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Secretariat of the Commission for Environmental Cooperation

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

Submission I.D. : SEM-97-001

Submitter(s):

B.C. Aboriginal Fisheries Commission
British Columbia Wildlife Federation
Trail Wildlife Association
Steelhead Society
Trout Unlimited (Spokane Chapter)
Sierra Club (U.S.)
Pacific Coast Federation of Fishermen's Association
Institute for Fisheries Resources

Represented by: Sierra Legal Defense Fund
and Sierra Club Legal Defense Fund

Concerned Party :

Canada

I EXECUTIVE SUMMARY

The Submission[1] alleges that Canada has failed to effectively enforce section 35(1) of the federal *Fisheries Act* [2], and is permitting the ongoing, unauthorized destruction of fish and fish habitat in British Columbia (B.C.), distorting the hydro power market, and undermining the purposes of the *North American Agreement on Environmental Cooperation ("NAAEC")*. The Submission focuses on a failure to prosecute several incidents arising from the operation of various British Columbia Hydro ("B.C. Hydro) dams. It is also alleged that Canada has failed to exercise its mandatory statutory jurisdiction, pursuant to section 119.06 of the *National Energy Board Act* ("*NEB Act*")[3], to examine the environmental impacts of the production of power for export.

As a preliminary matter, Canada states that the assertions concerning the enforcement of the *Fisheries Act* are the subject of pending judicial or administrative proceedings, and that, pursuant to Article 14(3)(a) of the *NAAEC*, factual records must not be prepared with respect to issues that are the subject of contemporaneous domestic proceedings. Further, Canada submits that it is enforcing its environmental laws and is in full compliance with its obligations under the *NAAEC*. Canada takes a broader view of "effective enforcement," and submits that the focus should not be merely upon the issue of whether or not prosecutions are being pursued under section 35(1) of the Fisheries Act. Canada also contends that the National Energy Board ("*NEB*") properly exercised its discretionary power under the *NEB Act*.

We are of the view that the phrase "judicial, quasi-judicial or administrative action" in Article 45(3)(a) of the *NAAEC* should be defined narrowly to fulfill the objectives and rationale of the *NAAEC*, and more particularly, Article 14(3). To fall within that term, a "judicial or administrative proceeding" must be specifically delineated in Article 45(3), be pursued by a Party in a timely manner, and be in accordance with a Party's law. Further, to invoke the automatic termination clause under Article 14(3)(a), such a proceeding must be of the same subject matter as the allegations raised in the Submission.

None of the proceedings relied upon by Canada necessitates the automatic termination of the proceedings under Article 14(3)(a). The two judicial proceedings, *BC Hydro and Power Authority v. A.G. Canada and the Minister of Fisheries and Oceans* [4] and *R. v. British Columbia Hydro and Power Authority* [5] are either not pursued by a Party, or are no longer pending. British Columbia's Water Use Planning process and the Regional Technical Committees, in our view, do not constitute "administrative proceedings" as that term is used in Article 14(3)(a).

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[1] SEM-97-001. The complete text of both the Submission and the Response are available from the Secretariat by request or electronically at http://www.cec.org.

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

[3] R.S.C. 1985, c. N-7.

[4] Federal Court Action File No. T-1171-97.

[5] [1997] B.C.J. No. 1744, Kamloops Registry No. 44436, July 19, 1997.

Canada's assertion that it employs a variety of regulatory measures, inclusive of prosecution, to effectively enforce its laws is consistent with the broad construct of "effective enforcement" articulated in Article 5 of the *NAAEC* and in other jurisdictions. Consequently, a lack of prosecutions under section 35 of the *Fisheries Act* may not be dispositive of the issue regarding Canada's effective enforcement of its environmental laws.

Additional information is required before an evaluation can be made that Canada is effectively enforcing its environmental laws. It is recommended that a factual record be developed in order to assemble further factual 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*.

With respect to the allegations raised regarding the NEB, it is the view of the Secretariat that there is no information to suggest that the NEB's exercise of discretion in that matter was "unreasonable", and we recommend that a factual record should not be prepared in respect of this issue. As a result, the preparation of a factual record is recommended only in respect of the alleged failure to effectively enforce section 35 of the *Fisheries Act.*

II BACKGROUND

On 2 April 1997, seven non-governmental organizations, the B.C. Aboriginal Fisheries Commission, the British Columbia Wildlife Federation, the Steelhead Society, the Trail Wildlife Association, the Pacific Coast Federation of Fishermen's Associations, the Sierra Club (Washington, D.C.) and the Institute for Fisheries Resources (collectively, the "Submitters")[6] filed a submission with the Secretariat, pursuant to Article 14 of the *NAAEC* ("Submission"). The Submitters allege, in summary, "the failure of the Canadian Government to enforce section 35(1) of the *Fisheries Act*, and to utilize its powers pursuant to section 119.06 of the *National Energy Board Act*, to ensure the protection of fish and fish habitat in British Columbia's rivers from ongoing and repeated environmental damage caused by hydro-electric dams".

