

Secretariat of the Commission for Environmental Cooperation

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

Submitter(s): Friends of the Earth
Union Saint-Laurent, Grands Lacs
Conservation Council of New Brunswick
Ecology Action Centre
Environment North

Represented by: Sierra Legal Defence Fund (SLDF)

Concerned Party: Canada

Date Received: 8 May 2002

Date of this Notification: 8 October 2003

Submission I.D.: SEM-02-003 / Pulp and Paper

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC) creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the North American Commission for Environmental Cooperation (the “Secretariat”) initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines, based on factors contained in Article 14(2), whether the submission merits requesting a response from the Party named in the submission. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record (Article 15(2)).

On 8 May 2002, the Submitters listed above filed a submission, along with supporting materials, asserting that Canada is failing to effectively enforce sections 34, 36, 40, 78 and 78.1 of the federal *Fisheries Act* and sections 5 and 6 and Schedules I and II of the *Pulp and Paper Effluent Regulations* (PPER) promulgated in 1992, against pulp and paper mills in Ontario, Quebec and the Atlantic provinces (i.e., New Brunswick, Nova Scotia and Newfoundland). Section 36 of the *Fisheries Act* prohibits the deposit of a deleterious substance in water frequented by fish unless the deposit is authorized by regulation, such as the PPER. The Submitters allege that, despite reductions in pulp mill effluent pollution since the coming into force of the PPER, in the period from 1995 to 2000 there were more than

2,400 documented violations of the PPER at mills in central and eastern Canada, and very few prosecutions. The submission and its appendices provide information on alleged violations at approximately 70 of the 116 mills that the Submitters identify, with twelve mills highlighted as mills of particular concern to the Submitters. The Submitters request the preparation of a factual record.

On 7 June 2002, the Secretariat determined that the submission meets the requirements of Article 14(1) of the NAAEC and requested a response from the Party in accordance with Article 14(2).¹ Canada submitted its response on 6 August 2002. The response explains Canada's general approach to enforcing the PPER and the *Fisheries Act* and provides the general policy framework for the decisions taken in connection with mills identified in the submission. Canada then provides information with respect to federal enforcement responses from 1995–2000 in regard to the twelve mills for which the Submitters raised particular concerns.² For five mills, although some information was provided, Canada explained that it would not provide further information in light of investigations that were ongoing at the time the response was prepared.

The Secretariat has concluded that the response leaves open central questions that the submission raises regarding enforcement of s. 36(3) and the PPER at the mills of concern in the submission and the information attached to it. Accordingly, in accordance with Article 15(1), the Secretariat hereby informs the Council that the Secretariat considers that the submission, in light of the Party's response, warrants developing a factual record and provides its reasons.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce sections 34, 36, 40, 78 and 78.1 of the federal *Fisheries Act* and sections 5 and 6 and Schedules I and II of the PPER against pulp and paper mills in Ontario, Quebec and the Atlantic provinces.

A. General Assertions

The Submitters first provide general assertions regarding the amount and pollutant content of effluent from Canada's 157 pulp and paper mills, contending the mills have "added tonnes of harmful substances to our waterways and caused extensive harm to aquatic ecosystems."³ They claim that the pulp and paper industry made progress in investing in environmental upgrades in the early 1990s but that those investments have dropped sharply since 1995.⁴

¹ SEM-02-003 (Pulp and Paper), Determination under Articles 14(1) and (2) (7 June 2002).

² For ten of the mills, only information from 2000 is provided.

³ Submission at 3.

⁴ Submission at 3.

Next, the Submitters describe the pollution prevention provisions of the *Fisheries Act* and the PPER that they contend Canada is failing to effectively enforce in Ontario, Quebec and the Atlantic provinces. They note that under the *Fisheries Act*, “it is an offense to deposit a deleterious substance of any type in water frequented by fish that renders the water deleterious to fish or fish habitat, unless the deposit is authorized by regulation.”⁵ They identify as relevant to their submission two provisions of the federal *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy (Compliance and Enforcement Policy)*. First is the policy that “fair, predictable, and consistent enforcement govern the application of the law, and responses by enforcement personnel to alleged violations.”⁶ Second is the intent stated in the *Compliance and Enforcement Policy* “to ensure that violators will comply with the *Fisheries Act* within the shortest possible time, that violations are not repeated and that all available enforcement tools are used.”⁷

The Submitters note that the 1991 PPER regulations, which took effect in July 1992, define acutely lethal effluent, biochemical oxygen demand (or BOD) matter and total suspended solids (or TSS) as deleterious under the *Fisheries Act*. According to the Submitters, the PPER authorize levels of BOD and TSS that do exceed specified maximum quantities as long as certain conditions are met, but (at least since 1995) they strictly prohibit acutely lethal effluent.⁸ The Submitters describe the conditions for discharges of TSS and BOD matter as “relating to monitoring equipment, monitoring reports, preparing a remedial plan in case the effluent fails certain acute-lethality tests, preparing and implementing an emergency response plan, and preparing environmental effects monitoring studies.”⁹

