVRD to upgrade the plant to full secondary treatment.[66]

28. The Submitters assert that prior to the private prosecution in December 2006 there were seven days when acutely toxic sewage was discharged from the Iona WWTP to the Georgia Strait: 9 July 2001; 14 August 2001; 3 June 2003; 7 October 2003; 6 May 2004; 1 June 2004; and 18 August 2004.[67]

29. The Submitters note that in 2005 and 2006, there were eight days when acutely toxic sewage was discharged from the Iona WWTP to the Georgia Strait. In that connection they cite the dates 3 May 2005; 1 June 2005; 7 July 2005; 13 September

[60] Submission, *supra* note 1 at para 41.
[61] *Ibid* at para 42.
[62] *Ibid*.
[63] *Ibid* at para 44.
[64] *Ibid*.
[65] *Ibid*.
[66] Exhibit 25, *supra* note 47 at 2, item 5(a).
[67] Submission, *supra* note 1 at para 24. See Exhibit 18, *supra* note 40.

2005; 20 July 2006; 14 August 2006; 12 September 2006; and 11 October 2006.[68]

30. The Submitters claim that since 2007, other violations were documented specifically on 7 May 2007; 10 July 2007; 12 September 2007; 7 May 2008; 9 June 2008; 8 July 2008; 14 August 2008; 6 May 2009; 12 August 2009; 10 September 2009 and 6 October 2009.[69]

31. The Submitters provide documentation from the EC's "National Pollutant Release Inventory" alleging that in the year 2007 Metro Vancouver discharged 17 tonnes of copper, 255 kilograms of arsenic, 84 kilograms of cadmium, 13 tonnes of hydrogen sulphide, 838 kilograms of lead, 15 kilograms of mercury, and 15 tonnes of zinc from the Iona WWTP into the Georgia Strait.[70]

32. On the subject of harm, the Submitters provide information stating that "[t]idal currents and mixing disperse the Iona WWTP effluent north in the Strait of Georgia, causing it to flow into Burrard Inlet".[71] As a result, so the Submitters, the Iona WWTP has been deemed to represent "a major potential impact to water quality in Burrard Inlet with potential acute toxicity and long-term effects".[72] The Submitters further note from a 2001 report that the release of contaminants from the Iona WWTP affects fish and their habitat because "[c]ontaminants settle into sediment and are taken up by the benthic community upon which fish depend for food".[73] With respect to harm and human health, the Submission states that

> [f]ish samples taken near the Iona WWTP outfall were tested to determine, "Tissue Residue Values" or TRVs for the protection of

[68] Submission, *supra* note 1 at para 25. See Exhibit 19, *supra* note 40.

[69] Submission, *supra* note 1 at para 26. See Exhibit 20, *supra* note 40. See also Exhibit 21: Addendum to Statement of John Werring, Registered Professional Biologist (29 January 2010) [Exhibit 21] at paras 1-4, where the expert confirms, after reviewing the documents submitted by the GVRD on Iona WWTP, that effluents from June 2007 to June 2009 "failed Acute Lethality Tests, and were thus acutely toxic to fish at the time of discharge, on at least eleven occasions".

[70] Submission, *supra* note 1 at para 48. See also Exhibit 33: Environment Canada, National Pollutant Release Inventory, *2007 Facility On-Site Releases: Greater Vancouver Regional District - Iona Island Wastewater Treatment Plant* [Exhibit 33], online: EC <www.ec.gc.ca/pdb/websol/querysite/release_details_e.cfm?opt_npri_id=0000005189&opt_report_year=2007>.

[71] Submission, *supra* note 1 at para 51; Exhibit 35: Vancouver Port Authority, Burrard Inlet Environmental Action Program, *Review of Upland Issues in Burrard Inlet: A Background Report to Assist in Developing Indicators for Burrard Inlet* (January 2006) at 35.

[72] *Ibid*.

[73] Submission, *supra* note 1 at para 52. Exhibit 3, *supra* note 14 at 59-60, states that "[c]oncentrations of cadmium, silver, chlorbenzenes, p,p'-DDE, coplanar PCB #77, several PCB cogeners, nonylphenol and its ethoxlates, and certain sterols showed trends in concentrations that indicated that their distribution in sediments was related to the Iona outfall…Comparison of measured concentrations to relative marine sediment quality values indicated that arsenic, chromium, copper, nickel, aldrin, total DDT, lindane, acenaphthene, anthracene, flouranthene, flourene, naphthalene, phenanthrene, and bis-(2-ethylhexyl) phthalate (DEHP) exceeded sediment quality values in one or more stations".

> human health. The TRV values showed that arsenic in the edible tissue of English sole and Dungeness crab exceeded the standard for human-health.[74]

According to the Submitters, the WWTP primary effluents and the chemicals that are present have numerous biological effects and can be "genotoxic and immunotoxic and/or can cause endocrine disruption in fish".[75] The Submitters allege that evidence from tests made to the liver tissue from male English sole fish shows that the B.C. Ministry of the Environment limit for lead has been exceeded.[76]

33. The Submitters assert that Canada's failure to effectively enforce its environmental laws has caused injury to the submitting parties because, as residents of Canada, they are directly and personally affected by the harm described above, and moreover the Submitters claim that Canada's alleged lack of enforcement against a municipal polluter "sets a terrible example to other polluting industries".[77]

34. The Submitters highlight Article 5 of the NAAEC and assert that it requires Canada to "effectively enforce its environmental laws and regulations through appropriate governmental action".[78] The Submitters assert that "[t]he Canadian government has failed to prevent the ongoing and continuous discharges of a deleterious substance into our waterways" and that "the beneficial uses of our natural resources used by submitting parties have been and continue to be degraded".[79] The Submitters affirm that the "aim of this submission is to promote the enforcement of the *Fisheries Act*".[80] They proceed to add: "further study and the preparation of a factual record would advance Article 1(a) and (g) of the NAAEC",[81] and conclude that "[t]his relief

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[74] Submission, *supra* note 1 at para 53; Exhibit 36: Metro Vancouver, *Assessment of Regional Water Bodies and Metro Vancouver's Wastewater Discharges*, Presentation to LWMP Reference Panel (10 December 2008) [Exhibit 36] at slide 16, online: Metro Vancouver <http://www.metrovancouver.org/services/wastewater/planning/LWMP%20Docs/LWMP-ReferencePanel-December_2008-presentation.pdf>.

[75] Submission, *supra* note 1 at para 54. Expert John Werring, registered professional biologist, stated that "WWTP effluents contain a potentially harmful mixture of heavy metals and natural and synthetic chemicals […]. They also contain a complex mixture of estrogens and estrogen mimicking compounds that are individually and collectively known to affect the reproductive health of wild fishes" (Exhibit 21, *supra* note 69 at 2).

[76] Submission, *supra* note 1 at para 53; Exhibit 36, *supra* note 74 at slide 16.

[77] Submission, *supra* note 1 at para 55.

[78] *Ibid* at para 3. The Submitters emphasize that in accordance with Article 5(1)(j) of the NAAEC, effective enforcement includes "initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations".

[79] Submission, *supra* note 1 at para 55.

[80] *Ibid* at para 61.

