Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission I.D.: SEM-97-006

Submitter(s): The Friends of the Oldman River

Concerned Party: Canada

Date of this Notification: 19 July 1999

I – EXECUTIVE SUMMARY

The Submitter, a nongovernmental organization known as "The Friends of the Oldman River" (FOR or the Submitter), claims that Canada is failing to effectively enforce its Fisheries Act and the Canadian Environmental Assessment Act (CEAA)[1] in at least two significant ways.[2] First, the Submitter asserts that Canada's approach to reviewing proposed projects is fundamentally flawed. The Submitter focuses particularly on projects that, as originally proposed to Canada, could harm fish habitat in violation of Fisheries Act Section 35(1),[3] but which Canada and the applicant agree will be modified to avoid such harm.

The Submitter alleges that Canada's standard enforcement response to such projects typically involves engaging in discussions with the project proponent and issuing a "Letter of Advice." The Submitter argues that this standard approach to project review harms the interest of FOR and the public in protection of fish habitat and compliance with Fisheries Act Section 35(1). The submission annex characterizes Canada's standard approach as "a powerful force for the reduction of the protection afforded to fish habitat."[4] The Submitter believes that Canada should use an alternative approach for project reviews that would enhance the effectiveness of project reviews in achieving the goals of

[1] *Fisheries Act, R.S.C.1985, c.F-14* and various supplements; *Canadian Environmental Assessment Act, S.C.1992, c.37*.
[2] The complete text of the submission and the response are available from the Secretariat by request or electronically at <http://www.cec.org>.
[3] Fisheries Act Section 35(1) provides that "[n]o person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat." The acronym often used to describe such harm is HADD. For purposes of convenience, the Secretariat refers to such HADD of fish habitat as harm to fish habitat.
[4] The annex is attached to the submission and is referenced by it, and the Secretariat has reviewed the annex as part of its consideration of the submission.

Fisheries Act Section 35(1). The Submitter asserts that Canada should evaluate such projects using the procedures established by the CEAA and, if it decides such projects should proceed, it should authorize them pursuant to Fisheries Act Section 35(2).[5] The Submitter claims that Canada's use of a purportedly less effective approach to project review constitutes a systematic failure to effectively enforce Canadian environmental law for purposes of Article 14 of the North American Agreement on Environmental Cooperation (NAAEC).

The Submitter also asserts that Canada's approach to prosecutions, when projects violate Fisheries Act, Section 35(1), constitutes a failure to effectively enforce for the purposes of Article 14 of the NAAEC. The Submitter claims that Canada rarely prosecutes violations of Section 35(1) of the Fisheries Act, that "prosecutions that do occur are very unevenly distributed across the country," and that Provincial prosecutions do not offset the shortfall in federal enforcement.

The Submitter cites the Sunpine Road project as an example of the government's purported failure to effectively enforce its environmental laws.

There is some common ground between the submission and the Canadian response. Consistent with the submission, Canada states that its standard approach to project review is to work with the project proponent and issue Letters of Advice for projects that could harm fish habitat but which Canada and the proponent agree will be modified to avoid such harm. For such projects, Canada advises the proponent of the changes necessary to avoid harm to fish habitat and the proponent agrees to implement such. (Response at 5). Canada sets out this standard approach in its 1995 *Directive on the Issuance of Subsection 35(2) Authorizations* (hereafter: *Directive*).[6]

The Canadian response parts company from the submission concerning the effectiveness of this standard Canadian response for projects that could harm fish habitat but which Canada and the proponent mutually agree will be modified to avoid such harm. Canada explains that its strategy is intended to prevent the occurrence of violations in the first place. As Canada explains, "[t]hrough this consultative process," DFO "provides advice to proponents regarding…mitigation measures…so that in the technical judgment of DFO, a HADD of fish habitat will not be incurred." (Response at 5). Canada advises that it uses Section 35(2) authorizations and CEAA reviews for appropriate projects, notably those that will harm fish habitat and therefore violate Section 35(1) of the Fisheries Act.

Canada indicates that prosecutions are another enforcement tool it uses. It contends that federal prosecutions must be considered in tandem with Provincial enforcement efforts as well as government approaches such as Letters of Advice and Fisheries Act Section 35(2) authorizations, and it claims that

[5] Fisheries Act Section 35(2) provides that "No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act."

[6] Canada's Department of Fisheries and Oceans (DFO) issued this *Directive*. The *Directive* is attached to the response and is referenced by it, and the Secretariat has reviewed the *Directive* as part of its consideration of the response.

its use of prosecutions constitutes an element of its effective enforcement effort.

Canada recommends that the Secretariat not consider the Sunpine Road situation because of ongoing litigation concerning that project.

The Secretariat does not view the submission to be a challenge to the effectiveness of the environmental laws of Canada.[7] The Submitter does not appear to allege that the Fisheries Act and the CEAA are ineffective as written. Instead, this submission alleges that Canada's application or implementation of these laws (i.e., Canada's approach to project reviews, as reflected primarily in the above-referenced 1995 *Directive,* and its approach to prosecutions) constitutes a systematic failure to enforce them for purposes of Article 14 of the NAAEC. Our analysis is based on this understanding of the submission.

Having considered the submission in light of the response, the Secretariat believes that developing a factual record is warranted. The response and submission leave open several central questions of fact relating to whether the Party is effectively enforcing the environmental laws at issue. Concerning the Party's approach to project review, as discussed in more detail in Section III below, for example, the Secretariat has been provided quite limited information concerning the current use of Letters of Advice (e.g., the numbers of Letters of Advice issued annually). Similarly, the Secretariat has only received limited information concerning use of Letters of Advice and related enforcement tools over time. Also, there is a lack of information concerning the extent to which Canada's strategy of using a consultative process and issuing Letters of Advice is effective in achieving its goal of preventing harm to fish habitat and violations of Fisheries Act Section 35(1). Regarding prosecutions, limited information has been provided as to Canada's statement that "when…the Fisheries Act is contravened, such that habitats supporting fisheries are harmfully altered, destroyed or degraded, enforcement action is taken." (Response at 9-10). For example, the number of Section 35(1) violations discovered each year and the number of prosecutions involving such violations have not been provided.