They also describe the test methods and effluent monitoring requirements for BOD, TSS and acute lethality and note that each day on which the PPER are violated constitutes a separate offense. They note that trout acute-lethality test failure is an automatic PPER (and hence *Fisheries Act*) violation that requires accelerated follow-up testing, and that failure of an acute-lethality test for *Daphnia magna*, while not an automatic violation, also requires follow-up test procedures. For both kinds of acute-lethality test, failure to conduct follow-up test procedures as required violates the PPER and the *Fisheries Act*. Testing for BOD levels and TSS is described as more straightforward. If testing shows levels of BOD or TSS above those authorized, the deposit is not authorized, violates the PPER and is an offense under the *Fisheries Act*. The submitters say that according to the *Compliance and Enforcement Policy*, every suspected violation is to be examined for action ranging from a warning to prosecution. Violations of s. 36(3) are punishable on summary conviction by a fine not exceeding C\$300,000 for a first offense and C\$300,000 plus imprisonment not exceeding six months for

⁵ Submission at 3. See *Fisheries Act* s. 36(3).

⁶ Submission at 4 (quoting *Compliance and Enforcement Policy*, Introduction).

⁷ Submission at 4.

⁸ Submission at 5. The submitters describe transitional authorizations under the PPER. Under ss.20-26, subject to conditions with a view to coming into compliance, mills unable to comply were allowed to exceed PPER limits and discharge acutely lethal effluent between 1 December 1992, and 31 December 1993, or under “extraordinary circumstances” and for reasons “beyond the control” of the mill operator, until 31 December 1995.

⁹ Submission at 5.

subsequent offenses, and for an indictable offense a fine not exceeding \$1 million for a first offense and a fine not exceeding \$1 million and imprisonment not exceeding three years for subsequent offenses.

B. Assertions Regarding Mills in Ontario, Quebec and the Atlantic Provinces

The Submitters next present in detail their assertion that Canada is failing to effectively enforce the *Fisheries Act* and the PPER in regard to pulp and paper mills in Ontario, Quebec and the Atlantic provinces. The two categories of noncompliance for which they contend enforcement is deficient are (1) failure to meet a “deleterious substances” effluent test (that is, either a BOD test, a TSS test or a trout acute-lethality test) and (2) failure to conduct follow-up testing as required when there is an effluent test failure. The submission and its appendices provide information on alleged violations at approximately 70 of the 116 mills that the Submitters identify, with twelve mills highlighted as mills of particular concern to the Submitters.

In regard to Quebec, the Submitters obtained data that they claim show 960 acute-lethality, BOD and TSS violations from 1995 to 2000 at nine mills. They claim that in 2000, 26 Quebec mills had 171 violations (presumably acute lethality, BOD and TSS violations); 24 mills failed the trout acute-lethality test, 33.3 percent of which also violated follow-up test procedures; and 28 mills, after failing the *Daphnia magna* acute-lethality test, violated the acute-lethality follow-up procedures.¹⁰ In all, the Submitters claim that there were at least 250 reported potential offenses for failure to follow the PPER follow-up test procedures throughout Quebec in 2000. The Submitters claim that, despite these offenses, they could find no *Fisheries Act* prosecutions or convictions of any Quebec mills, and they state that they are particularly concerned about apparent lack of effective enforcement at six mills, based on data from 2000. Of these, they highlight especially the Tembec Inc. mill in Témiscaming, for which they claim no prosecution was brought for noncompliance with either federal or provincial effluent regulations despite an alleged 275 reported violations from 1995 through 2000.

With regard to Ontario’s 33 regulated pulp and paper mills, the Submitters highlight the data for 13 mills that had over 225 acute-lethality, BOD and TSS test failures between 1996 and 2000. In 2000 alone, the Submitters claim that 7 mills were responsible for 18 such test failures, that six of those mills failed the trout acute-lethality test and that two of the mills also failed the trout lethality test follow-up procedures. They also claim that nine mills violated the *Daphnia magna* follow-up procedures. In all, the Submitters claim there were at least 94 follow-up test procedure violations at Ontario mills in 2000. The Submitters assert that from 1995 to 2000, six Ontario mills were prosecuted under the PPER, which they believe explains the lower number of alleged violations in Ontario as compared to Quebec and the Atlantic provinces, where the Submitters claim there have been fewer prosecutions. Nonetheless, on

¹⁰ Appendix 6 to the submission provides a flowchart showing the acute lethality testing procedures and the points at which violations occur.

the basis of 2000 data, the Submitters identify two Ontario mills for which they “have concerns about the apparent lack of effective enforcement of the federal laws.”¹¹

The Submitters obtained only partial data for the approximately 22 mills in the Atlantic provinces for the years 1995 to 2000 and claim therefore that they understate the number of alleged violations in those provinces. According to the Submitters, the data they obtained show that 19 mills reported 1,081 acute-lethality, BOD and TSS violations from 1995 to 2000. The Submitters did not calculate alleged follow-up test procedure violations for the Atlantic provinces. They claim that despite the number of alleged test failure violations, they found only “two prosecutions of mills in the Atlantic Region under the federal laws since the PPER came into force.”¹² Based on 2000 data, the Submitters are particularly concerned about the apparent lack of effective enforcement regarding four mills in the Atlantic provinces. According to the Submitters, the mill in the Atlantic provinces with the most alleged violations from 1995 to 2000, the Irving Saint John mill, was prosecuted under the federal laws in 1998 but still had 22 alleged test failure violations and an unknown number of alleged follow-up test violations in 2000.