[81] *Ibid* at para 60. Article 1(a) of the NAAEC establishes the objective of "fostering the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations"; and Article 1(g) of the Agreement states as an objective "enhancing compliance with, and enforcement of, environmental laws and regulations".

is requested with the aim of having the laws of Canada upheld and enforced by the federal government for the protection of the environment".[82]

## III. ANALYSIS

35. The Secretariat now turns to examining whether Submission SEM-10-003 (*Iona Wastewater Treatment*) fulfills the requirements under Article 14(1) of the NAAEC. The Secretariat will treat each component of Article 14(1) of the NAAEC in turn.

### A. Opening Paragraph of Article 14(1)

36. The opening paragraph of Article 14(1) of the NAAEC provides: "[t]he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission" meets the criteria in Article 14(1)(a) to (f). This paragraph establishes the following mandatory requirements:

#### *i.* The Submission must be filed by *any non-governmental organization or person*

37. The term "non-governmental organization" is defined in Article 45(1).[83] Fraser Riverkeeper Society, the principal Submitter, represents itself as "a non-governmental registered charity established and operating in Canada",[84] and provides its registration number.[85] The Submitter explains the organization "is dedicated to the protection, conservation, and improvement of the water quality and fish habitat of the Fraser River and its surrounding waters, including the waters of the southern Georgia Strait".[86] The Submitter describes its principal activities as patrolling the watershed by boat, responding to citizen complaints of pollution, and monitoring water quality.[87] As per Article 45(1) of the NAAEC, the Submitter does not appear to be affiliated with, or under the direction of, any government body, and it appears to meet the definition of a "non-governmental organization" as set out in Article 45(1) of the NAAEC.

38. The Submission does not provide specific information to determine each Co-Submitter's status as an NGO, but it clearly identifies each Co-Submitter by name. A Submitter notes that it is a licensed member of the international Waterkeeper

[82] Submission, *supra* note 1 at para 62.
[83] Article 45(1) states "… 'non-governmental organization' means any scientific, professional, business, non–profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government...".
[84] Submission, *supra* note 1 at para 1.
[85] *Ibid*.
[86] *Ibid*.
[87] *Ibid*.

Alliance, the only Co-Submitter not based in Canada.[88] Although it would be preferable that Submissions include sufficient information to describe the status of each and every Co-Submitter consistent with Article 45(1) of the Agreement, the Secretariat has conducted research to confirm that all Co-Submitters indeed conform to the definition of NGO set forth in Article 45(1).[89] The Secretariat thus holds that the requirements of Article 14(1)(a) have been met by the Submitters.

### *ii.* The Submission must regard a Party's failure to enforce its *environmental law*

39. The Secretariat now examines whether the laws at issue in the Submission constitute environmental law that may be reviewed further by the Secretariat. Article 45(2)(a) of the NAAEC defines the term "environmental law" for the purposes of Article 14(1) as follows:

> (a) "environmental law" means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
>
> (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
>
> (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
>
> (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

The primary purpose of the particular provision or regulation under examination must be the focus of such analysis, rather than "the primary purpose of the statute or regulation of which it is part".[90]

40. The Submitters assert that in accordance with Article 5 of the NAAEC, Canada must

> 'effectively enforce its environmental laws and regulations through appropriate governmental action' [including] initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek

[88] *Ibid*.
[89] Information gathered from each Co-Submitter's website confirms that all Co-Submitters appear to be registered charitable organizations dedicated to the protection of water bodies and that none appears to be "affiliated with, [or] under the direction of, a government".
[90] NAAEC, Article 45(2)(c).

> appropriate sanctions or remedies for violations of its environmental laws and regulations.[91]

As the Secretariat has noted in previous determinations, the NAAEC is not an "environmental law" under Article 45(2) for the purposes of Articles 14 and 15, unless a Party has incorporated the NAAEC or provisions thereof into its domestic legal regime,[92] and this is not the case in Canada.

41. Canada's obligations under the NAAEC extend to matters falling within its federal jurisdiction, and provincial governments may enter into the *Canadian Intergovernmental Agreement Regarding the NAAEC* ("CIA").[93] As B.C. has not signed the CIA, any provisions of B.C.'s provincial laws or regulations raised in the Submission, or any acts or omissions made pursuant to, and allegedly in breach of, such laws or regulations, may only be examined to the extent that they may pertain to assertions on Canada's alleged failure to effectively enforce its federal environmental laws. Thus, the Secretariat will not further examine the Submission's references to B.C. provincial legislation or regulations −such as the *Environmental Management Act*[94] or the *Municipal Sewage Regulation*[95]. Furthermore, regardless of whether they may constitute environmental law in accordance with Article 45(2) of the NAAEC, the Secretariat will not further examine any reference to other documents cited by the Submitters falling within B.C.'s jurisdiction –such as the Operational Certificate or the Liquid Waste Management Plan−,[96] inasmuch as such reference regards matters not directly related to the effective enforcement of federal environmental law.

42. The Submitters assert that the "Canadian *Fisheries Act* is a federal statute within the meaning of 'environmental law' set out in Article 45 of the NAAEC".[97] Regarding the federal-state nature of fisheries management in the Province of British Columbia, in *BC Hydro*[98] the government of Canada indicated that "while there is a partnership

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[91] Submission, *supra* note 1 at para 3. See also NAAEC, Article 5(1)(j).

[92] See SEM-09-005 (*Skeena River Fishery*), Articles 14(1) and 14(2) Determination (18 May 2010) [Skeena River] at para 29; SEM-98-001 (*Guadalajara*) Article 14(1) Determination (13 September 1999) at 7: "Only if an individual or nongovernmental organization could seek enforcement of [NAAEC Articles] under the domestic legal regime of a Party would these provisions be potentially susceptible to a submission under Article 14 of the Agreement".

[93] The Canadian provinces of Alberta, Manitoba and Quebec have signed the CIA. See online: <http://www.naaec.gc.ca/eng/implementation/cia_e.htm>. Generally on the federal-state nature of fisheries management in B.C. see note 63 of the Secretariat's Determination on SEM 09-005 (*Skeena River Fishery*) dated 18 May 2010, online at <http://www.cec.org/Storage/88/8490_09-5-DET_14_1_2_en.pdf>.

[94] SBC 2003, c 53. See generally Submission, *supra* note 1 at para 9; and Exhibit 15, *supra* note 8 at 3-1.

[95] BC Reg 129/99. See generally Submission, *supra* note 1 at para 19; and Exhibit 15, *supra* note 8 at 3-1.

[96] Submission, *supra* note 1 at paras 10, 34. See also Exhibit 2, *supra* note 26 (regarding the Operational Certificate); and Exhibit 15, *supra* note 8 (regarding jurisdiction for issuing the Liquid Waste Management Plan).

[97] Submission, *supra* note 1 at para 5.