Under Article 14, the Secretariat may consider a submission from any non governmental 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 instruct the Secretariat to prepare a factual record. The final factual record may be made publicly available upon a two-thirds vote of the Council.

[6] The Submitters are represented by the Canadian law firm Sierra Legal Defense Fund (S.L.D.F.) and the American law firm Sierra Club Legal Defense Fund (S.C.L.D.F.).

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

A. The Submission

The Submitters allege that Canada has failed to effectively enforce section 35(1) of the federal *Fisheries Act* permitting the ongoing unauthorized destruction of fish and fish habitat in British Columbia, distorting the hydro power market, and undermining the purposes of the *NAAEC*. B.C. Hydro, a Crown corporation wholly owned by the government of the Province of British Columbia, builds, owns, maintains and operates a system of hydro-electric dams across British Columbia. The Submitters allege that the operation of these dams causes substantial damage to fish and fish habitat.

Pursuant to sections 35(1) and 40(1) of the *Fisheries Act*, it is an offense to carry on work which results in the harmful alteration, disruption or destruction of fish habitat unless authorized by the Minister of Fisheries or by regulation. [7] The Submitters allege that B.C. Hydro has consistently violated section 35(1), but that the Department of Fisheries and Oceans ("DFO"), the federal department responsible for the administration of the *Fisheries Act*, has laid only two charges against B.C. Hydro since 1990 "despite clear and well documented evidence that B.C. Hydro's operations have damaged fish habitat on numerous occasions."[8]

The Submitters also allege that Canada has failed to utilize its powers pursuant to section 119.06 of the *NEB Act* to exercise its mandatory statutory jurisdiction to examine the environmental impacts of the production of power for export. Pursuant to section 119.06 of the *NEB Act*, the NEB may recommend to the federal Minister of Natural Resources that an application be subjected to a public review process. In determining whether to make that recommendation, the NEB is directed by section 119.06(2) to consider "the impact of the exportation on the environment" and to "avoid the duplication of measures taken in respect of the exportation by the applicant and the [provincial government]." The

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[7] Section 35 states:

> (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> (2) 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.

Section 40 states:

> (1) Every person who contravenes subsection 35(1) is guilty of:
>
> (a) an offense punishable on summary conviction and liable, for a first offense to a fine not exceeding three hundred thousand dollars and for any subsequent offense, 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 offense and liable, for a first offense to a fine not exceeding one million dollars, for any subsequent offense, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years or to both.

[8] Submission, supra note 1 at 1.

Submitters allege that the NEB is the only forum in which the environmental impacts of the production of electricity for export are addressed.

The Submitters state that in a 13 September 1996 decision, the NEB failed to address the environmental impacts of an application by Powerex Corp. to export power to Washington State. The Submitters assert that in rendering its decision the NEB concluded that the Government of British Columbia actively regulates the activity at issue. In the Submitter's view, the Province exercises no such regulatory authority.

In addition to these general allegations, the Submission outlines six specific incidents illustrating the nature and extent of damage to fish and fish habitat caused by the operation of B.C. Hydro's dams throughout the Province. Appendix A to the Submission includes certain additional information in respect of the alleged impact of B.C. Hydro's operations at each of 39 sites.

B. The Canadian Response

In its Response, Canada submits that it is in fact enforcing its environmental laws and is in full compliance with its obligations under the *NAAEC*. In addition, Canada states that the assertions concerning the enforcement of the *Fisheries Act* are the subject of pending judicial or administrative proceedings, and that, pursuant to Article 14(3)(a) of the *NAAEC*, factual records must not be prepared with respect to issues that are the subject of contemporaneous domestic proceedings. Canada states that the Submission raises issues that are pending before both the Federal Court of Canada and the British Columbia Supreme Court, and that the federal government is participating in two comprehensive administrative proceedings (namely, in British Columbia's Water Use Planning initiative and at the Regional Technical Committees.) Canada contends that a primary objective of these proceedings is to ensure B.C. Hydro's compliance with federal and provincial laws with respect to protection of fish habitat and to ensure that environmental objectives are fully integrated into water use decisions.