The Submitters contend that the exclusions in NAAEC Article 45(1) from the definition of “failure to effectively enforce environmental law” do not apply. They claim that Canada’s alleged failure to effectively enforce the *Fisheries Act* and the PPER do not reflect a reasonable exercise of discretion or result from *bona fide* decisions to allocate resources to other enforcement matters within the meaning of Article 45(1). Among other things, they assert that “[i]t is not a reasonable exercise of discretion where an available enforcement tool, such as prosecutions, is used so infrequently in the face of widespread and numerous violations.”¹³

C. Request for a Factual Record

Finally, the Submitters present information in support of their contention that the submission meets the requirements of Article 14(1)(a)-(f) and that the submission merits requesting a response from Canada based on the criteria in Article 14(2). They ask the CEC to prepare a factual record on enforcement of cited provisions of the *Fisheries Act* and the PPER with respect to the mills in Quebec, Ontario and the Atlantic provinces that they identify in the submission.

¹¹ Submission at 9.

¹² Submission at 10.

¹³ Submission at 11.

III. SUMMARY OF THE RESPONSE

Canada's response provides clarifying information on the general basis of the enforcement decisions of the Government of Canada and a description of enforcement decisions regarding specific cases raised by the Submitters.

A. Clarifying Information

Canada first provides “clarifying information” regarding Canada’s approach to enforcing the PPER and the *Fisheries Act*, so as to “assist the reader in understanding the facts pertaining to the specific cases identified in the submission as of particular concern to the Submitters.”¹⁴ Canada describes the role of fishery inspectors in conducting inspections and investigations and choosing the appropriate response if the inspector has reason to believe that an offense has been committed.¹⁵ Canada states that, consistent with the *Compliance and Enforcement Policy*, it will “choose the appropriate response such as a warning, inspector’s direction, prosecution, etc....”¹⁶ Canada explains that “[t]he response to a violation will be chosen taking into account the nature of the violation, the likelihood of achieving the desired result (i.e., compliance with the *Fisheries Act* in the shortest possible time and no further occurrence of violations), and consistency in enforcement.”¹⁷ The response provides criteria taken into account in assessing these factors. Canada states that the “ultimate decision on whether or not to proceed with a prosecution of the charges rest [*sic*] with the Attorney General of Canada.”¹⁸

Canada then describes methodologies for determining compliance under the PPER. Canada notes that the margins of error in the methodologies for determining compliance of effluent with the regulated limits for biological oxygen demand (BOD), and total suspended solids (TSS) may affect decisions on enforcement, especially as to whether a conviction may be obtained in accordance with the criminal burden of proof (guilt beyond a reasonable doubt).¹⁹

B. Enforcement Decisions for Specific Mills

The main body of Canada’s response is a discussion of its actions in connection with twelve specific mills identified in the submission, divided into sections on the Atlantic provinces, Quebec and Ontario.

¹⁴ Response at 2.

¹⁵ Response at 3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Response at 4.

¹⁹ Response at 4-5.

1. Atlantic provinces

In regard to four mills in the Atlantic provinces, Canada states that it subjected the mills' monthly effluent reports to an "off-site inspection" or review of the data. In cases of exceedance of TSS or BOD limits or the prohibition on acutely lethal effluent, the response states that from 1995–2000, it was routine practice of Environment Canada *Fisheries Act* inspectors to discuss the exceedances with Environment Canada specialists in the operation of pulp and paper mills.

a. Irving Pulp and Paper Ltd., Saint John, New Brunswick

The response provides information regarding the Irving Pulp and Paper Ltd. in Saint John, New Brunswick, for the period 1995 through 2000. The response states that this mill did not come into compliance with the PPER as required at the end of 1995 because of delays in environmental assessment approval from the province for a conventional treatment facility and the subsequent inability of the mill to complete in time the internal mill process changes it pursued as an alternate route to compliance.

In 1996, of the mill reported 481 test failures, including 157 failures of the trout acute-lethality test. In January, Environment Canada began an investigation of alleged PPER violations at the mill. Environment Canada closed the investigation after the mill indicated that modifications to the mill would achieve compliance by September. Federal inspectors also conducted an on-site inspection and issued the mill a written warning in July for exceedances of the BOD limit and for acute lethality. An effluent sample taken in December failed the trout lethality test.

In 1997, the mill reported 127 test failures. At an April meeting between representatives of Environment Canada, the provincial department and the mill, Irving presented a plan to meet the requirements of the PPER. In June, Environment Canada requested a tighter schedule and after project delays in August and September, "began to examine enforcement options."²⁰

In 1998, the mill reported 80 test failures. In the early spring of 1998, effluent collected under a search warrant failed the trout test and the mill was charged for *Fisheries Act* violations. In August, the mill was charged a second time under s. 36(3) for the discharge of green liquor and the company pled guilty and was fined \$50,000. After the company "fine-tuned the operation of the internal treatment systems it had installed to meet the regulatory limits,"²¹ reports and tests showed a reduced number of acute-lethality test failures, some non-lethal samples and improved, but still non-conforming, levels of BOD that the mill began to address. Following consultations with Environment Canada officials, in October 1998, the Attorney General advised that a prosecution was not warranted.

²⁰ Response at 7.