[98] SEM-97-001 (*BC Hydro*), Submitted on 2 April 1997.

between the Province and the federal government, Canada remains ultimately responsible for administering the habitat protection provisions of the Fisheries Act".[99]

43. The relevant provision in this Submission is subsection 36(3) of the federal *Fisheries Act*:

> **36(3)**
>
> Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water. [100]

The Submitters also assert that under subsections 36(3) and 40(2) of the *Fisheries Act*, "it is an offence to deposit or to permit the deposit of a deleterious substance in water frequented by fish, unless authorized by regulation".[101] Article 40(2) states:

> **40(2)**
>
> Every person who contravenes subsection 36(1) or (3) is guilty of
>
> (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
>
> (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.[102]

The Submitters also note that under section 78.1 of the *Fisheries Act*, each day a discharge deleterious to fish is made in contravention of subsection 36(3) of the Act constitutes a separate offence.[103]

44. While the prohibition set out in subsection 36(3) provides an exception for deposits authorized by regulation as provided in subsection 36(4), this provision has no application to assertions made in this Submission. For their part, sections 40(2) and

[99] SEM-97-001 (*BC Hydro*), Party Response (21 July 1997) [BC Hydro - Response] at 7; and SEM-97-001 (*BC Hydro*), Factual Record (11 June 2000) at para 36. See also Skeena River, *supra* note 92 at para 28, note 63.
[100] *Supra* note 4.
[101] Submission, *supra* note 1 at para 6.
[102] *Supra* note 4.
[103] Submission, *supra* note 1 at 23.

78.1 establish the penalties for an infringement of subsection 36(3) and may therefore be considered in connection with the latter provision.

45. As the Secretariat has found in previous Article 14 determinations, subsection 36(3) of the *Fisheries Act* is related to pollution prevention,[104] and has therefore been deemed to be "environmental law" within the meaning of Article 45(2) of the NAAEC. The Secretariat notes the Submitters' assertion that

> the purpose of subsection 36(3) of the Fisheries Act is to protect fish and fish habitat through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants,[105]

and notes that the Act's purpose may include "the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, […] related thereto", and the protection of the environment through the protection of species of fish, i.e., "wild…fauna," in the Party's territory.[106]

46. For the foregoing reasons, the Secretariat may consider further the Submitter's assertions regarding subsection 36(3) of the Act.

### *iii.* The Submission must *assert* that a Party is *failing* to *effectively enforce* its *environmental law*

47. The Secretariat has opined in a previous determination that assertions of a Party's failure to effectively enforce its environmental law in accordance with the opening paragraph of Article 14 should be explicit, indicative, and properly documented and reasoned[107]. A Submission must also show that such failure is ongoing on the date the Submission is made.[108]

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[104] SEM-02-003 (*Pulp and Paper*), Articles 14(1) and 14(2) Determination (18 May 2010) at 5, item III.A; SEM-03-005 (*Montreal Technoparc*), Articles 14(1) and 14(2) Determination (15 September 2003) at 3; and SEM-10-002 (*Alberta Tailings Ponds*), Article 14(1) Determination (3 September 2010) [Tailings Ponds] at para 32. See also SEM-98-004 (*BC Mining*), Article 14(1) Determination (29 June 1998); and SEM-03-001 (*Ontario Power Generation*), Articles 14(1) and 14(2) Determination (19 September 2003) [Power Generation] at 4, where subsection 36(3) of the *Fisheries Act* was also deemed to be environmental legislation without specifying the purpose of the provision.

[105] Submission, *supra* note 1 at para 6.

[106] NAAEC, Article 45(2)(ii) and (iii).

[107] Tailings Ponds, *supra* note 104 at para 28. See also Guidelines 5.1 and 5.3.

[108] The Secretariat has often discussed the need for assertions regarding failures to effectively enforce to meet the temporal requirement of concerning an apparently "ongoing" situation at the time of Submission. These occasions include: SEM-97-003 (*Quebec Hog Farms*), Notification to Council (29 October 1999) [Hog Farms] at 8 ("the Submission meets the temporal requirement in Article 14(1) because…the Submission asserts that many of the alleged violations are ongoing"); and SEM-99-002 (*Migratory Birds*), Articles 14(1) and 14(2) Determination (23 December 1999) at 4 ("the Submission focuses on asserted failures to enforce that are ongoing. It thereby meets the jurisdictional requirement in

48. Assertions that a Party is allegedly failing to effectively enforce its environmental laws "should focus on any acts or omissions of the Party asserted to demonstrate that failure".[109] In a Determination from 1998, the Secretariat established that

> [w]hile recognizing that the language of an "assertion" supports a relatively low threshold under Article 14(1), a certain amount of substantive analysis is nonetheless required at this initial stage. Otherwise, the Secretariat would be forced to consider all submissions that merely "assert" a failure to effectively enforce environmental law. The fact that the term "environmental law" is expressly defined in Article 45(2) for the purposes of Article 14(1) supports the conclusion that some initial screening is appropriate at the 14(1) stage.[110]

In that connection, the Secretariat has also determined that a submitter has the onus of showing "how such failure is allegedly occurring"[111] with "sufficiently documented reasons".[112]

49. One of the Submitters' key assertions is focused on the law at issue and on enforcement:

> The submission is based on the Canadian federal government's failure to enforce section 36(3) of the federal *Fisheries Act* with respect to sewage discharges from the Iona Island Wastewater Treatment Plant (the "Iona WWTP") in Richmond, a suburb of Vancouver in British Columbia.[113]

In paragraph four of the Submission, the Submitters state:

> Canada is failing to effectively enforce its environmental laws with respect to discharges of a substance deleterious to fish from the Iona WWTP.[114]

The above cited statements from the Submission are unambiguous. The Submitters assert the Party is not effectively enforcing subsection 36(3) of the federal *Fisheries Act*, specifically with respect to sewage discharges of a substance deleterious to fish from the Iona WWTP.

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the first sentence of Article 14(1).") See also SEM-09-004 (*Quebec Mining*), Article 14(1) Determination (20 October 2009) [Quebec Mining] at 6, note 31.

[109] Guideline 5.1.

[110] SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998) at 3, item III.I.

[111] Tailings Ponds, *supra* note 104 at para 28; and Guidelines 1.1, 5.1 and 5.3. See also *Quebec Mining*, *supra* note 108 at 5, item III.

[112] Tailings Ponds, *supra* note 104 at para 28, and Guideline 5.3. See also Quebec Mining, *supra* note 108 at 5, item III.

[113] Submission, *supra* note 1 at para 2.

[114] *Ibid* at para 4.

50. The Submission explains and documents how the asserted effective enforcement failures occurred: the Submitters first invoke the definition of the term "deleterious substance" under subsection 34(1) of the *Fisheries Act*,[115] and provide documentation that an allegedly deleterious substance – as determined by a biological test used and approved by the federal government –[116] was discharged into the Georgia Strait on at least 25 occasions between 2001 and 2009.[117] The Submitters also provide documents on the provincial OC which required compliance with the *Fisheries Act*,[118] and finally provide correspondence between the GVSDD and EC[119] showing *Fisheries Act* compliance issues with WWTP's primary sewage discharges. In addition, the Submission alleges that B.C. authorized the Iona WWTP to continue to operate under the conditions allegedly causing the violation of subsection 36(3) of the Act until 2020.[120] Finally, the Submitters show that the Attorney General stayed a private prosecution commenced pursuant to section 62 of the *Fishery (General) Regulations*[121] for the violation of subsection 36(3) of the *Fisheries Act*, after process had been issued against all three accused on 22 March 2007.[122] According to the Submitters, the Attorney General's stay of the Chapman prosecution "demonstrates a failure of the government to enforce, or allow to be enforced, its environmental laws".[123] The Secretariat does not find however, that assertions relating to the Attorney General's power to stay a prosecution, are assertions of a failure to effectively enforce environmental law as defined by NAAEC Article 42, and does not consider such assertions further.