Canada submits that it is fully enforcing the environmental provision of the *Fisheries Act*. Canada notes that support for the concept that enforcement encompasses actions broader than prosecutions, is found in Article 5 of the *NAAEC*, which provides a non-exhaustive list of appropriate enforcement actions. Canada states that the Submission is based on a limited view of enforcement which equates enforcement directly with legal and judicial sanctions, and fails to recognize that both Canada and the Province of British Columbia have a clear record of ongoing cooperative, comprehensive, and productive studies and projects to enhance fisheries interests. Canada suggests that the reports and studies relied upon by the Submitters are an important step in identifying problems and solutions. To the extent that such studies lead to solutions through cooperative means, more formal enforcement is often unnecessary. Canada says that it considers enforcement by means of prosecutions to be a last resort after cooperation and persuasion have failed. Canada suggests that the immediate and widespread use of prosecution as a primary enforcement tool would be ineffective and counterproductive.

Canada goes on to outline those actions which have been taken with respect to the specific impacts and the specific incidents outlined in the Submission. The Response also asserts that the NEB properly exercised its power under the *NEB Act*. That *Act* gives the NEB the discretion to decide whether evidence filed about environmental impacts is sufficient to recommend a designation order for a public hearing. Canada states that the NEB acted within this discretion in making this determination on the basis of the evidence before it, which was not the same as that reflected in the attachments provided by the Submitters.

Canada also suggests that the *NAAEC* and the *Fisheries Act* cannot be applied retroactively. Finally, Canada states that the development of a factual record would not further the objectives of the *NAAEC* in light of the detailed information provided in its response.

III SHOULD THE SUBMISSION PROCESS BE AUTOMATICALLY TERMINATED OWING TO A MATTER WHICH CONSTITUTES A PENDING JUDICIAL OR ADMINISTRATIVE PROCEEDING?

Article 14(3)(a) of the *NAAEC* provides that the Secretariat "shall proceed no further" where the responding Party has shown that the matter is the subject of a "pending judicial or administrative proceeding". This suggests that the Parties intended to foreclose a review of enforcement matters actively being pursued by any Party. Article 45(3)(a) defines "judicial or administrative proceeding" for the purposes of Article 14(3). In its response, Canada states that the subject matter of the Submission is the subject of pending "judicial or administrative proceedings", including the two court cases and the two examples of administrative proceedings referred to above, and that therefore the submission review process must end. We consider this assertion at the outset, since the fundamental issue of the preparation of a factual record need only be addressed if the Secretariat is so authorized.

As noted above, in making its assertion that the Secretariat is estopped from any review, Canada relies on two pending judicial proceedings. The first case is *BC Hydro and Power Authority v. A.G. Canada and the Minister of Fisheries and Oceans,* currently underway in the Federal Court of Canada (the "Federal Court Case"). This case addresses the constitutionality of a minimum flow order made pursuant to section 22 of the *Fisheries Act.* The second case is *R. v. British Columbia Hydro and Power Authority,* a case decided by the Supreme Court of British Columbia after the Submission and Response were received by the Secretariat (the "Supreme Court Case"). That case involves charges brought against B.C. Hydro under, among other provisions, section 35 of the *Fisheries Act.*

Canada further argues that its participation in British Columbia's Water Use Planning ("WUP") initiative and on the Regional Technical Committees ("RTCs") qualifies as administrative proceeding pursuant to Article 45(3)(a) of the *NAAEC* and consequently bars any further review. The WUP is an initiative sponsored by the government of British Columbia to review all B.C. Hydro water licenses and to develop water use plans for each facility. Canada has responded that, through DFO, the government

participates in some aspects of the WUP. DFO also participates, along with representatives from the B.C. Ministry of Environment, Lands and Parks and B.C. Hydro, in the RTCs which are charged with reviewing fisheries issues at both individual facilities and on a broader basis.

In making its determination, the Secretariat first considers the meaning of the term "judicial or administrative proceedings" for the purposes of Article 14(3)of the *NAAEC*. Secondly, on the basis of that interpretation the Secretariat makes a determination regarding whether the proceedings put forward by Canada in its response fall within the scope of this term.