²¹ *Id.*

In 1999, the mill reported a total of 11 test failures. The internal changes made in 1998 generally allowed the Irving mill to meet all discharge limits except the monthly limit on BOD. Environment Canada process specialists indicated that the mill was making progress on this problem. The mill subsequently failed some acute-lethality tests, but by October, the effluent passed.

In 2000, the mill reported 25 exceedances, including six failures of trout acute-lethality tests. Two trout test failures came in February, attributed by the mill to start-up after a shutdown; and two more in April said to be due to a membrane leak in the treatment reverse osmosis unit. The response states: “In a manner consistent with the factors to consider before taking action with respect to an alleged violation, Environment Canada decided that the mill had reported corrective action and that no action on the inspector’s part was required.”²² The mill attributed a further failure in June to maintenance work. Environment Canada subsequently conducted an on-site inspection and all the samples taken passed the trout lethality test. The mill reported failure of a trout lethality test failure in December, after which the follow-up tests passed as required. Hence Environment Canada took no action. The mill explained that the 19 reported failures of TSS and BOD tests were due to maintenance activities or were corrected, and some exceedances were within the margin of precision. Environment Canada therefore took no action.²³

b. AV Cell Inc. at Atholville, New Brunswick

The response reports 35 alleged violations by this mill in 2000. As regards 10 failures of the trout acute-lethality test, the mill set up a “trouble-shooting” team but the test failures continued. Both Environment Canada and the New Brunswick Environment Department conducted on-site sampling, and the province proceeded with a prosecution for failure of the trout lethality tests. In these circumstances, Environment Canada took no enforcement measures. The mill pled guilty to the provincial charge and was fined \$30,000. The mill reported failures of the TSS limits in every month from January to May and of BOD in February, March and July. The mill attributed these test failures to maintenance, a temporary shutdown and a process change, and took corrective action. Environment Canada decided not to act. Canada says that the PPER allows for an authorization for higher emissions associated with process changes, and that the mill applied and received such an authorization in May 2000.

c. Abitibi-Consolidated Inc., Grand Falls, Newfoundland

This mill reported nine failures of the trout acute-lethality test in April, May, June, November and December of 2000. Process changes made prior to December did not prevent the December test failure. Environment Canada inspectors conducted on-site inspections in June

²² Response at 9.

²³ Response at 10-11.

and July and executed a search warrant and took effluent samples in December. All of the Environment Canada samples passed the trout lethality test.

d. Bowater Mersey Paper Company Ltd., Brooklyn, Nova Scotia

In 2000, this mill reported 16 test failures, including 13 trout acute-lethality test failures and three daily TSS failures. On the basis of an “adequate compliance history” and “ongoing corrective measures,” Environment Canada took no immediate action for two trout test failures reported in January.²⁴ Following another acute-lethality test in June, Environment Canada took samples that passed the test, and the mill took corrective action. The mill reported no test failures after October, and an Environment Canada sample taken in January 2001 passed. In view of the mill’s corrective action, Environment Canada decided to take no action in regard to the trout test failures. After the mill reported a TSS test failure in January, it installed a new system for removing solids, which was complete in December. The mill attributed TSS test failures in April 2000 to the dredging of its treatment system.

2. Quebec

With respect to mills in Quebec, Canada’s response explains that consistent with the spirit of an expired federal-provincial agreement, the six mills discussed in the response submitted monthly effluent reports under the PPER to the province, which served as a “single window” for information required under both provincial and federal legislation. The province then forwarded the information to Environment Canada. The federal-provincial agreement expired in 2000.²⁵

a. Tembec Inc., Témiscaming, Québec

The response explains that this mill had a transitional authorization that expired in December 1995 and that the mill had complied with the conditions of the authorization. The response then provides information regarding the mill for the years 1996 through 2000.

For 1996, the mill reported 25 failures of the monthly trout lethality test and 82 failures of the weekly follow-up trout lethality test, with failures of both in every month of the year. Environment Canada reviewed the effluent reports and contacted the Quebec Ministry of the Environment (QME), which issued notices of violation of the provincial law in May and September 1996 and January and February 1997. The QME requested a corrective action plan, which the mill finalized in July 1996. Environment Canada took into account the actions of the province.

In 1997, the mill failed monthly or weekly trout acute-lethality tests in every month, for a total of 66 failures. The mill also reported four failures of TSS or BOD tests. Environment Canada

²⁴ Response at 15.

²⁵ Response at 17.

inspector reviewed the effluent reports and consulted with the province. QME indicated that it issued notices of violation in April, July, September, October, November and December 1997 and in January and February 1998. Environment Canada took into account the actions of the province.

In 1998, the mill reported failures of trout acute-lethality tests in every month. The mill reported failure of daily TSS tests on 16 occasions. QME requested a corrective plan from the mill and approved it in May 1998. QME also issued notices of infraction in every month from May to October 1998 and in February 1999. Environment Canada initiated an investigation in April 1998.²⁶

In 1999, the mill reported 20 failures of the monthly or weekly trout acute-lethality tests and nine failures of the daily TSS test. The mill reportedly continued to work to achieve the requirements of its 1998 corrective action plan, and QME issued notices of infraction every month from March through September. Environment Canada's investigation continued.