51. The Submitters have sufficiently documented their explicit assertions that Canada allegedly failed to effectively enforce its environmental laws.

52. The Secretariat has consistently interpreted Article 14(1) to exclude any assertions alleging a deficiency in the law itself.[124] Conversely, the Secretariat has also stated that

> "mindful of the government enforcement actions that are included in Article 5 of the NAAEC, the Secretariat has also dismissed assertions in previous submissions that challenged the kind of standard-setting that the NAAEC Parties reserved to themselves, as contrasted with

[115] *Ibid* at para 6.
[116] Exhibit 15, *supra* note 8 at 3-1.
[117] See *supra* at paras 28-30.
[118] Exhibit 2, *supra* note 26 at 1 (letter).
[119] Exhibit 24 *supra* note 40.
[120] Exhibit 25, *supra* note 47.
[121] SOR/93-53.
[122] Submission, *supra* note 1 at para 39.
[123] *Ibid* at para 42.
[124] SEM-04-005 (*Coal-Fired Power Plants*), Article 14(1) Determination (12 December 2004) [Coal-Fired Power Plants] at 4; Power Generation, *supra* note 104 at 4-5. See SEM-98-003 (*Great Lakes*), Articles 14(1) and 14(2) Determination (8 September 1999) [Great Lakes] at 7-9, item III.A.3.

> assertions of a "failure to effectively enforce."[125]

53. The Submission does not seem to assert a deficiency in the law at issue, and it expressly focuses on at least 25 instances where an offence under subsection 36(3) of the Act allegedly occurred.

54. In issuing the Iona OC, B.C. clearly stated that the GVSDD was still subject to other applicable legislation,[126] which legislation would include the *Fisheries Act*. Under the OC, the GVRD submits a monthly toxicity test to the Provincial government. At least 25 of these tests failed between 2001 and 2009.[127] The OC directed the OC holder to "conduct a Toxicity Identification Evaluation (TIE) study for determining the probable cause of the failure" every time the Plant failed a monthly bioassay test, and to submit the study "to the Regional Waste Manager by the end of the month following the month that the bioassay test failure occurred".[128] A study submitted by the GVRD to the Ministry (B.C.) pursuant to Permit-00023 (now called OC-00023) on June 28, 2002, in which study a series of TIE studies were analyzed, alleges that BOD was the main cause of the toxicity observed in failed tests at Iona WWTP.[129] Further, the Submission includes correspondence between EC and the GVRD acknowledging that "as of April 6, 2001, Environment Canada is receiving monthly bioassay results" and that the LWMP as proposed could lead to a failure to comply with subsection 36(3) of the *Fisheries Act*.[130] The Submission also includes a letter of Warning of 20 March 2001, from an inspector of the Enforcement and Emergencies Division of EC to the GVRD, stating that "further steps will be considered by Environment Canada if you do not take the necessary action to prevent the release of a deleterious substance".[131] Another such letter by an EC official to the City of Vancouver dated 15 May 2001, notes that EC

> > has been working for many years with the GVRD during the development of its LWMP. EC's primary interest in this regard is ensuring that GVRD discharges are in compliance with the federal Fisheries *Act*.[132]

That same letter states that "EC is not fully satisfied that the final Stage 3 Plan recently submitted to the Province will meet the requirements of the *Fisheries Act*", and it concludes that EC would continue to work with the GVRD to address the

[125] Coal-Fired Power Plants, *supra* note 124 at 4.
[126] Exhibit 2, *supra* note 26 at 1 (letter).
[127] Exhibit 18, *supra* note 40; Exhibit 19, *supra* note 40; and Exhibit 20, *supra* note 40.
[128] Exhibit 2, *supra* note 26 at 3.1.3 (OC).
[129] Exhibit 5: Greater Vancouver Regional District, *Iona Island Wastewater Treatment Plant 2001 Analytical Data Assessment Report* (June 2002) [Exhibit 5] at 18.
[130] Exhibit 22, *supra* note 36 at 1.
[131] Exhibit 23, *supra* note 39 at 2.
[132] Exhibit 24, *supra* note 40.

issue.[133] On 4 April 2002, the Provincial Minister of Environment, Lands and Parks (B.C.) granted the Iona WWTP a new OC, authorising it to continue to function with primary wastewater treatment only, until 2020.[134]

55. In the *BC Hydro* submission, Canada acknowledged that both the federal and provincial governments shared responsibility for administering the *Fisheries Act*, resulting in "a complex administrative environment where cooperation, common goals, and good faith are essential".[135]

56. The Secretariat now considers whether the assertions relate to an alleged failure of the Party to effectively enforce its environmental law that was *ongoing* at the time of the Submission. The Submission was filed with the Secretariat on 7 May 2010. According to the Submission, "the Iona WWTP facility discharges over 30 tonnes of oxygen demanding substances into the Strait of Georgia" daily.[136] While asserting that the WWTP opened in 1963 and it has since "been discharging sewage effluent after only primary treatment", the Submitters have included details of Acute Lethality Test failures only since the year 2000.[137]

57. The Submitters assert that "on approximately 25 monthly testing days between the years 2001 and 2009, Metro Vancouver discharged primary treated sewage effluent that was acutely toxic to fish from the Iona WWTP into Georgia Strait".[138] As early as 2001, the Submission alleges that:

> [I]n the months of April, June, August, October and December of 2001, and in February 2002, EC inspectors visited the Iona WWTP and took samples of the sewage being discharged into Georgia Strait. Three of the six samples subsequently failed the 96 hour LC50 Acute Lethality Tests. These and other toxicity test failures were acknowledged by Metro Vancouver and GVSDD, who recognized the fact that they were not in compliance with the *Fisheries Act*.[139]

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[133] *Ibid.*
[134] Exhibit 25, *supra* note 47.
[135] *BC Hydro* - Response, *supra* note 99 at 7. Further on the topic of federal-provincial fisheries management, the Fisheries and Oceans Canada website states regarding the Skeena River in B.C.: "The management and protection of fish stocks in the Skeena River system is shared by Fisheries and Oceans Canada (DFO) and the Province of British Columbia (B.C.) DFO is responsible for the conservation of salmon populations in the river, and for managing the fisheries that target these stocks" (online: Fisheries and Oceans Canada <http://www.dfo-mpo.gc.ca/media/back-fiche/2008/pr08-eng.htm>).
[136] Submission, *supra* note 1 at para 56. See Exhibit 37: Greater Vancouver Sewerage & Drainage District, *Monitoring Results for Operating Certificate ME-00023, Iona Island WWTP Effluent* (November 2009).
[137] Submission, *supra* note 1 at para 56. See Exhibit 24, *supra* note 40, which reports failures were observed in 2000. See also Exhibit 9: Metro Vancouver, *Treatment Plants: Iona Island Wastewater Treatment Plant*, online: Metro Vancouver <http://www.metrovancouver.org/services/wastewater/treatment/Pages/treatmentplants.aspx>.
[138] Submission, *supra* note 1 at para 28.
[139] *Ibid* at para 30. See Exhibit 38, *supra* note 38.