A. The Definition of a "Judicial or Administrative Proceeding"

In making a determination on the issue of whether any proceeding falls with the definition of a "judicial or administrative proceeding" under Article 14(3) the Secretariat has considered first the plain reading of Article 45(3)(a) of the *NAAEC*. Secondly, the Secretariat has considered the possible interpretation of the terms within the broader context of other provisions of the *NAAEC*. Finally, it is useful to refer to previous decisions by the Secretariat throughout the interpretive process, though we acknowledge that the Secretariat and the Council are not bound by the principle of *stare decisis*. [9]

(i) A Plain Reading of Article 45(3)

As stated above, the definition of the term " judicial or administrative proceeding" is provided in Article 45(3) of the *NAAEC*, which reads:

> For the purposes of Article 14(3), "judicial or administrative proceeding" means:
>
> (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and

[9] At a minimum, references to previous determinations will assist in ensuring that the Secretariat consistently applies the provisions of the *NAAEC*. Such a contextual approach to a treaty is suggested by general canons of statutory interpretation as well as Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See Pierre-André Côté, The Interpretation of Legislation in Canada, 2nd ed. (Cowansville: Les Editions Yvon Blais, 1991), c.2; Ruth Sullivan, Driedger on the Construction of Statutes, 3d ed. (Toronto: Butterworths, 1994), c.8, and The Vienna Convention on the Law of Treaties, concluded at Vienna, May 23, 1969, entered into force January 27, 1980, 1155 U.N.T.S. 331 ("Vienna Convention"). The Vienna Convention is in force in both Canada and Mexico as of January 27, 1980. The United States signed the Vienna Convention on April 24, 1970 but has not ratified it. I.M. Sinclair notes in *The Vienna Convention on the Law of Treaties* (2nd ed., 1984) that since 1969, provisions of The Vienna Convention have frequently been cited in judgments of the Courts of the United States and in state practice as accurate statements of the customary rules in relation to interpretation of treaties.

(b) an international dispute resolution proceeding to which the Party is party.

In order to constitute a "judicial or administrative proceeding", the action must accordingly be pursued (i) by a Party; (ii) in a timely fashion; (iii) in accordance with the Party's law; and (iv) comprise one of the prescribed categories of activities.

As previously determined, the Secretariat has held that the term "by a Party" means that the action must be undertaken by a government signatory to the *NAAEC*.[10] The requirement to proceed in a "timely fashion" appears to require that any such actions be pursued in a vigorous manner without undue delay. The third requirement is interpreted to mean that the proceedings must be grounded in the statutory or common law of the Party. Finally, as stated in Article 14(3) discussed more fully below, the "judicial or administrative proceeding" must address the same "matter" as the Submission.

(ii) Other Provisions of the NAAEC

We note that in the context of Article 5(3)(b), a compliance agreement is referred to as a type of sanction or remedy, along with the imposition of fines, imprisonment, injunctions and the closure of facilities. This suggests that the term "seeking an assurance of voluntary compliance or a compliance agreement" includes proceedings regarded as measures leading to sanctions or remedies.

(iii) The Object and Purpose of the NAAEC

Following an examination of the language in other provisions of the *NAAEC*, we next turn to the object and purpose of the *NAAEC* in order to seek guidance on the interpretation of the scope of Article 14(3).[11]

In order to promote the objectives of the *NAAEC* set out in its Article 1, and to give meaning to the Article 14 process, which is designed to scrutinize the Parties' commitments to effectively enforce their environmental laws, it is important to construe narrowly the definition of "judicial or administrative proceeding" in Article 45(3), which, in the context of Article 14(3), has the ultimate effect of terminating submission review processes. Only proceedings which are designed to culminate in a specific decision, ruling or agreement within a definable period of time should be considered as falling within Article 14(3)(a). Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, should not be sufficient to trigger the automatic termination clause. If such proceedings were included within the definition, a Party could effectively shield non-enforcement of its environmental laws from scrutiny simply by commissioning studies or holding consultations.

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[10] Commission for Environmental Cooperation - Secretariat Determination pursuant to Articles 14 and 15 of the *NAAEC*, SEM-96-003, April 2, 1997.

[11] Article 31 of the Vienna Convention, supra note 9, provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in light of its object and purpose".

We are in no way suggesting that Canada's attempt to invoke this clause represents a deliberate attempt to prematurely terminate the proceedings. However, to give full effect to the *NAAEC*, for the reason given a peremptory clause of this nature must be construed narrowly.