In 2000, the mill reported five failures of the monthly or weekly trout acute-lethality test and three failures of the daily TSS limit. QME issued notices of infraction in April and July. In October, the Attorney General advised Environment Canada that a prosecution was not warranted. The mill took corrective action that according to Canada "significantly improved its rate of conformity from 1997 to 2000."²⁷

b. The five other Quebec mills

For the remaining five Quebec mills discussed in the response, Canada provides information for the year 2000. For the Fjordcell Inc. mill at Jonquière, the Tembec Inc. mill at St. Raymond and the La Compagnie J. Ford Ltd. mill at Portneuf, Canada provides a summary of the effluent reports for each mill but limited additional information because of investigations that were pending at the time of the response. The investigations were initiated in July, August and September 2000. The response states that the Uniforêt-Pâte Port Cartier Inc. mill at Port-Cartier reported 24 failures of daily TSS and BOD tests and monthly trout acute-lethality tests and that Environment Canada issued written warnings. The response states that the mill ceased operating in February 2001. The response indicates that the F.F. Soucy Inc. mill at Rivière-du-Loup was in compliance throughout 2000.

3. Ontario

The response addresses the concerns raised by the Submitters with respect to two Ontario mills in 2000, the Abitibi-Consolidated Inc., mill in Iroquois Falls and the Interlake Papers mill in St. Catherines. In light of investigations begun at the Abitibi Consolidated mill in October

²⁶ Response at 21.

²⁷ Response at 23.

2001 and at the Interlake Papers mill in October 2000, both of which were ongoing at the time of the response, Canada provided only limited information regarding these two mills.

IV. ANALYSIS

The Secretariat considers that the submission, in light of Canada's response, warrants developing a factual record as recommended in this notification.²⁸ The reasons for the Secretariat's recommendation are set forth below.

To reach this stage, the Secretariat must first determine that a submission meets the criteria in Article 14(1) and that it merits requesting a response from the Party based upon a review of the factors in Article 14(2). As indicated above, on 7 June 2002, the Secretariat determined that the submission meets the criteria for continued review included in Article 14(1) and that, based on the factors in Article 14(2), the submission warranted a response from the Party.²⁹

A. Why a factual record is warranted

This submission seeks a factual record regarding enforcement of the *Fisheries Act*, one of the principal federal environmental statutes in Canada, in regard to one of Canada's important industrial sectors, the pulp and paper industry. In the submission and supporting materials attached to it, the Submitters describe the environmental, economic and trade significance of the pulp and paper industry. They call it "Canada's largest net export sector"³⁰ and describe the significant water use and discharge of organic waste and chemicals associated with pulp and paper production processes used in Canada.³¹ They note the public concern regarding pollutant discharges from pulp and paper mills that led to the promulgation of the PPER in 1991. Both the submission and the response allude to the challenges that the pulp and paper industry and the government face in striving to achieve compliance with the *Fisheries Act* and the PPER in the pulp and paper sector. The submission emphasizes the Submitters' concern over a perceived lack of prosecutions to enforce and assure compliance with the PPER and the *Fisheries Act*.

Canada's response to the submission provides a considerable amount of information regarding the federal government's actions in regard to twelve specific mills mentioned in the submission. Nonetheless, it leaves open central questions regarding Canada's enforcement of

²⁸ On 16 October 2002, the Submitters sent to the Secretariat a brief "reply" to Canada's response. Neither the NAAEC nor the Guidelines make any provision for a reply to a response. Consistent with its practice to date, the Secretariat did not consider the Submitters' reply in conducting its review under Article 15(1) but will retain the reply for possible consideration during the preparation of a factual record, should the Council instruct the Secretariat to prepare one.

²⁹ SEM-02-003 (Pulp and Paper), Determination in accordance with Article 14(1) and (2) (7 June 2002).

³⁰ Submission at 2.

³¹ Submission at 2-3.

the relevant provisions of the *Fisheries Act* and the PPER at the mills of concern. A factual record would afford a thorough and detailed factual examination relevant to those open questions so as to allow a more comprehensive consideration of whether Canada is failing to effectively enforce those laws as the Submitters assert.

Although the primary focus of the submission is on twelve specific mills, the Submitters provide information regarding the *Fisheries Act* and PPER compliance record for 1995 through 2000 at approximately 116 mills in eastern Canada, noting over 2,400 alleged violations. Appendices 5 and 7 to the submission, in particular, provide considerable detail regarding those alleged violations. The Secretariat considered the information regarding the twelve mills of heightened concern in light of the extensive information provided in regard to numerous other mills as well. With this comprehensive view of the submission in mind, the following sections explain why a factual record is warranted to present detailed information regarding matters that the submission and Canada's response leave open.

1. Failure to conduct acute-lethality tests and follow-up tests

The submission focuses in part on Canada's alleged failure to effectively enforce the *Fisheries Act* and PPER when pulp and paper mills do not conduct required acute-lethality tests and follow-up tests.³² A factual record is warranted to present a clearer and more comprehensive set of factual information regarding acute-lethality test failures and failures to conduct follow-up as required.