The Secretariat believes that it is appropriate to develop a factual record concerning these enforcement tools. Conducting such a review would be consistent with a broad interpretation of enforcement that encompasses Canada's "preventative" project review enforcement strategy as well as its approach to prosecutions, an interpretation contemplated by NAAEC Article 5.

II – BACKGROUND

Under NAAEC Article 14, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where the Secretariat determines that the requirements of Article 14(1) have been met, it shall decide whether the submission merits a response from the concerned Party in accordance with Article 14(2). In light of the response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance with Article 15. The Council may then

[7] Cf. SEM-95-001, SEM-95-002, involving challenges to a Party's environmental laws.

instruct the Secretariat to prepare a factual record. The final factual record is made publicly available upon a two-thirds vote of the Council.

On 9 September 1996, the Submitter filed a submission with the Secretariat, pursuant to Article 14 of the NAAEC. On 1 October 1996, the Secretariat rejected this submission on the ground that it failed to meet the Article 14(1) criterion that it indicate that the matter (the alleged general failure to enforce) had been communicated to the relevant authorities of the Party. Following the Submitter's 8 October 1996 re-submission, which contained information regarding communications to Canada about the alleged general failure to enforce, on 18 October 1996, the Secretariat determined that the submission met the criteria under Article 14(1).

On 8 November 1996 the Secretariat requested a response from Canada under Article 14(2). On 10 January 1997, Canada responded by stating that the submission was the subject of a pending judicial or administrative proceeding. On 2 April 1997, the Secretariat dismissed the submission. The Secretariat determined that while the court case at issue was not a "pending judicial or administrative proceeding" for purposes of Article 14(3)(b) of the NAAEC [as it was not commenced by a Party, see Article 45(3)(a) of the NAAEC], the subject matter was sufficiently similar in nature that it would not be appropriate to proceed to a factual record under Article 15(1).

On 4 October 1997, the Submitter re-submitted the submission, noting that the litigation had been discontinued. On 23 January 1998, the Secretariat determined that the submission met the criteria in Article 14(1). On 8 May 1998, the Secretariat determined pursuant to Article 14(2) that a response from Canada was warranted. Canada submitted its response on 13 July 1998.

The Secretariat has reviewed the most recent submission in light of Canada's response in considering whether the development of a factual record is warranted.

A. The Submission

The Submitter asserts that the stakes are high with respect to the government practices at issue in this proceeding. It claims that the two environmental laws involved, the Fisheries Act and the CEAA, are the "most important legislation for the protection of fish habitat in Canada." (Submission at 1) The submission annex similarly notes that the "strong federal power" relating to marine and freshwater environments "makes the habitat-protection regime and the prohibitions against the discharge of deleterious substances in the Fisheries Act potentially the most powerful and universally applicable provisions of federal environmental law in Canada." The Submitter asserts that "protection of the environment and particularly protection of rivers and riparian ecosystems[ ] are very much affected by how the Fisheries Act and CEAA are applied." (Submission at 1)

The Submitter asserts that Canada's strategy for "applying, complying with, and enforcing" the Fisheries Act and the CEAA is deficient in two primary respects. First, the Submitter contends that Canada's

process for reviewing projects that may violate Section 35(1) of the Fisheries Act and cause harm to fish habitat constitutes a failure to effectively apply, comply with, and enforce Sections 35 and 37 of the Fisheries Act.[8] The Submitter claims that these sections "were to create a preventative and planning regime for works and undertakings with the potential to harm fish habitat." (Submission at 1).

The Submitter contends that Canada's strategy is a "clear attempt to avoid issuing [Fisheries Act Section] 35(2) authorizations and to circumvent CEAA," because it contemplates use of Letters of Advice rather than Section 35(2) and the CEAA for a substantial number of projects that as proposed would harm fish habitat. (Submission at 2). In the Submitter's view, Canada's failure to use Section 35(2) as "intended" and its "circumvention" of CEAA constitutes an ineffective approach to implementing these laws because the approach fails adequately to prevent projects from violating Section 35(1) and harming fish habitat. The Submitter alleges that Canada:

> invents a decision making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision making tool….[Under the *Directive* that outlines Canada's policy] [t]he question of whether effects on fisheries and fish habitat are acceptable and can be properly mitigated is prejudged without any public input. (Submission at 2).

The submission annex characterizes the *Directive* in the following way: "The most worrisome development of recent years [concerning implementation of the Fisheries Act] is the *Directive on the Issuance of Subsection 35(2) Authorizations* (1995)….[T]he *Directive* has serious negative implications for the protection of fish habitat and Canada's environment." The submission annex asserts that a lack of opportunity for public involvement and a narrower scope of environmental assessment under the *Directive* are particular deficiencies that will undermine protection of fish habitat:

> As DFO would have the administration of Sections 35(2) and 37, multiple determinations are made regarding impacts, project design, mitigation, and even compensation without ever conducting screening or comprehensive study under CEAA as an early planning and decision-making tool. This denies Canadians the right to be informed of projects and to participate in decision making. It also means, for example, that cumulative effects of projects may never be considered.

The Submitter claims that there has been a decline in recent years in use of the allegedly more effective Fisheries Act Section 35(2) authorization approach to project review and asserts that this decline is evidence of Canada's failure to apply, comply with, and enforce Canadian environmental law. In terms of empirical support for this claim, the Submitter indicates that in 1995–96, DFO issued no more than 339 authorizations under Section 35(2) of the Fisheries Act, while more than 12,000 authorizations were issued in 1990–91. (Submission at 3). As is discussed in more detail below, the Secretariat has also been provided with limited information by Canada, suggesting that the Party uses the allegedly

[8] As noted above, this process is outlined in Canada's 1995 *Directive on the Issuance of Subsection 35(2) Authorizations*. This *Directive* is discussed in Section II.B.1 below.

ineffective Letter of Advice approach to project review far more frequently than it uses the supposedly more effective CEAA and Fisheries Act Section 35(2) approach. Finally, the Submitter asserts that the fact that "the number of Section 35(2) authorizations varies widely from province to province" supports its claim that there is a failure to effectively apply, comply with and enforce the law. (Submission at 2).[9]