The Submitters assert that prior to, during, and after the time period covered by the private prosecution,[140] acutely toxic sewage was discharged from the Iona WWTP to the Georgia Strait on seven, eight and at least eleven days, respectively.[141]

58. The Submitters note that such violations may potentially continue until 2020, the deadline imposed by the Province of British Columbia on the GVRD to upgrade Iona Island Sewage Treatment Plant to full secondary treatment.[142] The Submitters also allege that a lack of dissolved oxygen in the effluent caused the toxicity test failures,[143] and according to their cited expert opinion, "in every instance where the Iona effluent failed the standard EC acute lethality test, the reason for those test failures was overly high biological oxygen demand", which purportedly continues to produce effects in the present.[144] The Submitters also advance documents allegedly showing that primary treatment only reduces BOD by about 30%, while secondary treatment reduces BOD by about 90%.[145] Metro Vancouver's website supports the Submitters' technical conclusion in the latter connection.[146] The Submitters assert that "[i]f secondary treatment facilities were implemented, up to 90% of the BOD would be removed".[147]

59. As a whole, the violations documented at the Iona WWTP before the filing of the private prosecution in December 2006, those documented through 2009, and the anticipated violations as a result of BOD levels caused from primary treatment of effluent[148] until as late as 2020 tend to support the notion that the assertions relate to a situation that is ongoing. For these reasons, the Secretariat considers that the assertions in the Submission meet the temporal requirement in the opening paragraph of Article 14(1).

60. The Secretariat will now treat each requirement of NAAEC Article 14(1) (a–f) in turn.

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[140] The information laid covered the period between 1 January 2005 and 30 November 2006. See Submission, *supra* note 1 at para 36.

[141] *Ibid* at para 57. The dates cited by the Submitters are 9 July 2001; 14 August 2001; 3 June 2003; 7 October 2003; 6 May 2004; 1 June 2004; 18 August 2004; 3 May 2005; 1 June 2005; 7 July 2005; 13 September 2005; 20 July 2006; 14 August 2006; 12 September 2006; 11 October 2006; 7 May 2007; 10 July 2007; 12 September 2007; 7 May 2008; 9 June 2008; 8 July 2008; 14 August 2008; 6 May 2009; 12 August 2009; 10 September 2009 and 6 October 2009.

[142] *Ibid* at para 33. See Exhibit 25 *supra* note 47 at 2, item 5(a).

[143] Submission, *supra* note 1 at para 58.

[144] Exhibit 7, *supra* note 11 at para 16.

[145] Exhibit 7, *supra* note 11 at para 25. See also Exhibit 8: Metro Vancouver, *Wastewater Treatment*, online: Metro Vancouver <http://www.metrovancouver.org/services/wastewater/treatment/Pages/treatmentplants.aspx>.

[146] *Ibid*.

[147] Submission, *supra* note 1 at para 58.

[148] *Ibid*.

**14(1)(a) The Submission must be in *writing in a language designated by that Party in a notification to the Secretariat***

61. The Secretariat finds the Submission meets the criterion of NAAEC Article 14(1)(a) as the Submission is in English, an official language designated by the Parties for the filing of a Submission.

**14(1)(b) The Submission must *clearly identify the person or organization making the Submission***

62. The Submission provides the name and mailing address of the lead Submitter, a charitable organization, and the contact person filing it. The Submission statement of the name and address of the person or organization is sufficient for the Secretariat to clearly identify the lead Submitter, the Fraser Riverkeeper Society *et al.* All Co-Submitters are clearly identified by name.

63. The Secretariat considers that the lead Submitter, as well as the Co-Submitters, are clearly identified, and this has been corroborated by Secretariat research. Thus the Submission meets the criterion of Article 14(1)(b).

**14(1)(c) The Submission must *provide sufficient information to allow the Secretariat to review the Submission, including any documentary evidence on which the Submission may be based***

64. In accordance with Guideline 5.3, the Submission provides documents and materials related to the assertion that the Party is failing to effectively enforce the environmental law with respect to effluent discharges into fish-bearing waters. The Submission includes background information on the location of the discharges,[149] as well as documented findings that discharges failed the effluent toxicity tests in contravention of subsection 36(3) of the *Fisheries Act*[150] and the operation of the facility.[151] The Submitters also provide allegedly relevant scientific information,[152] expert reports,[153] case law and legal information on terms, definitions and

[149] Submission, *supra* note 1 at paras 13, 15.
[150] *Ibid* at paras 24-26. See Exhibit 18, *supra* note 40; Exhibit 19, *supra* note 40; and Exhibit 20, *supra* note 40; and Exhibit 21, *supra* note 69 at paras 1-4.
[151] See e.g. the copy of the OC issued to the Iona WWTP (Exhibit 2, *supra* note 26).
[152] See e.g. information on Environment Canada's Testing Methods (Exhibit 17: Environment Canada, *Biological Test Method: Reference Method for Determining Acute Lethality of Effluents to Rainbow Trout*, 2d ed (December 2000), Report EPS 1/RM/13); and monitoring reports (e.g. Exhibit 18, *supra* note 40; Exhibit 19, *supra* note 40; Exhibit 20, *supra* note 40; and Exhibit 33, *supra* note 70).
[153] See e.g. Exhibit 7, *supra* note 11; Exhibit 21, *supra* note 69; and Exhibit 34: Albert van Roodselaar et al, "Sediment Quality Assessment of the Iona Deep-Sea Outfall Area, 2000-2002" (Paper presented at the Georgia Basin/Puget Sound Research Conference, 2003).

jurisdictional issues.[154]

65. The Secretariat finds that the Submission satisfies the requirements of Article 14(1)(c) and it provides adequate supporting documentation in accordance with Guideline 5.3.

### 14(1)(d) The Submission must *appear to be aimed at promoting enforcement rather than at harassing industry*

66. Article 14(1)(d) requires that a submission "be aimed at promoting enforcement rather than at harassing industry", and Guideline 5.4(a) clarifies that in making such determination, the Secretariat will consider factors such as whether "the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the submitter is a competitor that may stand to benefit economically from the submission".

67. In accordance with Guideline 5.4(a), first sentence, the Submission focuses on the Party's acts and omissions, consistent with the central assertion that the Party is failing to effectively enforce subsection 36(3) of the *Fisheries Act.* In addition to documents concerning instances of toxicity test failures ─ as alleged proof of asserted breaches of the law at issue ─ the Submitters also include copies of court documents filed by a citizen in a private prosecution launched in 2006 involving toxicity exceedances of the Iona WWTP. These Court documents show that the remedy sought in this prosecution was enforcement of subsection 36(3) of the *Fisheries Act*, the law at issue in this Submission. Further, the Submitters state that their Submission and the request for the production of a factual record have "the aim of having the laws of Canada upheld and enforced by the federal government for the protection of the environment".[155] The Submitters state that the "aim of this submission is to promote the enforcement of the *Fisheries Act*".[156] The Secretariat is thus satisfied that the Submission appears to be aimed at promoting enforcement of the laws at issue.