(iv) Further Considerations

In its Article 15(1) determination of Submission No. SEM-96-003, the Secretariat considered the rationale underlying Article 14(3)(a). The Secretariat stated that the exclusion of matters which are currently the subject of judicial or administrative proceedings was required for two reasons: (a) the need to avoid a duplication of effort; and (b) the need to refrain from interfering with pending litigation. These considerations apply to both proceedings that fall within the Article 45(3)(a) definitional requirements as well as to other proceedings outside of that specific provision. In another determination under Article 15(1), the Secretariat noted:

> Civil litigation is a complex undertaking governed by an immensely refined body of rules, procedures and practices. The Secretariat is reluctant to embark on a process which may unwittingly intrude on one or more of the litigant's strategic considerations.[12]

Nor would it be appropriate for the submission review process to "second guess" a domestic court on the meaning of a provision or on the disposition of factual and legal matters before that Court.

In sum, in order to fall within the definition of "judicial or administrative proceeding" in Article 45(3)(a), a proceeding must be: specifically delineated in Article 45(3)(a), pursued by a Party in a timely manner, and in accordance with a Party's law. Further, such a proceeding must concern the same subject matter as the allegations raised in the submission. Thus, this initial threshold consideration should be construed narrowly so as to give full effect to the object and purpose of the *NAAEC*, and more particularly, to Article 14(3).

B. Should Review of the Submission Be Terminated Based upon the Proceedings Identified by Canada?

(i) BC Hydro and Power Authority v. A.G. Canada and the Minister of Fisheries and Oceans

Canada relies on the case of *BC Hydro and Power Authority v. A.G. Canada and the Minister of Fisheries and Oceans* (the "Federal Court Case") as a "pending judicial proceeding" within the meaning of Article 14(3)(a). While it is clearly a "judicial proceeding" as that term is used in Article 45(3)(a), it does not relate to the enforcement of section 35(1) of the *Fisheries Act*; rather, the case involves an application for judicial review of an order made under section 22 of the *Fisheries Act*. Accordingly, the "subject matter" of the case and the Submission is not the same. Furthermore, it does

[12] Supra note 10.

not appear that the proceeding was initiated by a Party, in this case Canada. Consequently, the Federal Court Case does not operate to automatically terminate the submission review process under Article 14(3).

With respect to the two-pronged criteria applied by the Secretariat; that is, avoidance of duplication and non-interference, the Secretariat has determined that the Federal Court Case will not resolve the issue raised in the Submission nor is there an identity of issues between the matters. There appears to be minimal risk that the preparation of a factual record will result in a duplication of effort. Second, the preparation of a factual record with respect to the Submission will not interfere with the pending litigation since the object of a full record inquiry would focus on the enforcement conduct of Canada, not the constitutionality of section 22 of the *Fisheries Act*.

(ii) R. v. British Columbia Hydro and Power Authority

Canada also relies on *R. v. British Columbia Hydro and Power Authority* (the "Supreme Court Case") as evidence of effective enforcement of environmental laws. The Supreme Court Case involved allegations that B.C. Hydro, in response to large inflows into the Bridge River drainage system, had "spilled large volumes of water from the Terzaghi Dam on three occasions and ended a long standing spill from the Seton dam rather abruptly"[13]. The Court did find that these actions had killed fish and damaged fish habitat. However, B.C. Hydro was acquitted on the basis that it had exercised due diligence in the operation of the dams.

The subject matter of the Supreme Court Case did involve the enforcement of section 35(1). However, we note that the judgment in the case was rendered on July 10, 1997. As a result, the matter is no longer "pending" before the courts, and so the proceeding no longer falls within the Article 14(3)(a) barrier. Article 14(3)(b)(i) suggests that the fact that an issue was formerly the subject of a proceeding may nonetheless be of relevance. Therefore, while this case does not warrant termination of the process, the disposition of the case itself may constitute a fact worthy of notice in a factual record examining the effectiveness of current government enforcement strategies. Moreover, those allegations which relate to ongoing impacts not litigated in the lawsuit could be included in a factual record.

(iii) British Columbia's Water Use Planning Initiative

Canada asserts that British Columbia's WUP initiative is an ongoing administrative proceeding within the meaning of Article 14(3)(a). Canada advises that the WUP is a project to review all B.C. Hydro water licenses and to develop water use plans for each B.C. Hydro facility and that the plans will lead to changes in the water licenses of the individual facilities, and the System Operating Orders. Canada has advised that binding statutory constraints on B.C. Hydro operations will most likely result from the process. Canada states that the water use plans will be subject to *Fisheries Act* requirements, and that the intent of the WUP is to "ensure compliance both with the federal *Fisheries Act* and provincial legislation in the operation of B.C. Hydro facilities, and to ensure that all environmental, social and

[13] [1997] B.C.J. No. 1744, DRS 97-13306, Kamloops Registry No. 44436, supra note 8 at paragraph 1.

economic values are considered in water use decisions."[14] The WUP process is expected to take five years or more to complete.