In addition to its claim that Canada's review of proposed projects constitutes a failure to effectively enforce, the Submitter contends that the federal record on prosecutions constitutes a similar failure. The Submitter asserts that Canada's small number of prosecutions for violations of Fisheries Act Section 35(1) means that it has effectively abdicated its legal responsibilities to the provinces. The Submitter claims that the paucity of Canadian prosecutions is compounded by the fact that in some parts of the country prosecutions are rarely if ever brought at all; and by the fact that the provincial prosecutions of such conduct fall far short of curing problems with the federal performance. To quote the submission:

> There are very few prosecutions under the habitat provisions of the Fisheries Act and the prosecutions that do occur are very unevenly distributed across the country. In fact, there has been a de facto abdication of legal responsibilities by the Government of Canada to the inland provinces. And the provinces have not done a good job of ensuring compliance with or enforcing the Fisheries Act. (Submission at 3).

Finally, while affirming that the "general failure" of Canada to apply, comply with, and enforce the Fisheries Act and CEAA is the subject matter of the submission, the Submitter outlines in detail the facts of one "specific example" of the general allegations. The example relates to a road construction by Sunpine Forest Products in Alberta that entailed some 21 stream crossings. The Submitter indicates that neither authorizations nor Letters of Advice were issued for 19 of the crossings. Letters of Advice were issued for the remaining two (Prairie Creek and Ram River) following an environmental assessment triggered under the Navigable Waters Protection Act.

B. The Response

Canada submits that it is effectively enforcing its environmental laws with respect to projects that may harm fish habitat in violation of Fisheries Act Section 35(1), and it is therefore in full compliance with its obligations under the NAAEC. Canada asserts that, as a result, the development of a factual record is not warranted.

In asserting that it effectively enforces its environmental laws Canada, like the Submitter, addresses both the process it uses to evaluate proposed projects, and Canada's prosecution of violators of the prohibition in Section 35(1) against harming habitat without a Section 35(2) authorization. Canada claims that its enforcement approach is effective. It also asserts that its approach constitutes reasonable

[9] Along the same lines, the Submitter claims that "[a]pplication of 35(2) is far from consistent." The Submitter also asserts that Canada under-utilizes Section 37. (See Submission at 2).

exercise of its discretion and therefore is exempt from consideration under Articles 45 and 14 of the NAAEC.

1. Canada's Process for Preventing and Minimizing Violations

Canada disagrees with the Submitter's assertion that the *Directive* establishes a process for reviewing proposed projects that fails to effectively apply, comply with, and enforce Fisheries Act Section 35. Canada asserts, instead, that the *Directive* effectively applies, complies with, and enforces this Section because it does not allow harm to fish habitat prohibited by Section 35(1), and it does not preclude the genuine need for an authorization. (Response at 4).[10]

Canada explains the process its implementing Department, the Department of Fisheries & Oceans (DFO), follows under the *Directive* when a project proponent applies for review of a project relative to Section 35 of the Fisheries Act.[11]

- On receiving a proposal, DFO representatives examine it to determine whether the project will result in harm to fish habitat. (Response at 5). DFO's *Directive* makes applicants "responsible for providing sufficient information with respect to their projects to allow" DFO to assess "potential impacts to fish habitat, including information concerning proposed measures to prevent, mitigate or compensate for damage to fish habitat." (*Directive* at 4).[12]

- If DFO decides that no harm to fish habitat will result if the proposed work is carried out as specified in the plans provided to DFO, DFO notifies the applicant that a Section 35(2) authorization is not needed. DFO cautions the applicant that "if harmful alteration, disruption or destruction of fish habitat occurs as a result of the failure to implement the work as proposed, a violation of Section 35(1) of the Fisheries Act may occur." (Response at 5).

[10] Canada also addresses the Submitter's allegation that the *Directive* is illegal because it is inconsistent with the CEAA and the Fisheries Act. (Response at 7-9). The Secretariat does not address the latter issue in this document. Canada appears to agree with the Submitter that Section 35(1) prohibits harm to fish habitat, and that Section 35(2) qualifies this absolute prohibition by empowering the Minister of Fisheries and Oceans to authorize such harm to fish habitat under certain circumstances. Canada indicates, for example, that "[b]oth the [Fisheries] Act and the *Directive* are explicit that any HADD of fish habitat requires an authorization in order to avoid a violation of the Fisheries Act." (Response at 4). Further, Canada and the Submitter appear to agree that the Minister's exercise of this regulatory power to issue a Section 35(2) authorization triggers an environmental assessment under the CEAA. (Response at 4).

[11] Some of this discussion of DFO's process is quoted directly from the response or from the *Directive* itself, while other parts paraphrase the response or *Directive*. Canada notes its view that DFO does **not** have authority to require a project proponent to seek or obtain a Section 35(2) authorization. Instead, a proponent "can proceed with the work at its own risk should it wish to do so": Section 35 of the Fisheries Act "does not create a mandatory obligation for a proponent to seek an authorization." (Response at 2, 8).

[12] This DFO review occurs informally and is not done pursuant to the CEAA. DFO's view concerning when review under the CEAA is warranted is discussed below.

- In cases in which the project as proposed would harm fish habitat, DFO tries to help the proponent to "develop and propose mitigation measures that will avoid these effects." If DFO and the applicant identify such measures, DFO informs the proponent that "inclusion of the measures, if carried out as outlined, will avoid [harm to fish habitat] and consequently subsection 35(2) will not apply." (Response at 5). If the applicant agrees to do so, DFO will provide the applicant with a Letter of Advice in which, as appropriate, DFO "set[s] out measures aimed at ensuring that harmful effects do not occur." (*Directive* at 4). The Letter of Advice will further indicate that DFO believes that the project will not cause harm to fish habitat if the applicant implements specified measures. As the *Directive* provides, "[a]lthough such written advice does not constitute an authorization, proponents will have some protection against enforcement action where due diligence has been applied in implementing the provided written advice." (*Directive* at 4).