68. The Secretariat now considers whether the Submission appears to be aimed at harassing industry. The Submission does not appear to be focused on compliance by a particular company or business. The Submission focuses on one waste water facility that is operated by a municipal government agency license holder. The Submitters identify the responsible institution, the GVSDD, which according to the Submission, is directed by Metro Vancouver. Metro Vancouver is a federation of

[154] Submission, *supra* note 1 at paras 17-19 (Exhibit 10: Black's Law Dictionary, 5th ed, *sub verbo* "deleterious"; Exhibit 11: *Fletcher v Kingston (City)*, 70 OR (3d) 577, [2004] OJ No 1940 (Lexis) (Ont CA); Exhibit 12: *R v Ontario (Ministry of the Environment)*, [2001] OJ No 2581 (Lexis) (Ont Ct J); Exhibit 13, *supra* note 31; and Exhibit 14: *Municipal Sewage Regulation*, BC Reg 129/99, s 9).
[155] Submission, *supra* note 1 at para 62.
[156] *Ibid* at para 61.

municipalities and electoral areas in Greater Vancouver (B.C.).[157] The Submission states that while "strictly speaking a separate legal entity from Metro Vancouver, the GVSDD shares the same Board of Directors and is functionally part of Metro Vancouver"[158] and it operates four other wastewater treatment plants in the Greater Vancouver area. The Iona WWTP facility does not have secondary treatment, which the Submitters allege, is the cause of test toxicity failures.[159] According to the agreement between the federal and provincial governments in the Liquid Waste Management Plan, any facility upgrade is the responsibility of public bodies and is not due until 2020, thus this is not a private company.[160] In addition, the Co-submitters are non-profit and environmental public interest organizations, and moreover they are non-governmental organizations and do not appear to be affiliated with either Metro Vancouver or the GVSDD. On the basis of the information before the Secretariat, it does not appear that the Submitters are associated with privately-owned waste water treatment plants, or any other company or business that would potentially stand to benefit economically from the submission if, for example, an upgrade of the Plant to full secondary treatment of waste-water were to be undertaken.

69. For the foregoing reasons, the Secretariat finds the Submission also appears to be aimed at promoting enforcement rather than at harassing industry and is in accordance with Article 14(1)(d) and Guideline 5.4.

**14(1)(e) The Submission must *indicate that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response***

70. In accordance with Guideline 5.5, the Submission must include, if available, "copies of any relevant correspondence with the relevant authorities", which are "the agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question", and the "Party's response" (if any).

71. The Submission includes court transcripts[161] which indicate copies of the evidence tendered by the informant were provided to Canada's Attorney General, which demonstrates that the assertions regarding primary discharges and violations of the *Fisheries Act* at the Iona WWTP outflow were communicated to the Party in 2007.[162]

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[157] *Ibid* at para 8.
[158] *Ibid.*
[159] Submission, *supra* note 1 at para 45.
[160] Exhibit 25, *supra* note 47.
[161] See Submission, *supra* note 1 at paras 38-40; Exhibit 29: *Chapman v British Columbia*, Transcript: Proceedings at Application (BC Prov Ct), Chen J (8 March 2007) [Exhibit 29]; Exhibit 13, *supra* note 31 at para 9; Exhibit 31, *supra* note 58.
[162] Exhibit 28: Letter from Sierra Legal Defence Fund to John Cliffe, Attorney General's Counsel for the

Other documents included with the Submission include copies of correspondence, obtained through the federal *Access to Information Act*,[163] from Environment Canada, being the relevant authority. In addition to the OC reminder issued in 2004 to the Certificate holder that it is required to comply with "other applicable legislation that may be in force",[164] a letter dated 15 May 2001 from EC's Pacific and Yukon regional office indicated knowledge of the compliance issues existing at the WWTPs as early as 2000:

> In May of last year [2000], EC advised the GVRD that its environmental monitoring and 'triggering' approach may be acceptable as one component of its LWMP but that the GVRD must also achieve compliance with the *Fisheries Act* at all of its wastewater discharge points.[165]

The Submitters also include the 2007 National Pollutant Release Inventory[166] data submitted for the Iona WWTP and published by the Party.

72. For the foregoing reasons, the Secretariat determines that the Submission indicates that the matter has been communicated in writing to the relevant authority of Canada, that the Submission meets the requirements of Article 14(1) (e), and that it is in accordance with Guideline 5.5.

### 14(1)(f) The Submission must be *filed by a person or organization residing or established in the territory of a Party*

73. The Submitter states that its main office is in Vancouver, British Columbia. It filed the Submission on its own behalf and that of ten other organizations, one of which is not based in the territory of the Party. The Co-submitters are organizations that are clearly identified. The Co-submitters that are listed in the Submission are: Lake Ontario Waterkeeper, Ottawa Riverkeeper, Fundy Baykeeper, Grand Riverkeeper, Georgian Baykeeper, Petitcodiac Riverkeeper, David Suzuki Foundation, T. Buck Suzuki Environmental Foundation, and Georgia Strait Alliance, and these are all established in Canada. One co-submitter, the Waterkeeper Alliance is based in the United States. Only the address of the lead Submitter is identified in the Submission.

74. From time to time, the Secretariat receives Submissions that are filed by several persons or organizations. In the Submission, the lead submitter, the Fraser Riverkeeper Society is established in Canada. The Secretariat finds that the

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accused, accompanying the prosecution brief (23 January 2007) [Exhibit 28].

[163] RSC 1985, c A-1. See Exhibit 22, *supra* note 26; Exhibit 23, *supra* note 39; and Exhibit 24, *supra* note 40.

[164] Exhibit 2, *supra* note 1 at 1 (letter).

[165] Submission, *supra* note 1 at para 32; Exhibit 24, *supra* note 40.

[166] Submission, *supra* note 1 at para 48; Exhibit 33, *supra* note 70.

Submission is filed by organizations and persons residing in and established in the territory of a Party, and thus satisfies the requirements of Article 14(1)(f).

### B. Article 14(2) Factors

75. The Secretariat reviews a Submission under Article 14(2) if it finds that the Submission meets the criteria set out in NAAEC Article 14(1). Having determined in the preceding section that the Submission indeed meets the requirements of NAAEC Article 14(1), the Secretariat will now review the Submission under NAAEC Article 14(2), in order to determine whether the Secretariat should request a response to the Submission from the Party. The requirements under Article 14(2) serve to orient the Secretariat in determining whether a response from the Party is warranted.[167]

76. NAAEC Article 14(2) provides that:

> 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.[168]
>
> The Secretariat will now review these in turn along with its reasons.

#### *(a) "the Submission alleges harm to the person or organization making the Submission"*

77. First, the Secretariat examines whether the Submission alleges harm to the person or organization making the Submission under Article 14(2)(a). Following Guideline 7.4(a) and (b), the Secretariat considers whether the alleged harm, according to the Submitter, is due to the asserted failure to effectively enforce environmental law (in this case subsection 36(3) of the *Fisheries Act*), and whether the alleged harm relates to the protection of the environment or to the prevention of danger to human life or health.