As the WUP is a provincial initiative, it is arguable that the proceeding is not undertaken by "the Party" (since the Submission is brought against Canada). However, Canada is participating in the project, and it is arguable that a certain degree of federal participation is sufficient to constitute a proceedings brought "by a Party." However, it is unnecessary to consider that question since we have concluded that the WUP, for other reasons, does not operate to terminate the submission review process.

The WUP initiative may lead to greater protection of fish habitat by a determination to impose statutorily binding limits on B.C. Hydro's water use. In fact, after the WUP process is completed, the conditions attached to B.C. Hydro's water licenses may become a primary vehicle for protection of fish habitat. However, WUP process itself, in our view, is not a "judicial or administrative proceeding" as that term is used in Article 45(3)(a). The WUP does not fall into any of the categories listed under Article 45(3)(a). The process does not constitute "seeking an assurance of voluntary compliance or a compliance plan" as those terms are used in other contexts, or as they should be interpreted for the purposes of the *NAAEC*. To consider the WUP to be part of "the process of issuing a license" would unduly expand the definition of that phrase.

The fact that Canada is participating in a provincial process that may lead to a different manner of protecting fish and fish habitat does not preclude the development of a factual record concerning whether Canada is effectively enforcing the *Fisheries Act* under the legal means which exist at this time. Moreover, the development of a factual record in this case will not lead to a duplication of effort, nor will the outcome of the administrative proceedings interfere with or render moot the subject matter of the Submission.

(iv) Regional Technical Committees

Canada also relies on its participation in RTCs as constituting an administrative proceeding under Article 14(3). These committees, which include representatives from DFO, the B.C. Ministry of Environment, Lands and Parks and B.C. Hydro, review fisheries issues at both individual facilities and on a system-wide basis. As Canada states in its response to the Submission: "The committee work has primarily involved identifying and documenting areas of concerns for fish and fish habitat at existing hydro facilities and to obtain funding from B.C. Hydro for biophysical and fish inventory studies by independent consultants to identify improvement possibilities." [15]

While the ultimate aim of the RTC work may be to secure compliance with the *Fisheries Act*, the work does not come within the definition of "judicial or administrative proceedings" in Article 45(3)(a), for the same reasons outlined above in our discussion of the WUP initiative. As well, the open-ended nature the RTC work provides additional arguments against including such initiatives within the scope of Article

[14] Canadian Response to SEM-97-001, July, 1997 (the "Response") at page 10.
[15] Response, supra at 19.

45(3)(a). Finally, the subject matter of the Submission, namely the enforcement of section 35 of the *Fisheries Act*, is not the subject of the RTC discussions.

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

A. Failure to Effectively Enforce Section 35(1) of the *Fisheries Act* against B.C. Hydro

In the face of varied allegations respecting the application of section 35(1) of the *Fisheries Act*, Canada responds by outlining a range of actions undertaken to ensure B.C. Hydro's compliance with section 35(1). However, little information is provided respecting (a) enforcement policies or directives utilized by Canada and (b) specific factual information regarding enforcement activity in respect of the allegations raised in the Submission. The development of a factual record will allow this information to be compiled, which will in turn facilitate an analysis of whether Canada has been effectively enforcing its environmental laws.

A number of examples will illustrate the point that genuine issues persist regarding the Submitters' allegations. The Submitters allege that in the summer of 1996, B.C. Hydro dewatered Cranberry Creek, killing and stranding trout over a 10 km section. [16] Canada's Response states that the Walter Hardman development, which affects Cranberry Creek, is a priority for the WUP initiative, and that DFO has participated in the development of interim operating orders, which are not yet in effect.[17] It is not clear from the Response what specific enforcement action Canada undertook (and the effectiveness of that action) in response to the incident at Cranberry Creek. Without the benefit of that information, including information in respect of Canada's enforcement policies, it is difficult to evaluate whether there has been effective enforcement with respect to the incident at Cranberry Creek or the other specified incidents in the Submission.