  DFO summarizes this consultative process as one of providing advice to proponents at the planning stage of a project in order to avoid harm to fish habitat where possible. DFO explains that, in its view, if there is no harm to fish habitat, there is no possible violation of Section 35(1) and therefore there is no need for a Section 35(2) authorization. DFO notes, however:

  > Although it is not mandatory for proponents to obtain letters of advice or authorizations with respect to their projects, failure to do so could result in enforcement action being taken if adverse effects to fish habitat occur as a result of project implementation. In addition, failure to implement measures set out in letters or authorizations which result in harmful effects to habitat could lead to enforcement action. (*Directive* at 5).

- If the project will harm fish habitat and the applicant refuses, or is unable, to include measures DFO determines are necessary to avoid such harm, DFO informs the applicant that it must obtain a Section 35(2) authorization in order to avoid violating Fisheries Act Section 35(1). The consideration of whether to issue a Section 35(2) authorization triggers the CEAA. Through this process, DFO obtains additional information and determines whether to issue or deny the authorization. DFO identifies any particular terms or conditions to be included in the authorization as part of this process as well.[13] It appears from the *Directive* that DFO's intention was to create a narrow universe of projects for which Section 35(2) authorizations would be issued:

[13] As a general matter, DFO notes that it prefers to proceed on a voluntary basis to obtain information necessary to deal with Section 35 issues rather than use the powers of Section 37 to do so. DFO expresses the view that the question of whether to use Section 37(1) and (2) to obtain information and require modifications in order to avoid harm to fish habitat, or whether to accomplish these goals using other approaches, is a matter for its discretion. Canada notes:

> When, in the opinion of DFO officials, the information and/or required amendments to plans or changes to undertakings will occur without invoking the powers under Section 37 of the Act, such officials are reflecting a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters as explicitly allowed for under the NAAEC Article 45 definitions. (Response at 7).

The Submitter challenges the legality of this interpretation. We do not address this legal issue, but instead focus on

> Subsection 35(2) authorizations should only be issued…"when it prov[e]s impossible or impractical to maintain the same level of habitat productive capacity by altering the design of the project or using mitigating measures."…In practical terms, authorizations should only be issued for works or undertakings which could result in damage to fish habitat which cannot be avoided through relocating or redesigning the project or through mitigation. (*Directive* at 3).

Canada's conclusion is that:

> Since the Directive is explicit that any HADD of fish habitat requires an authorization in order to avoid a violation of the Fisheries Act, its characterization as a device or mechanism which facilitates or enables the government to fail to apply, comply with or enforce Section 35 of the Fisheries Act is unfounded. (Response at 5).

Canada provides limited information concerning the level of Canada's activity in providing authorizations and Letters of Advice, based on the *1996/97 Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (hereafter: *Annual Report*). Canada notes:

> [T]here were 91 authorizations issued and advice provided in 3689 instances to private proponents and in 3223 instances to federal, provincial or territorial agencies for a total of 7003 instances where efforts were made to ensure compliance with Section 35. (Response at 10).

As discussed in more detail in Section III below, information is not provided concerning the number of authorizations and Letters of Advice issued in other years, or concerning the extent to which Letters of Advice are effective in accomplishing their objective—*i.e.*, to prevent projects that receive them from harming fish habitat in violation of Fisheries Act Section 35(1).

2. Prosecutions

Canada rejects the Submitter's allegation that the small number of federal prosecutions involving violations of Section 35(1) of the Fisheries Act, or their uneven distribution throughout the country, means that "there has been a de facto abdication of legal responsibilities by the Government of Canada to the inland provinces." Canada offers the following points in asserting that its pattern of program implementation and enforcement across the country is appropriate:

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questions of fact relating to the nature and effectiveness of Canada's enforcement responses. The Submitter attaches to its submission a 7 May 1997 decision from the Federal Court of Canada, Trial Division (Muldoon, J.), in which the Judge concluded that Canada's approach improperly circumvented the requirements of the Fisheries Act and the CEAA.

1. It is misleading to look only at federal enforcement prosecutions because the provinces, under provincial law, address, including prosecute, some activities that constitute violations of Section 35(1). While DFO has primary responsibility for enforcing the habitat protection provisions of the Fisheries Act, provinces, particularly the inland provinces, also have the authority to enforce these provisions. Further, "provinces have developed their own conservation legislation…which may deal with similar development." Canada indicates that, "[a]s a result, activity that could risk legal action under the federal Fisheries Act is often subject to legal sanction under provincial statute where this is chosen to be the most appropriate route by enforcement officers." (Response at 3, 10). Canada notes that "fish habitat related matters frequently find redress through provincial court action under provincial statute." (Response at 11).

   Canada indicates that it "has identified provincial personnel responsible for the implementation of the habitat provisions and enforcement of the Fisheries Act for every province in Canada." It provides a very brief overview of the provincial staffing devoted to such work. (Response at 11).

2. The uneven distribution of federal prosecutions among the provinces is understandable because of a variety of factors, such as the distribution of habitat and varying levels of economic activity. Canada states that "[t]he pattern of enforcement and referral/assessment activity…reflects the level and variety of economic development activity across the country….Further, proximity to fisheries waters is not uniform across the country so that related enforcement cannot be expected to be uniformly distributed." (Response at 10).

3. The level of federal enforcement activity reflects a reasonable exercise of enforcement discretion, as contemplated under Article 45 of the Agreement.[14]

4. The "allocation of [federal enforcement] resources to do the job is consistent with Article 45 definitions of NAAEC." (Response at 9). Related, "the pattern of enforcement reflects the level of resources allocated by federal and provincial governments." (Response at 3).