78. The Submitter states that the release of contaminants affects fish and fish habitat, since "[c]ontaminants settle into sediment and are taken up by the benthic community

[167] SEM-97-007 (*Lake Chapala*), Notification to Council (14 July 2000) at 3 (Spanish version).
[168] NAAEC, Article 14(2).

upon which fish depend for food".[169] The Submitters provided the results of a Metro Vancouver study[170] allegedly showing the impacts of the Iona WWTP outfall on the safety of eating fish.[171] Fish samples taken near the Iona WWTP outfall were tested and the test values allegedly showed that arsenic in the edible tissue of English sole and Dungeness crab exceeded the standard set by the United States Environmental Protection Agency.[172] The Submission further purports to show that PCB cancer rates were allegedly exceeded in the latter species, and also liver tissue from male English sole fish was found to exceed the B.C. Ministry of the Environment limit for lead.[173]

79. The Submitters provide expert opinion on biological harm stating that "WWTP effluents and the chemicals therein have numerous biological effects and can be genotoxic and immunotoxic and/or can cause endocrine disruption in fish".[174] The Submitters state that by violating the *Fisheries Act* and through further systemic, ongoing contamination from the Iona WWTP, harm is being caused to the watershed.[175] Further, the Submitters assert that Canada's failure to effectively enforce its environmental laws is causing injury to the Submitters.[176] Finally, the Submitters allege that they and "residents of Canada, […] are directly and personally affected by the harm described above".[177]

80. The Secretariat concludes for the foregoing reasons that the Submission alleges harm to the organizations making the Submission in accordance with Article 14(2)(a), and that this assertion of a failure to effectively enforce environmental law relates to the protection of the environment, namely fish and fish habitat.

### *(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"*

81. The Secretariat now considers Article 14(2)(b) and whether the Submission raises matters the further study of which in this process would advance the goals of the Agreement. In this connection, the environmental matter being raised in the Submission concerns the effects of effluent and wastewater treatment outflow in fish bearing waters on fish and fish habitat. The Submitters allege that on a daily basis, "the Iona WWTP facility discharges over 30 tonnes of oxygen demanding substances into the Strait of Georgia".[178] In this connection, the Submitters state that the aim of

[169] Submission, *supra* note 1 at para 52.
[170] *Ibid* at para 53; Exhibit 36, *supra* note 74.
[171] Submission, *supra* note 1 at para 53.
[172] *Ibid.*
[173] *Ibid*.
[174] Submission, *supra* note 1 at para 54. See Exhibit 21, *supra* note 69 at paras 1-4.
[175] Submission, *supra* note 1 at para 55.
[176] *Ibid.*
[177] *Ibid*.
[178] Submission, *supra* note 1 at para 56.

the Submission is to promote the enforcement of the *Fisheries Act*[179] by "having the laws of Canada upheld and enforced by the federal government for the protection of the environment".[180] The Submitters note: "[T]he lack of enforcement against this municipal polluter [Metro Vancouver and the GVSDD] sets a terrible example to other polluting industries".[181] The Submitters also contend that the Submission is consistent with the objectives of NAAEC.[182]

82. The Secretariat considers the matters raised in the Submission could advance NAAEC objectives found in Article 1 (a) and (g)[183] in accordance with Article 14(2)(b).

### *(c) "private remedies available under the Party's law have been pursued"*

83. The Secretariat now turns to examining whether private remedies available under the Party's law have been pursued in accordance with Article 14(2)(c). Although the term "private remedies" is not defined under the NAAEC, the term may be interpreted in the context of the domestic court system of the Party concerned.[184] The consideration of Article 14(2)(c) is guided by whether reasonable actions have been taken to pursue such remedies prior to the filing of a Submission, particularly where barriers may have existed to the pursuit of such remedies.[185] Guideline 5.6(c) suggests that pursuing private remedies is one of a series of "actions" that may be carried out to satisfy Article 14(2)(c) of the NAAEC, and when Guideline 5.6(c) is read in connection with Guideline 7.5(b), "reasonable actions" may be seen to include actions taken to assess whether the Submitters' pursuit of private remedies would be practical.[186]

84. The Submission includes information on a private prosecution[187] under section 504

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[179] *Ibid* at para 61.
[180] *Ibid* at para 62.
[181] *Ibid* at para 55.
[182] *Ibid* at para 60.
[183] NAAEC Article 1 objectives that may be advanced by further consideration of the Submission are to:
"(a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; […]
(g) enhance compliance with, and enforcement of, environmental laws and regulations; […]".
[184] Skeena River, *supra* note 92 at para 44.
[185] Guideline 7.5(b): "In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether: [...]
(b) reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases."
[186] Skeena River, *supra* note 92 at para 44.
[187] In Canada, a private prosecution may be brought by a citizen against a party that is believed to have committed an offence if the private prosecution is provided for in a provincial or federal statute or regulation. The individual that initiates a private prosecution fulfils the government role to enforce applicable environmental legislation. A private prosecution is therefore distinct from a civil suit, in

of the Criminal Code of Canada[188] launched by Douglas Chapman, who at the time the action was filed, worked for Sierra Legal Defence Fund [now Ecojustice][189] and was represented in Court by a staff lawyer working with that organization.[190] Mr. Chapman claimed that the the Province of British Columbia, the GVRD, and GVSDD contravened subsection 36(3) of the *Fisheries Act* at the Iona WWTP located in the City of Richmond between January 1, 2005 and November 30, 2006.[191] The Submission notes that while Canada opposed the issuance of process by the Court,[192] the Court did issue a summons against all three accused on March 22, 2007.[193] According to the Submission, Canada through its Attorney General's office:

> […] formally intervened in the case and stayed the charges […] because "the public interest did not require this prosecution to be pursued", and there was "not a reasonable prospect of conviction". [The Attorney General] provided no clarification as to why the charges were not in the public interest nor any explanation or evidence to contradict the judiciary finding that there was sufficient evidence for process to issue.[194]

The Submitter states that "the Canadian government intervened to the exclusion of the informant [Mr. Chapman], took over the prosecution, and stayed the charges".[195] The Submitters consider that this private prosecution "demonstrates a failure of the government to enforce, or allow to be enforced, its environmental laws".[196] The Submitters state they did not appeal the Attorney General's decision, allegedly because "[i]ntervention by the [Attorney General] can rarely, if ever, be successfully challenged".[197]

85. A private prosecution has been considered a private remedy for the purpose of Article

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which an individual sues for compensation or an injunction with respect to harm or damages that they, personally, suffer. An example of such process is found under subsection 62(1) the *Fishery (General) Regulations*, where an information may be laid (a prosecution commenced) by a person other than a DFO employee relating to an offence under the Act. In the latter case, the payment of the proceeds of any penalty imposed arising from a conviction for the offence shall be made (a) one half to the person, and (b) one half to the Minister (see generally, online: Canadian Environmental Law Association <http://www.cela.ca/article/environmental-tool-kit-private-prosecutions>).

[188] RSC 1985, c C-46 s 405.
[189] Submission, *supra* note 1 at para 35.
[190] Exhibit 29, *supra* note 161 at 1, lines 6-8.
[191] Submission, *supra* note 1 at para 36. See also Exhibit 29, *supra* note 161.
[192] Submission, *supra* note 1 at para 38. See Exhibit 29, *supra* note 161.
[193] Submission, *supra* note 1 at para 39.
[194] *Ibid* at para 40.
[195] *Ibid* at para 42.
[196] *Ibid.*
[197] Submission, *supra* note 1 at para 41.