Additional information is especially warranted in regard to follow-up testing. Appendix 7 to the submission provides detailed information regarding 344 alleged failures to conduct follow-up tests as required by 48 mills in Ontario and Quebec in 2000. The federal government's investigation of two of the Ontario mills, discussed in Canada's response, indicates that Canada considers failure to conduct follow-up tests to be a potential compliance problem meriting investigation.³³ Although the response provides some information on some of the mills' reporting of follow-up tests for trout lethality,³⁴ the picture it presents regarding follow-up testing for trout lethality is far from complete, and it provides almost no information regarding testing and follow-up testing for *Daphnia* lethality. The response also does not address the Submitters' emphasis on the magnification of the extent of alleged noncompliance that occurs because each day of noncompliance constitutes a separate offense under the *Fisheries Act*. Under this continuing offense provision, the Submitters contend that the 344 alleged failures to conduct follow-up tests as required resulted in 1,406 alleged violations.

In addition, unexplained discrepancies exist between the submission and response regarding the number of test failures at the mills of concern. For example, for the F.F. Soucy Inc. mill in Rivière-du-Loup, Quebec, Canada indicates that it found no instances of noncompliance in

³² Submission, at 5 and 8.

³³ Response at 27-28.

³⁴ See, e.g., Response at 8. 911, 13, 15, 18, 19, 20, 24 and 27.

2000.³⁵ By contrast, the Submitters allege that in 2000 the mill had four test failure violations and 36 violations for failure to conduct follow-up tests as required.³⁶ Discrepancies between the submission and response also exist in regard to test failures at the Irving Pulp and Paper mill at Saint John,³⁷ the AV Cell mill at Atholville,³⁸ the Tembec mill at Témiscaming,³⁹ and the Fjordcell mill in Jonquière.⁴⁰ A factual record would afford an opportunity to develop and present factual information in regard to such discrepancies, in particular those for which the submission alleges a greater number of failures than are reported in Canada's response.

2. Canada's consideration of provincial enforcement action

Several times in its response, Canada makes note of provincial enforcement action and in some cases states that Canada took such action into account in determining how to respond to possible noncompliance with the PPER or the *Fisheries Act* at various mills.⁴¹ The Submitters do not assert that any of the provinces are failing to effectively enforce provincial environmental laws, and the Secretariat is not proposing that a factual record is warranted to consider any such assertion. However, information regarding provincial enforcement action may be relevant to a consideration of whether the federal government is failing to effectively enforce provisions of the *Fisheries Act* and the PPER if the federal government took provincial action into account in determining its own enforcement response. A factual record is warranted to present in more detail facts regarding the manner and extent to which the federal government took into account action, such as approval of corrective action plans, notices of infractions or other enforcement-related measures, that provincial officials took in regard to certain mills.⁴² More detailed information than is included in Canada's response regarding federal-provincial administrative agreements or other federal-provincial

³⁵ Response at 26.

³⁶ Submission at 8, Appendix 5 at 2, Appendix 7 at 9-10.

³⁷ Compare Submission, Appendix 5 at 14 (106 BOD test failures and 97 trout lethality test failures in 1996) with Response at 6 (324 BOD test failures and 157 trout lethality test failures in 1996); compare Submission, Appendix 5 at 14 (49 trout lethality test failures in 1997) with Response at 6 (51 trout lethality test failures in 1997); and compare Submission, Appendix 5 at 15 (7 monthly BOD test failures and 5 trout lethality test failures in 2000) with Response (9 monthly BOD test failures and 6 trout lethality test failures in 2000).

³⁸ Compare Submission, Appendix 5 at 15 (4 monthly TSS test failures and 9 trout lethality test failures in 2000) with Response at 11 (5 monthly TSS test failures and 10 trout lethality test failures in 2000).

³⁹ Compare Submission, Appendix 5, at 5 (1 daily TSS test failure and 25 trout lethality test failures in 1996) with Response at 18 (no daily TSS test failures and 21 trout lethality test failures in 1996); compare Submission, Appendix 5 at 6 (5 daily TSS test failures and 65 trout lethality test failures in 1997) with Response at 19 (1 daily TSS test failure and 66 trout lethality test failures in 1997); compare Submission, Appendix 5 at 6 (7 daily TSS test failures and 44 trout lethality test failures in 1998) with Response at 20 (16 daily TSS test failures and 78 trout lethality test failures in 1998); compare Submission, Appendix 5 at 6 (8 daily TSS test failures and 25 trout lethality test failures in 1999) with Response at 22 (9 daily TSS test failures and 20 trout lethality test failures in 1999); and compare Submission, Appendix 5 at 8 (2 daily TSS test failures in 2000) with Response at 23 (3 daily TSS test failures in 2000).

⁴⁰ Compare Submission, Appendix 5 at 8 (28 BOD test failures and 9 trout lethality test failures in 2000) with Response at 24 (28 BOD test failures and 7 trout lethality test failures in 2000).

⁴¹ Response at 12, 18, 19, 21-25, 27.

⁴² Response at 7, 11-12, 18-19, 21, 22-27.

arrangements on enforcement of the *Fisheries Act* would also be relevant to understanding Canada's consideration of provincial enforcement activity.