5. " The pattern of prosecutions and convictions under the habitat provisions of the Fisheries Act reflects the compliance-based approach taken to habitat protection….DFO prefers to prevent damage to habitat and avoid losses to the fisheries resource in the first phase, before proponents

[14] As a general matter, Canada takes the position that its enforcement of Section 35 of the Fisheries Act, and the implementation of the *1995 Directive*, constitute a reasonable exercise of its discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters. It notes that Article 45 of the *NAAEC* recognizes that Parties may exercise their discretion in relation to such matters. Canada suggests that a factual record is not warranted because the *Agreement* "does not permit the review of the legitimate exercise of a Party's discretion." (Response at 3). Canada urges that its approach to enforcement is contemplated by the *Agreement*. Canada points to Article 5, which lists "seeking assurances of voluntary compliance" as an appropriate governmental action for effectively enforcing environmental law. It indicates that the Canadian *Directive* cited above, among others, establishes a strategy intended to assure voluntary compliance. Canada suggests that the fact that its enforcement strategy is one of those expressly acknowledged in Article 5 of the *NAAEC* reinforces its position that a factual record is not warranted because Canada's enforcement approach is a legitimate exercise of a Party's discretion.

proceed with projects." (Response at 9). Canada continues: "However, when voluntary compliance fails, and the Fisheries Act is contravened, such that habitats supporting fisheries resources are harmfully altered, destroyed or degraded, enforcement action is taken." (Response at 9-10).

Canada cites its *1996/97 Annual Report* in reporting that there were 48 convictions under Section 35(1) during that time period. (Response at 10).

3. Sunpine Road

The final topic Canada covers in its response is the Sunpine Forest Products Forest Access Road. The Sunpine Road project involves a road project that would cross 21 streams. DFO determined that 8 of the 21 had potential implications for fish habitat. For two of the streams, Ram River and Prairie Creek, DFO permits for bridge construction were required under the Navigable Waters Protection Act (NWPA). This triggered DFO's responsibility to conduct CEAA screenings for these bridges. The screenings were completed and permits issued. DFO issued Letters of Advice for these crossings. DFO concluded that six crossings did not have a HADD potential if constructed as proposed by the company and therefore no further action by DFO was required. Project construction, except for the Prairie Creek Bridge, was completed in 1997. Alberta Fish and Wildlife officials have inspected the 40 km road and have confirmed that the bridges and culverts have been constructed as proposed and that fish habitat has been protected. (Response at 11).

The permits and Environmental Assessments are currently subject to judicial review. Canada suggests that because an appeal is now pending, further review of Sunpine is not appropriate at this time. (Response at 12).

III – IS THE PREPARATION OF A FACTUAL RECORD WARRANTED IN THIS CASE?

A. Introduction

We are now at the Article 15(1) stage of the factual record process. To reach this stage, the Secretariat must first determine that a submission meets the criteria in Article 14(1) and that it is appropriate to request a response from a Party based upon a review of the factors contained in NAAEC Article 14(2). For this submission, the Secretariat has found that the submission meets the Article 14(1) criteria on two occasions (on 18 October 1996, and on 23 January 1998). With respect to Article 14(1)(e), the Secretariat initially found the submission deficient on this point (see Secretariat's *Determination* of 1 October 1996[15]), but the Secretariat was persuaded by the Submitter's re-submission on 8 October 1996, that the matter had been communicated in writing to the Party in compliance with this requirement. (See the Secretariat's *Determination* of 18 October 1996). The Secretariat similarly determined that the submission met NAAEC Article 14(1)(d) and a series of factors persuaded the Secretariat that the submission satisfied Article 14(1)(c), including the fact that the submission focuses on "systemic" practices rather than on an alleged failure to effectively enforce involving a single incident and the burden on a submitter of establishing non-enforced violations in this context;[16] the importance of the environmental laws involved and, related, the significance of fish habitat as a resource intended to be protected by the laws; and the operation of the precautionary principle (the project review practices that are a central element of the Party's enforcement response are intended to prevent violations in the first place, which is consistent with the notion that it is easier to prevent violations and environmental harm from occurring than to repair the damage once a violation exists).

Finally, as noted at the outset, the Secretariat believes that this submission does not focus on the effectiveness of the environmental laws as written; instead, it addresses the extent to which a Party has failed to effectively implement or enforce those laws.

Similarly, the Secretariat has determined on two occasions that a response from the Party was warranted based on the factors in Article 14(2) (on 8 November 1996 and on 8 May 1998).[17] The Secretariat previously determined that the submission alleges harm [see Article 14(2)(a)].[18] Similarly, in

[15] See SEM-96-003, "The Friends of the Oldman River."
[16] Here, the submission not only takes a "systemic" approach, it also is broad-ranging in that it challenges a Party's project review approaches as well as its approach to traditional prosecutions. The Submitter claims, among other things, that the Party's project review practices are not effective because they lack certain features and protections provided by alternative processes available to the Party.
[17] See SEM-96-003 and SEM-97-006. As noted above, the Secretariat has actually made these determinations twice each in connection with this submission because of its history.
[18] See *Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, SEM-96-001* (7 June 1996), stating that in considering harm, "the Secretariat notes the importance and character of the resource in question" and continuing that "[w]hile the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America," the

the Secretariat's view the submission raises matters whose further study would advance the goals of the NAAEC, notably the effectiveness of a Party's various enforcement practices under one of the most important environmental laws of that Party. The Secretariat also was satisfied that the Submitter had adequately pursued private remedies (among other things, the Submitter filed a lawsuit challenging the Party's practices), and that the submission was not drawn exclusively from mass media reports (the submission cites a number of reports, as well as information obtained from the government, in support of its allegations).

Once the Secretariat requests, and receives, the Party's response, Article 15(1) of the NAAEC provides the following direction to the Secretariat for this third step of the factual record process:

> If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

Thus, having previously found that the submission meets the criteria in Article 14(1) and having previously evaluated the submission in light of the factors contained in NAAEC Article 14(2) and determined that a response from the Party was merited, the Secretariat must now consider the impact of the response on the issues raised in the submission.

The language of the legal provision that is central to this submission, Section 35(1) of the Fisheries Act, is quite clear and direct: "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."[19] Section 35(2) provides the only qualification on the broad language of Section 35(1). Section 35(2) provides that "No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act."[20] Under the CEAA and the *Law List Regulations,* a Section 35(2) authorization "triggers"[21] commencement of an environmental assessment.[22] Section 37(2) of the Fisheries Act, which allows various orders to be made respecting modifications to a project, is also a "trigger."[23]

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nature of the resources at issue "bring the submitters within the spirit and intent of Article 14 of the NAAEC." In the Secretariat's view, the importance of the resources at issue in this proceeding support the same conclusion.