Similar questions apply to allegations which relate to ongoing operational problems. For example, the Submission suggests that with respect to the Shuswap Falls project, negative effects have resulted from low winter flows, dewatering, rapid flow ions, increased sediment levels, and reduced access, as well as impacts on benthic productivity. [18] In response, Canada lists a number of actions taken, including the following: (a) commissioning a study on the impacts of ramping down on flows; (b) the development of a rule curve which B.C. Hydro is currently declining to use; (c) DFO's verbal statement to B.C. Hydro that the flow regime proposed by B.C. Hydro is unacceptable; and (d) DFO's request to B.C. Hydro for additional time to monitor work such as flash board removal. In addition, Canada refers to a request by the B.C. Ministry of Environment, Lands and Parks, not acceded to by B.C. Hydro, that the

[16] Submission, supra at 5.
[17] Response, supra at 27.
[18] Submission, supra, at 5.

impacts of ramping on invertebrates be examined. [19] Again, little information is provided on the effectiveness of these actions to ensure compliance with the law.

With respect to the Downton Lake and the LaJoie project, Canada states that it has deferred to the Province's decision not to prosecute B.C. Hydro with respect to a May 1996 drawdown. Canada notes that the Province chose not to proceed based on the lack of quantitative evidence of fish losses and the lack of a pre-impact survey. [20] This response does not contain sufficient information regarding the effectiveness of Canada's enforcement response. At a minimum, deferral to the Province does not address Canada's obligations regarding the enforcement of the federal *Fisheries Act*.

The Submission states that the Bennett Dam and the G.M. Shrum Station are associated with a decline in fish productivity, rapid flow fluctuations causing strandings, elevated gas levels and sedimentation. Canada responds that:

> DFO was not involved at the time of construction in the 1960s. B.C. Hydro has not requested Fisheries Act authorization for the project. DFO's Eastern BC Habitat Unit was formed in 1990, two decades after operations were established at these facilities. [21]

These statements do not appear germane to the issue of whether Canada is failing to currently effectively enforce its environmental laws. As the Secretariat noted in Submission No. SEM-96-001: [22]

> Article 47 of the *NAAEC* indicates the Parties intended the Agreement to take effect on January 1, 1994. The Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the *NAAEC*. Notwithstanding the above, events or acts concluded prior to January 1, 1994, may create conditions or situations which give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law.
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> The Vienna Convention on the Law of Treaties provides in section 28 that "unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the Treaty with respect to that party" (United Nations, Treaty Series, vol. 1155, p. 331.)

In that submission, the Secretariat noted "that a present duty to enforce may originate from, in the language of the Vienna Convention, a situation which has *not* ceased to exist". It is appropriate to take

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[19] Response, supra, 36-37.
[20] Ibid., at 32, 37.
[21] Ibid., at 32.
[22] 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, SEM 96-001, June 7, 1997.

a similar approach to this Submission. Canada's Response does not appear to be directed to the allegation of a present, continuing failure to effectively enforce its environmental law. More information is therefore required.

Another example is the allegation respecting the Keenleyside Dam. The Submission states that complete shut down of flows in April 1990 dewatered and stranded rainbow trout and kokanee fry on the Norns Creek fan.[23] Canada has responded that this event cannot be the subject of an Article 14 submission, since it occurred before the *NAAEC* came into force. The Secretariat concurs, and recommends that a factual record not be prepared in respect of this specific allegation.

However, if a situation arising in the past continues to exist, it may be the subject of an Article 14 submission. For example, if B.C. Hydro operations continue to damage fish habitat, it makes no difference if those activities were commenced prior to the entry into force of the *NAAEC*. As noted above, the Secretariat recognizes that a present duty to enforce may originate from a situation which continues to exist. If the construction of facilities in the past has led to a state of affairs which "has not ceased to exist", then the facts surrounding this condition may be the subject of a factual inquiry.

Canada also asserts that the negative impacts of facilities at the Bennett Dam are offset, at least in part, by the Peace/Williston Compensation Program.[24] It is unclear that compensation is of any relevance to the effective enforcement of Canada's environmental laws.

In asserting that Canada has failed to effectively enforce section 35(1) of the *Fisheries Act*, the Submitters point to the fact that only two prosecutions have been undertaken against B.C. Hydro since 1990. Canada, in its response, suggests that it undertakes a variety of activities which, when taken together, constitute effective enforcement of its environmental law. The Secretariat is mindful of the varied principles and approaches that can be applied to a definition or application of the term "effective enforcement". For example, under certain circumstances, other enforcement measures may be deemed more effective in securing compliance than an exclusive reliance on prosecutions. In that regard, it is not clear how Canada selects its enforcement responses to secure compliance with its environmental law.