By way of illustration, factual information regarding the relation of provincial enforcement actions to federal enforcement responses is relevant in regard to the Submitters' assertion of a total absence of federal prosecution for alleged violations of the *Fisheries Act* and the PPER in connection with Quebec mills.⁴³ The Submission gives minimal information on prosecutions of pulp and paper mills under Quebec law.⁴⁴ Similarly, Canada's response indicates in several places that QME's issuance of notices of infraction was a factor relevant to federal decisions on compliance and enforcement responses.⁴⁵ However, the response does not explain the nature and terms of those notices of infraction, the effect those notices had in achieving compliance, any sanctions obtained in connection with the notices or other information regarding the notices that may have been relevant to the federal government's consideration of them. To present a complete picture, a factual record would also allow for a more detailed presentation of facts regarding other examples, such as Canada's decision not to take enforcement in connection with alleged ongoing discharge of acutely lethal effluent by the AV Cell mill in New Brunswick in view of provincial charges leading to a fine of \$30,000.⁴⁶

3. Canada's use of the full set of options under the *Compliance and Enforcement Policy*

The submission highlights the Submitters' primary concern regarding the alleged lack of prosecutions of pulp and paper mills and does not discuss in detail other possible enforcement responses. Nonetheless, both the submission and Canada's response note the full range of available enforcement responses under the *Compliance and Enforcement Policy*.⁴⁷ These responses include actions short of court proceedings, such as warnings, directions by Fishery inspectors, authorizations, and ministerial orders, as well as court actions, such as injunctions, prosecution, court orders upon conviction and civil suits for recovery of costs.⁴⁸ Canada explains that, following an inspection or investigation, "[t]he response to a violation will be chosen taking into account the nature of the violation, the likelihood of achieving the desired result (i.e., compliance with the *Fisheries Act* in the shortest possible time and no further occurrence of violations), and consistency in enforcement."⁴⁹

For the twelve mills highlighted in the submission, Canada's response recounts several instances in which Canada issued warnings and notes one federal prosecution resulting in the payment of a fine. Canada does not mention any instances in which ministerial orders, as to which the *Compliance and Enforcement Policy* indicates failure to comply may result in

⁴³ Submission at 7-8.

⁴⁴ Submission at 8, Appendix 5 at 1.

⁴⁵ Response at 18, 19, 21, 22, 23, 25, 27.

⁴⁶ Response at 11-12.

⁴⁷ Submission at 4; Response at 3.

⁴⁸ Compliance and Enforcement Policy (July 2001) at 5 (attached to Submission as Appendix 4).

⁴⁹ Response at 3.

prosecution,⁵⁰ were used to seek compliance. In several instances, Canada indicates that its enforcement response took into account a mill's corrective action, but in no case is there any indication that the corrective action plan was part of a binding, enforceable order or agreement. In addition, the response indicates occasions on which warnings were sent to mills, at least two of which became the subject of *Fisheries Act* investigations.⁵¹ The *Compliance and Enforcement Policy* indicates that prosecution is the preferred course of action where "the alleged violator had previously received a warning for the activity and did not take all reasonable measures to stop or avoid the violation."⁵²

A factual record is warranted to examine in further detail Canada's consideration and use in connection with the pulp and papers mills discussed in the submission of the full range of enforcement options described in the *Compliance and Enforcement Policy*, including ministerial orders, warnings and prosecutions, and the results obtained. In connection with fines imposed, relevant information would include facts regarding the factors taken into account in recommending sentences under the *Compliance and Enforcement Policy*, such as the benefit gained, the number and nature of previous convictions, deterrence of future violations, prevalence and trends in the type of violation involved generally and sentencing precedents in similar cases.

4. Self-reporting, inspections and investigations

The large number of instances of alleged noncompliance with the *Fisheries Act* and PPER as reflected in mandatory reporting by individual mills lies at the heart of the submission. Canada's response reveals no instance in which Canada initiated a prosecution without tests by government inspectors that confirmed reports from mills of discharges with levels of TSS or BOD that exceed PPER limits or discharges of acutely lethal effluent. In addition, the response indicates instances in which the results of Environment Canada's on-site sampling differed from the results reported by mills. One possibly relevant factor, mentioned in Canada's response, is the range of precision for the monitoring tests for TSS and BOD.⁵³

The federal government has relied on self-reported data in prosecutions in other contexts.⁵⁴ A factual record would afford the opportunity to present detailed facts regarding the application of the *Compliance and Enforcement Policy* in connection with self-reported instances of noncompliance and, in particular, in regard to the practice of consulting with Environment

⁵⁰ *Compliance and Enforcement Policy* (July 2001) at 23.

⁵¹ E.g., Response at 25, 27.

⁵² *Compliance and Enforcement Policy* (July 2001) at 24.

⁵³ Response at 4.

⁵⁴ In 1995, the Supreme Court of Canada held in *R.v. Fitzpatrick*, [1995] 4 S.C.R. 154, that on charges of exceeding a fishing quota under the *Fisheries Act* and its regulations, the Crown could introduce into evidence "hail reports" required to be made by the fisherman. Their use was held not to offend the *Canadian Charter of Rights and Freedoms* right not to be deprived of the right against self-incrimination as included in the s.7 protection of the liberty and security of the person except in accord with the principles of fundamental justice.

Canada pulp and paper mill specialists and conducting on-site testing and investigations to confirm the results of test failures.