[19] R.S.C. 1985, c.F-14.

[20] R.S.C. 1985, c.F-14.

[21] The term "trigger" is used to describe a provision of a federal statute which is listed in the *Law List Regulations*, and which instigates an environmental assessment when an action is taken by the federal government under that statutory provision.

[22] The key provisions of CEAA are as follows:

> 5(1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
> ....

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or license, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

* * *

59 (1) The Governor in Council may make regulations

(f) prescribing the provisions of any Act of Parliament or any regulation made pursuant thereto that confer powers, duties or functions on federal authorities the exercise or performance of which requires an environmental assessment. under paragraph 5(1)(d).

[23] Section 37 of the Fisheries Act provides as follows:

(1) Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat…the person shall, on the request of the Minister or without request in the manner and circumstances prescribed by regulations made under paragraph (3)(a), provide the Minister with such plans, specifications, studies, procedures, schedules, analysis, samples or other information relating to the work or undertaking and with such analysis, samples, evaluations, studies or other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine.

(a) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof….

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offense under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(b), or, if there are no such regulations in force, with the approval of the Governor in Council.

(a) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or

(b) restrict the operation of the work or undertaking, and with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances.

The Party enforcement response at issue in this submission is intended to promote compliance with Fisheries Act Section 35(1). The response consists primarily of advance review of projects that have the potential to harm fish habitat (sometimes using Fisheries Act Section 35(2) and the CEAA) and after-the-fact prosecutions in some cases when violations of Fisheries Act Section 35(1) occur. The level and nature of advance project review varies depending on Canada's judgment concerning whether harm from a project can and will be avoided. The fundamental question is whether the Party's approach to project review and to prosecutions constitutes effective enforcement of Fisheries Act Section 35(1).

B. Why Preparation of a Factual Record is Warranted

1. Canada's "Preventative Enforcement Response"

In the Secretariat's view, the response leaves open several central questions concerning the effectiveness of Canada's approach to project review. From Canada's response it appears clear that consultations with project proponents leading to issuance of Letters of Advice is a key element of its effort to "seek…assurances of voluntary compliance." (Response at 3). Important information concerning use of this strategy to promote voluntary compliance, however, is not provided. With a particular focus on projects for which Canada issues "Letters of Advice" in an effort to prevent violations of Fisheries Act Section 35(1), four key areas of information that warrant further development are as follows:

1. What is the extent of use of this strategy and how has the use of this approach shifted over time? Canada provides information concerning the number of times it provided "advice" during fiscal year 1996–97 (6,912 times, 3,689 times to proponents and 3,223 times to "others"). (Response at 10). It is not clear, however, whether these instances of providing "advice" were embodied in Letters of Advice. Basic information concerning the number of Letters of Advice issued annually is not provided in the submission or response. Such information is essential to understand use of this enforcement tool.

   Such information is especially pertinent in light of the Submitter's claim that the number of authorizations issued has dropped significantly in recent years. It reports that in 1995–96, Canada issued no more than 339 authorizations under Section 35(2) of the Fisheries Act, while more than 12,000 authorizations were issued in 1990–91.[24]

   Because of the potential relationship between authorizations and Letters of Advice, information concerning the number of Fisheries Act Section 35(2) authorizations applied for and issued annually is also relevant. Canada only provides information concerning the number of authorizations issued in 1996–97,[25] while the Submitter provides some information concerning the number of authorizations provided in 1995–96 and 1990–91.

[24] The submission annex provides as follows on this point:

> [T]he effect [of the *Directive*] is to radically reduce the number of cases where DFO will be involved in protecting fish habitat and the scope of Sections 35(2) and 37(2) as CEAA triggers. It allows officials and proponents to simply sidestep application of the fish-habitat protection regime of the Fisheries Act and CEAA.

ENGO Concerns and Policy Options Regarding the Administration and Delegation of Subsection 35(2) of the Fisheries Act, Proposed Subsection 35(3) and Consequences for Federal Environmental Assessment, Prepared by the Quebec Environmental Law Centre, January 1996 (Principal Consultants: Yves Corriveau, Franklin S. Gertler), 2.

[25] Canada indicates that during fiscal year 1996–97, DFO issued 91 authorizations under Section 35(2), as well as

Similarly, information would be relevant concerning the nature and extent of information required by the Department prior to issuance of letters of Advice, and how this information differs from that required prior to issuance of Fisheries Act Section 35(2) authorizations.

2. What is the nature and extent of Canada's efforts to monitor projects that receive Letters of Advice to identify violations of Section 35(1), in terms of numbers of violations and severity of violations? Canada justifies use of Letters of Advice on the basis that they are effective in preventing violations of Section 35(1) from occurring—that they help to produce voluntary compliance. Information directly relevant to this claim, however, is not provided. First, no information is provided concerning the nature of Canada's efforts to monitor the extent to which projects that receive Letters of Advice violate Section 35(1). [See, e.g., NAAEC Article 5(1)(b).] With respect to monitoring, it would be relevant to have information relating to the amount of compliance-related monitoring conducted on projects that receive Letters of Advice. It would also be relevant to have information relating to any differences in the nature of, and resources dedicated to, monitoring of compliance, depending on whether a Letter of Advice or an authorization is issued.

   In addition, information concerning the number and severity of violations of Section 35(1) committed by projects that receive such Letters is directly relevant to Canada's claim that Letters of Advice are effective in preventing violations of Fisheries Act Section 35(1), but is not provided. It would be relevant to develop such information in connection with the Party's claim.

3. What is the nature and extent of Canada's enforcement response with respect to projects that receive Letters of Advice and violate Section 35(1)? [See, e.g., NAAEC Article 5(1)(j).] The *Directive* indicates that "failure to implement measures set out in Letters of Advice which result in harmful effects to habitat could lead to enforcement action." (*Directive* at 5). The response, however, provides little information concerning this aspect of Canada's enforcement approach. Relevant information would include any Canadian policies concerning the array of possible enforcement actions in response to violations of Fisheries Act Section 35(1) and the circumstances under which Canada would use such. Information concerning the actual use of these enforcement approaches, both in an absolute sense and in the context of the number and severity of violations, is relevant as well.