14(2)(c) in prior Secretariat Determinations.[198] The fact that FRK was not involved in pursuing the public prosecution (It was Mr. Chapman, a lawyer who laid the information as a private citizen, although he currently bears the title of "Riverkeeper" for the lead submitter) is not an impediment to including such proceedings in the consideration of whether private remedies have been pursued, since on its face, Article 14(2)(c) does not restrict such consideration only to the Submitters of a submission, "but rather contemplates some consideration of whether others have pursued private remedies as well".[199] This is especially true "where barriers to pursuing the remedies available under the Party's law exist".[200]

86. In the Chapman prosecution, the cause of action was very similar to the assertions being made by the Submitters in the Submission. Mr. Chapman also considered whether seeking judicial review was worthwhile given his limited chances of meeting the allegedly high threshold required to successfully challenge the Attorney General's decision to stay the proceedings. Further, it appears from the Submission that Mr. Chapman, sought independent legal counsel to assist with the prosecution.[201] The Secretariat has noted that "obtaining legal advice regarding the pursuit of private remedies may be considered a reasonable 'action' in accordance with Guideline 5.6".[202]

87. The Secretariat has also acknowledged that it may be impractical or unrealistic for individuals or non-governmental organizations with limited resources to seek redress through private remedies in complex matters, particularly where the issue raised by the Submitters regards "cumulative and widespread impacts"[203] of the alleged failures at issue, and where there has been prior experience with futile private prosecutions.[204] In this case, the Submitters allege a widespread lack of enforcement with respect to Iona WWTP's discharges, documenting at least twenty-five instances of alleged violations of subsection 36(3) of the *Fisheries Act*. In addition, the Submitters have taken other actions such as obtaining certain documents indicating that the federal government was aware of Iona WWTP's continued lack of compliance with the Act through access to information legislation.[205]

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[198] Skeena River, *supra* note 92 at para 43; SEM-98-004 (*BC Mining*), Notification to Council [BC Mining - Notification] at 14-15.

[199] Coal-Fired Power Plants, *supra* note 124 at 10-11; SEM-06-003 and SEM-06-004 (*Ex Hacienda El Hospital II* and *Ex Hacienda El Hospital III*), Notification to Council at 18.

[200] *Ibid.*

[201] See generally Exhibit 27: Letter from Susan Coristine, lawyer at Coristine Woodall Barristers and Solicitors, to Sierra Legal Defence Fund (18 January 2007); Exhibit 28, *supra* note 162.

[202] Skeena River, *supra* note 92 at para 44.

[203] SEM-04-005 (*Coal-Fired Power Plants*), Notification to Council at 16; BC Mining - Notification, *supra* note 198 at 14.

[204] *Ibid*.

[205] Exhibit 22, *supra* note 36; Exhibit 23, *supra* note 39; Exhibit 24, *supra* note 40.

88. In light of the foregoing, the Secretariat finds that private remedies regarding the laws at issue in the submission were pursued. Moreover, as the case cited by the Submitters has been stayed, and there has been no subsequent appeal, and because no other court proceedings addressing issues asserted in the Submission are known to the Secretariat, there appears to be no question of duplication of judicial efforts or interference with pursuit of private remedies as per Guideline 7.5(a).[206]

89. In light of the foregoing, the Secretariat finds that the Submission meets the requirements of Article 14(2)(c).

### *(d) the Submission is drawn exclusively from mass media reports*

90. With respect to Article 14(2)(d), and guided by Guideline 7.6,[207] the Secretariat examines whether the the Submission is based exclusively on mass media reports. In reviewing the Submission along with its appendices, the Submitters note that the Submission is based primarily on information obtained from the federal and provincial governments, and scientific research, as well as the Lead Submitter's direct involvement in the monitoring of pollution and water quality in the Fraser River and surrounding waters. The Submitters do not provide media reports. The Submitters include a variety of other information such as legal information,[208] reports from GVSDD[209] and expert reports.[210]

91. The Secretariat considers that the Submission is not based solely on mass media reports and is in accordance with the factors listed in Article 14(2)(d).

## IV. DETERMINATION

92. In light of the foregoing, and having considered the Submission and its documentation, the Secretariat determines that Submission SEM–10-003 (*Iona Wastewater Treatment*) meets the requirements of Article 14(1) of the Agreement.

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[206] See Guideline 7.5(a) which states: "In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether:
(a) requesting a response to the submission is appropriate if the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter [...]".

[207] NAAEC Guideline 7.6 states: "[I]n considering whether a response from the Party concerned should be requested when the submission is drawn exclusively from mass media reports, the Secretariat will determine if other sources of information relevant to the assertion in the submission were reasonably available to the Submitter".

[208] See *supra* at para 64, note 154.

[209] See e.g. Exhibit 5, *supra* note 129.

[210] See *supra* at para 64, note 153.

The Secretariat, having also considered the Submission in light of Article 14(2) and the relevant Guidelines, further determines that the Submission warrants requesting a response from the Government of Canada.

93. In any response, the Party may wish to include information regarding the Submitters' assertions that Canada is failing to effectively enforce subsection 36(3) of the *Fisheries Act*. In so doing, Canada may, as far as practicable, wish to include information on *Fisheries Act* enforcement at the Iona WWTP from 2001 to 2009 with respect to the Submission's documented 96-hour Rainbow Trout bioassay LC50 test failures, and any additional documented failures for: a) 2001-2005, b) 2005-2006, c) 2007-2009,[211] or d) any discharge exceedances recorded for 2010.

94. The Party may wish to provide copies of any Warning Letters such as the one issued for exceedances on February 13, 2001[212] but related to the dates of such exceedances specified in the Submission. The Party may also wish to provide information on prosecutions involving Iona WWTP (Operational Certificate ME-00023) it has undertaken or any other enforcement activities related to the above dates, and any other dates not mentioned in the Submission, but such as may be related to documented discharges in excess of the 96-hour Rainbow Trout bioassay LC50 test results. The Party may moreover wish to include information on the effectiveness of its efforts in conserving and protecting fish in accordance with the laws at issue in the area at issue. The Party may further wish to comment on any special arrangements it has in place or planned to ensure the Iona WWTP's compliance with the *Fisheries Act* from the date of the Submission until the date of the future planned upgrade of the Iona WWTP facility.

95. Given the complex jurisdictional environment in which the *Fisheries Act* is administered, the Party may wish to address in any response how the federal government ensures the effective enforcement of the Act, specifically with respect to the issuance of OCs by the Province, and in particular for the Iona WWTP OC.

96. The Secretariat requests a response from the Government of Canada to the abovementioned Submission in accordance with Article 14(3) of the Agreement, and notes that any response should accordingly be received normally within 30 days of this Determination. A copy of the Submission and its appendices is being forwarded to the Party under separate cover.

97. Recognizing that a response from the Government of Canada may contain confidential information and that the Secretariat shall make public its reasons to

[211] Submission, *supra* note 1, at paras 24-26.
[212] Exhibit 23, *supra* note 39.

recommend or not a factual record, the Secretariat recalls that paragraph 17.3 of the NAAEC Guidelines encourages the Party to provide a summary of confidential information, or a general explanation of why information is considered confidential, for public disclosure.

Respectfully submitted,

**Secretariat of the Commission for Environmental Cooperation**

(*original signed*)
per: Dane Ratliff
Director, Submissions on Enforcement Matters Unit

cc: Mr. Dan McDougall, Canada Alternate Representative, Environment Canada
Ms. Michelle DePass, US Alternate Representative, EPA
Mr. Enrique Lendo, Mexico Alternate Representative, Semarnat
Mr. Evan Lloyd, Executive Director, CEC
Submitters