A factual record is also warranted to present detailed information regarding the investigations that Canada has undertaken at several of the mills. For example, in the case of the Tembec mill in Témiscaming, Quebec, Canada refers to an investigation file that was opened by Environment Canada in April 1998 and remained “active” until October 2000, when “the Attorney General advised that a prosecution was not warranted given the particular facts of this case.”⁵⁵ During the period in which the investigation was underway, the response reveals several instances of reported test failures and noncompliance with the *Fisheries Act* and PPER, contacts between Environment Canada and the mill operators, off-site federal inspections and a number of provincial notices of infraction and corrective plans. There appears to have been in that period some improvement in compliance by the mill. For this and other investigations, a factual record would provide an opportunity to present additional factual information regarding the concrete steps in the investigation, its results and the federal decisions that followed.⁵⁶

5. Information regarding compliance promotion

The *Compliance and Enforcement Policy* makes a distinction between enforcement and measures to promote compliance. Compliance-promoting activities listed in the policy include communication and publication of information, public education, consultation with parties affected by the pollution prevention and habitat protection provisions of the *Fisheries Act* and technical assistance.⁵⁷ Preparation of a factual record regarding the open questions discussed above would provide an opportunity to present relevant information regarding Canada’s actions, in addition to the kinds of enforcement measures listed in the *Compliance and Enforcement Policy*, to promote compliance at the mills of concern in the submission. It would also provide an opportunity to present information regarding Canada’s use of those appropriate governmental actions set out in Article 5 of the NAAEC that are relevant to assertions in the submission.

In addition, a factual record would afford an opportunity to provide further information regarding the challenges that the pulp and paper sector has faced in seeking to achieve compliance with the *Fisheries Act* and the PPER. This would include information regarding the nature, environmental limitations and compliance potential of various pulp and paper technologies mentioned in the submission;⁵⁸ the kinds of process, facility and equipment

⁵⁵ Response at 21-23.

⁵⁶ The Secretariat is aware that certain information regarding investigations might be subject to confidentiality, as recognized in the NAAEC and the Guidelines. See, e.g., NAAEC Articles 11(8), 39; Guideline 17.

⁵⁷ *Compliance and Enforcement Policy* (July 2001) at 5. See also the activities listed on pages 14–18 of the policy.

⁵⁸ Submission at 2-4, Appendix 3.

changes required to achieve compliance; the economic costs of compliance; and the variability in these factors across the mills of concern in the submission.

B. Consideration of Canada's pending investigations at certain mills

Canada declined to provide further facts with regard to the record of certain mills on the basis of ongoing investigations by Environment Canada.⁵⁹ Canada does not state that these investigations are pending judicial or administrative proceedings that bar the Secretariat from proceeding further.⁶⁰ However, with previous submissions, the Secretariat has noted that ongoing, timely and active investigations, especially with a view to penal proceedings, may in appropriate cases militate against proceeding with a factual record that could interfere with or jeopardize those proceedings.⁶¹

Canada's response indicates that the five Environment Canada investigations mentioned were commenced in July 2000, August 2000, September 2000, October 2000 and October 2001. The factual record recommended here need not include information regarding instances of noncompliance for which a pending administrative or judicial proceeding or a timely and active investigation, capable of leading to charges, is underway. However, for the mills under investigation at the time of the response, a factual record is warranted to present information regarding: 1) investigations that have been concluded, 2) alleged violations for which no investigation was undertaken, and 3) alleged violations for which the two-year limitation period for summary conviction criminal proceedings has run or an indictment is no longer a realistic option.⁶²

V. RECOMMENDATION

For the foregoing reasons, the Secretariat considers that this submission, in light of Canada's response, warrants the development of a factual record and hereby so informs the Council. The submission and response leave open matters for which a more detailed presentation of factual information will assist in considering whether Canada is failing to effectively enforce the *Fisheries Act* and the PPER in Ontario, Quebec and the Atlantic provinces, as the Submitters allege. As discussed above in detail, a factual record is warranted to develop and present, in connection with all of the mills of concern in the submission, detailed factual information regarding: (1) the federal response to alleged effluent test failures and failures to conduct follow-up tests as required under the PPER; (2) Canada's consideration of provincial action in enforcing the PPER; (3) Canada's use of the full set of options under the *Compliance*

⁵⁹ Response at 24 (Fjordcell), 25 (Tembec and St-Raymond), 27 (J. Ford), 27 (Abitibi Consolidated), 28 (Interlake Paper).

⁶⁰ See NAAEC Article 14(3)(a).

⁶¹ SEM-00-004 (BC Logging), Article 15(1) Notification, at 15-17.

⁶² *Fisheries Act* s. 82. Section 40 of the *Fisheries Act* creates hybrid offenses, and in proceedings by way of indictment (subject to the relations of ss. 7 and 11 (b) of the *Canadian Charter of Rights and Freedom*) no limitation period applies.

and Enforcement Policy in enforcing the PPER; (4) the system of self-reporting, inspections and investigations that Canada employs in enforcing the PPER; and (5) federal efforts to promote compliance with the PPER. Information regarding offenses for which a timely and active investigation, capable of leading to charges, is underway need not be included in the factual record. In light of the comprehensive information presented in the Appendices 5 and 7 to the submission in addition to the detailed information regarding the twelve mills of particular concern, the factual record should present facts regarding specific mills in the context of factual information regarding the broader enforcement concerns throughout eastern Canada that frame the submission.

Accordingly, pursuant to Article 15(1), and for the reasons set forth in this document, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by developing a factual record as recommended herein regarding the submission.

Respectfully submitted on this 8th day of October 2003.

per: (*original signed*)
 William V. Kennedy
 Executive Director