4. How effective are these follow-up efforts in promoting and achieving compliance with Section 35(1)?

To sum up, the questions listed above focus primarily on Canada's use of Letters of Advice as an enforcement tool to review project applications and to prevent violations of Section 35(1) from occurring. Canada asserts that its overall approach to habitat protection is "compliance-based." That is, Canada tries to prevent damage from being caused in the first place. (Response at 10, 11). Information, however, is lacking concerning the details of Canada's compliance-

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Sections 26 and 32, without providing a breakdown.

based approach and the extent to which Canada's approach is effective in achieving the purposes of the Fisheries Act and the CEAA. As the questions above reflect, while the response provides some information concerning this approach, we believe that there are significant information gaps and that a factual record is warranted to fill those gaps.[26]

2. Prosecutions

The Secretariat is similarly of the view that important information is lacking concerning the use of prosecutions as an enforcement tool. Canada advises that when Canada's "voluntary compliance fails, and the Fisheries Act is contravened, such that habitats supporting fisheries resources are harmfully altered, destroyed or degraded, enforcement action is taken." (Response at 9, 11). The Party, however, offers only limited information concerning the nature of enforcement activity, notably the number of convictions in 1996/97. (Response at 10).[27] Additional information necessary to substantiate the statement that enforcement action is taken when the Fisheries Act is contravened that is lacking, for example, includes the number and severity of violations, the nature and extent of Canada's enforcement responses, and the effectiveness of those responses. This is true for projects that receive Letters of Advice as well as for other projects (e.g., those that receive authorizations and "outliers"—i.e., projects that have been built without government review). [28]

Canada asserts that it is misleading to look only at federal enforcement prosecutions because the provinces address some violations of Section 35(1). As noted above, the response indicates that "activity that could risk legal action under the federal Fisheries Act is often subject to legal sanction under provincial statute"…"and that the provinces have authority to enforce the Fisheries Act as well. (Response at 3, 10, 11). Yet, little information is provided concerning provincial enforcement activity under provincial law or under the Fisheries Act, other than the number of provincial employees involved in certain activities. (Response at 11). Because of Canada's apparent view that provincial prosecutions are an integral element of the effort to enforce Fisheries Act Section 35(1), information concerning the provinces' prosecution efforts is relevant as well and should be developed.

3. Other issues concerning the Party's enforcement practices

[26] For a variety of reasons, the Secretariat is not persuaded that it is warranted to extend the scope of a factual record concerning the project review stage to include (Fisheries Act) Section 37-related issues. Among other things, the Secretariat views the submission and annex as focusing primarily on the *Directive on the Issuance of Subsection 35(2) Authorizations* in their challenge to Canada's project review practices.

[27] The submission annex reports that in 1991–92 there were a total of 145 prosecutions and four injunctions relating to the habitat protection and pollution prevention provisions of the Fisheries Act.

[28] The Submitter asserts that federal prosecutions for violations are particularly important because federal practice significantly constrains private actions when violations occur. The Submitter claims that the issuance of Letters of Advice frustrates prosecutions by private parties, as do interventions in and stays of such prosecutions by the Attorney General. (Submission at 1).

1. As noted above, Canada asserts that its enforcement approach reflects a reasonable exercise of its discretion in respect of investigatory, prosecutorial, regulatory or compliance matters. In particular, Canada asserts that:

> The method by which Canada enforces and applies Section 35 of the Fisheries Act and the issuance of the Directive is a legitimate application of [its] discretion. Furthermore, the Agreement acknowledges, in Article 5, that seeking assurances of voluntary compliance, as Canada does through the Directives, is an appropriate government enforcement action. As such, Canada respectfully submits that the development of a factual record in this case is not warranted since the Agreement does not permit the review of the legitimate exercise of a Party's discretion. (Response at 3).

The Secretariat agrees that strategies intended to assure voluntary compliance may qualify as effective enforcement under Articles 5 and 14 of the NAAEC. Respectfully, however, the Secretariat does not believe that Canada's response establishes adequately that Canada's enforcement approach constitutes a legitimate exercise of its discretion. Article 45(1)(a) provides that a Party has not failed to "effectively enforce its environmental law" where its action or inaction reflects a reasonable exercise of its discretion in relation to investigatory, prosecutorial, regulatory or compliance matters. As the questions listed above reflect, Canada's response provides very little information concerning key issues necessary to evaluate its exercise of its discretion, such as the number and severity of violations, the nature of Canada's enforcement responses, and the effectiveness of those responses. Canada's response also fails to provide information concerning its overall policy context—for example, information concerning its policies regarding the nature of monitoring that is appropriate, the circumstances under which it is appropriate to pursue various types of enforcement action, and the circumstances in which enforcement action is not needed. Finally, Canada has failed to provide information concerning the extent to which it is implementing the strategies set forth in its policy context.

Thus, there is no basis for the Secretariat or the Council to evaluate whether Canada has exercised its discretion in a reasonable way. The extent to which it is appropriate for the Secretariat to conduct such an evaluation has never been addressed and the Secretariat does not seek to address it here. The Secretariat, however, believes that a Party must provide more support for a statement under Article 45 that it has reasonably exercised its discretion than is contained in this response in order to exempt its enforcement practices from scrutiny under Article 14.

2. Canada also asserts that its enforcement approach results from **bona fide** decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities. As is the case with respect to the exercise of discretion, virtually no information is provided to support this assertion. There is little information, for example, concerning the

overall level of resources available for enforcement, the relative priority of various environmental matters, or the level of resources devoted to enforcement in the area covered by the submission. Again, the extent to which it is appropriate for the Secretariat to evaluate a claim under Article 45(1)(b) has never been addressed and the Secretariat does not seek to address it here. The Secretariat, however, believes that a Party must provide more support for a statement that it has made **bona fide** decisions to allocate resources to enforcement concerning higher priority matters than is contained in this response.