In summary, Canada's response does not disclose sufficient factual information regarding the specific enforcement activity undertaken by Canada in each of the alleged incidents and the effectiveness of that activity in ensuring compliance with its environmental law. As a result, the preparation of a factual record is recommended in respect of the failure to effectively enforce section 35 of the *Fisheries Act*.

B. Failure to Effectively Enforce the *National Energy Board Act*

One of the Submitters, the B.C. Wildlife Federation, made an application in 1996 to the NEB for a public review of the environmental effects of the export of power to the United States by a wholly

[23] Submission, at supra 5.
[24] Response at supra 32.

owned subsidiary of B.C. Hydro. The NEB denied this application, in part relying on the fact that the Province was "actively regulating" the activity at issue. The NEB indicated in its reasons that "the evidence tended to show that the Province was active with respect to ensuring appropriate operation of hydro-electric stations, and was taking steps to promote the public interest in this regard". [25] The Submitters contend that there are no provincial laws or regulations that apply to the environmental impacts of the production of hydro power. The Submitters allege that the NEB is the only federal regulatory tribunal with the jurisdiction to examine the environmental impacts of the production of power for export and that the NEB's failure to exercise that jurisdiction has resulted in a failure of both levels of government to regulate the impact of power generated for export on fish and fish habitat.

The B.C. Wildlife Federation applied for leave to appeal the decision of the NEB to the Federal Court of Appeal on the grounds that the NEB erred in failing to address the environmental effects of the production of energy for export. This application for leave to appeal was denied without reasons. The Submitters allege that the denial of leave to appeal effectively immunizes the NEB's decision from review and exhausts any further recourse under domestic proceedings.

In its decision, the NEB characterizes the matters raised in the application as operational matters which fall within provincial jurisdiction. The NEB is of the view that, as a responsible federal regulator, it must be careful to ensure that it does not intrude into matters of provincial jurisdiction. The NEB concluded that the evidence raised by the B.C. Wildlife Federation related to operational issues. The record before the NEB demonstrated that B.C. had approved an Energy Removal Certificate on February 15, 1996. The NEB was entitled to conclude that the regulatory concerns of British Columbia in relation to the export application had been satisfied. The NEB found that the evidence present tended to show that the Province was active with respect to ensuring appropriate operation of hydro-electric facilities and was taking steps to promote the public interest in this regard. The NEB concluded that is should not duplicate provincial responsibilities where the record tends to show that the Province is actively regulating the activity at issue.

In its reply, Canada asserts that it has properly exercised its power under the *NEB Act*. Canada claims that the *NEB Act* gives the NEB the discretion to decide whether evidence filed about environmental impacts is sufficient to recommend a designation order for a public hearing. Canada contends that the NEB acted within this discretion in making this determination on the basis of the evidence before it. Canada notes that the NEB decided the matter on the evidence filed before it in relation to the application, and that the evidence filed before the NEB is not the same as that reflected in the attachments provided by the Submitters. Accordingly, Canada suggests that it cannot be said that Canada failed to enforce the relevant provisions of the NEB.

Article 45 (1) of the *NAAEC* states:

[25] Decision of the National Energy Board, NEB File # 6200-B007-5, September 13, 1996.

A Party has not failed to "effectively enforce its environmental law" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

(a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters.

On this matter, the Submission does not meet the threshold necessary to merit further review. Where an environmental law grants discretionary decision-making power, a Submitter must adduce evidence that under the circumstances the Party acted "unreasonably" in exercising discretion in respect of such matters. The Submitters have failed to meet this standard. As a result, the preparation of a factual record with respect to the allegations concerning the *NEB Act* is not warranted.

V RECOMMENDATION

The Secretariat considers that, in light of the response provided by Canada, the Submission warrants developing a factual record to compile further factual 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.

As noted above, the factual record should not re-examine the underlying facts which formed the basis of the Supreme Court of British Columbia action with respect to the Terzaghi and Seton Dams. However, the ongoing impacts which result from operation of those projects may be examined, and the disposition of the case itself may be relevant to determining the effectiveness of Canada's enforcement efforts. Nor should the factual record examine acts or events preceding the entering into force of the *NAAEC*, unless such acts or events are in relation to allegations of a continuing failure to effectively enforce environmental law.

For the reasons set out above, the Secretariat submits that the preparation of a factual record is not warranted with respect to the allegations concerning non-enforcement of the *NEB Act*.

Respectfully submitted on this 27th day of April, 1998,

Janine Ferretti
Interim Executive Director