4. Sunpine Road project

As noted above, the Submitter has provided the "Sunpine Road" example as a specific illustration of Canada's alleged failure to effectively enforce the Fisheries Act and CEAA. The Party, on the other hand, urges that the pendency of a lawsuit relating to the road renders it inappropriate to delve further into the project as part of a factual record.[29]

The Secretariat has previously addressed the issue of pending judicial proceedings in connection with this submission, among others. Briefly, the NAAEC is clear that the Secretariat must "proceed no further" when the subject matter of the submission is also the subject of an ongoing judicial or administrative proceeding being pursued by a Party.[30] This provision does not apply here because the pending litigation was not pursued by a Party. The Secretariat may also deem it appropriate not to consider a matter because, as it had stated in an April 1997 *Determination*, the "similarity of issues presented in both the submission and the lawsuit…creates a risk that the preparation of a factual record may duplicate important aspects of the judicial action" and interfere with the pending litigation.[31]

As stated in this *Determination*, the Secretariat considered that this submission did not warrant developing a factual record because a court case pending at the time involved similar issues, notably the

[29] Two judicial proceedings are relevant to the submission. The first one is *The Friends of the West Country Association* v. *The Minister of Fisheries and Oceans* and *Attorney General of Canada*, Federal Court Trial Division (Docket T2457-96). This proceeding was initiated in November 1996 but then abandoned by the Submitters in November 1997. The second court case is *The Friends of the West Country Association* v. *Minister of Fisheries and Oceans* and *Director, Marine Programs, Canadian Coast Guard*, Federal Court Trial Division (unreported, 7 July 1998, Docket T-1893-96; Gibson J.). A decision was rendered in July 1998 but then appealed by the Canadian Government in September 1998. The appeal is currently under way (*Minister of Fisheries and Oceans* and *Director, Marine Programs, Canadian Coast Guard* v. *Friends of West Country Association*, Federal Court of Appeal (Docket A-550-98).

[30] See, e.g., *Recommendation of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation (27 April 1998)*, regarding SEM 97-001 at 9. Article 14(3) of the NAAEC provides that the Secretariat "shall proceed no further" where the responding Party has shown that the matter is the subject of "pending judicial or administrative proceedings." Article 45(3) defines a "judicial or administrative proceeding" for purposes of Article 14(3) to mean: "a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law..."

[31] *Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation for SEM-96-003 (2 April 1997).*

use of Letters of Advice under the Fisheries Act. The Secretariat noted that the Submitter "may wish in the future to file a new submission following a…resolution" of the court case involving these issues.[32] The Submitter later abandoned the court case.

The currently ongoing court proceedings appear to create less overlap with the submission than the case pending in April 1997. The current court case appears to be concerned primarily with the interpretation of the Canadian Environmental Assessment Act and the Navigable Waters Protection Act. [33] In contrast, as discussed above, the factual record would concentrate on the development of factual information concerning the Party's project review strategy under the Fisheries Act, with a particular focus on the Letter of Advice strategy, and information concerning the Party's approach to prosecutions. Thus, the risk of substantial duplication or interference seems minimal, unlike in the previous court case that led to the Secretariat's termination of the submissions process in April 1997.

Weighed against the possible downside of duplication or interference is the reality that it would seem relatively straightforward to fill the gaps in the information provided to the Secretariat concerning the handling of this project under the Fisheries Act. Based on the submission and response, it appears that three types of information have not been provided. First, the Submitter asserts that the government was concerned, at least early on, that several of the projects could harm fish habitat in violation of Fisheries Act Section 35(1). Information concerning such possible impacts and possible violations has not been provided. Second, the Secretariat has not been provided with the Letters of Advice issued to prevent harm or violations from occurring due to two of the crossings. Finally, while the Secretariat has been advised that Alberta officials have inspected the road and concluded that the construction did not harm fish habitat, the Secretariat has not been provided with a copy of the report of the Alberta enforcement officials concerning their assessment of the final impacts on fish habitat as a result of the construction.

V. RECOMMENDATION

[32] Ibid.

[33] On 7 July 1998, the Federal Court Trial Division decided that the environmental assessments conducted concerning the construction of two bridges as part of the Sunpine project were inadequate, and the approvals were set aside. The Court found that the Coast Guard failed in its requirement to consider the cumulative environmental effects from other projects or activities that had been or would be carried out [Section 16(1)(a), CEAA], to assess various other undertakings [Section 15(3), CEAA], and to ensure convenient public access to all documents in the public registry [Section 55, CEAA]. Together with the related statutory preliminary steps, the approvals were referred back to the Minister of Fisheries and Oceans for "redetermination in manner consistent with the Canadian Environmental Assessment Act, the Navigable Waters Protection Act and these reasons." *The Friends of the West Country Association* v. *Minister of Fisheries and Oceans* and *Director, Marine Programs, Canadian Coast Guard*, Federal Court Trial Division (unreported, 7 July 1998, Docket T-1893-96) (Gibson J.), at 33. The Attorney General of Canada appealed the decision to the Federal Court of Appeal based on the following grounds:
a) the Court erred in the standard of review applied to the circumstances of the case;
b) the Court erred in its interpretation of Section 15 of CEAA.
c) the Court erred in law in its interpretation of Section 16 of CEAA; and
d) the Court erred in its opinion that the public registry established by the Coast Guard failed to meet the requirements of Section 55 of CEAA so as to constitute a further reviewable error.

The Secretariat considers that, in light of Canada's response, the submission warrants developing a factual record to compile further information regarding the enforcement activity undertaken by Canada and the effectiveness of that activity in ensuring compliance with Section 35(1) of the Fisheries Act. The response does not take issue with the importance of the environmental laws and natural resources at issue in this submission. Instead, it reflects an appreciation for their significance. The 1996/97 DFO *Annual Report* to Parliament concerning administration and enforcement of the Fisheries Act, cited in the response, notes that "[t]he fish habitat protection…provisions of the Fisheries Act" are among the "main tools for the conservation and protection of fish habitat." Further, while the response asserts that the project review and prosecution approaches the Party uses are effective in preventing and addressing violations of Fisheries Act Section 35(1), the lack of information concerning the actual extent of use of different enforcement tools, and concerning the effect of these tools in achieving compliance with the Fisheries Act, has led the Secretariat to conclude that it is appropriate to use the factual record process to develop facts concerning these questions.

Respectfully submitted on this 19 day of July 1999.

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Executive Director