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Secretariat of the Commission for Environmental Cooperation of North America

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

Submission I.D. No.:	**SEM-00-004**
Submitter(s):	David Suzuki Foundation Greenpeace Canada Sierra Club of British Columbia Northwest Ecosystem Alliance National Resources Defence Council
Represented by:	Sierra Legal Defence Fund Earthjustice Legal Defence Fund
Concerned Party:	Canada
Date Received:	15 March 2000
Date of this Determination:	27 July 2001

I. EXECUTIVE SUMMARY

Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement") provides that the Secretariat of the Commission for Environmental Cooperation of North America (the "Secretariat") may consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements in Article 14(1). When the Secretariat determines that a submission meets the requirements in Article 14(1), it then determines based on factors set out in Article 14(2) whether the submission merits requesting a response from the Party named in the submission. If the Secretariat considers that the submission, in light of any response from the Party, warrants developing a factual record, the Secretariat must inform the Council and provide its reasons (Article 15(1)). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record (Article 15(2)).

On 15 March 2000, the Submitters filed with the Secretariat a submission alleging that Canada is failing systemically to enforce sections 35(1) and 36(3) of the *Fisheries Act* effectively in connection with logging operations on public and private land in British Columbia and is also failing to meet its obligation in Article 7 of the NAAEC to ensure that its judicial proceedings comply with due process of law and are sufficiently open to the public. To support their allegations, the Submitters included information indicating that: 1) salmon populations in British Columbia are seriously declining; 2) logging has contributed to this decline in salmon populations;

3) certain logging activities that are likely to have harmful impacts on fish and fish habitat are allowed system-wide on public and private lands in British Columbia under provincial forestry laws and regulations; 4) in reliance on these provincial laws and regulations, Canada has scaled back its review of whether logging plans will ensure compliance with the *Fisheries Act*; 5) Canada rarely prosecutes *Fisheries Act* violations resulting from logging operations in British Columbia; and 6) Fisheries and Oceans Canada (the Department of Fisheries and Oceans, referred to hereafter as DFO) staff are concerned that British Columbia forestry laws and regulations are not sufficiently protecting fish and fish habitat. The Submitters described TimberWest's logging in three areas in the Sooke watershed as an example of a logging operation on private land that resulted in *Fisheries Act* violations as to which Canada's enforcement response was inadequate.

On 8 May 2000, the Secretariat determined that the Submitters' allegations regarding enforcement of the *Fisheries Act*, but not the allegation regarding Article 7, met the criteria in Article 14(1) and merited a response from the Party in light of the factors listed in Article 14(2).[1] On 6 July 2000, the Secretariat received a response from the Party. Canada responded to the Submitters' assertions regarding logging activity by TimberWest in three areas in the Sooke watershed but did not provide any response to the allegation in the submission of a province-wide failure to effectively enforce the *Fisheries Act* generally in connection with logging operations. This determination is the Secretariat's notification to Council, in accordance with Article 15(1), that certain aspects of the Submission, in light of the Response, warrant developing a factual record.

II. SUMMARY OF THE SUBMISSION

The submission contains two basic assertions. First, the Submitters assert that the Party is failing to effectively enforce sections 35 and 36 of the federal *Fisheries Act* in connection with logging operations on public and private lands throughout British Columbia. Section 35(1) prohibits the harmful alteration, disruption or destruction of fish habitat in the absence of an authorization issued or regulations made under section 35(2). Section 36(3) prohibits the deposit of deleterious substances in waters frequented by fish unless the deposit is authorized by regulation. Second, the Submitters assert that the Party is failing to effectively enforce certain Articles of NAAEC. In its 8 May 2000 determination pursuant to Article 14(1) and (2), the Secretariat determined that this second assertion did not satisfy the requirements of Article 14(1) and did not request a response to this assertion from the Party. This notification will address only the first assertion, which is summarized briefly below.[2]

The Submitters assert that although Canada has the jurisdiction and responsibility under the *Fisheries Act* to protect fish and fish habitat, it is not doing so effectively in regard to logging activity in British Columbia. They claim that Canada relies heavily on British Columbia's regulation of forest practices under its 1995 *Forest Practices Code* to ensure compliance with the *Fisheries Act* but state that British Columbia routinely allows logging practices under the *Forest Practices Code* that result in *Fisheries Act* violations on public lands.[3] They further claim that on

[1] See SEM-00-004 (BC Logging), Determination pursuant to Articles 14(1) and (2) (8 May 2000).
[2] A more detailed summary is presented in the Secretariat's determination pursuant to Articles 14(1) and (2) for this submission.
[3] Submission at 10-12.

private lands, "no effective provincial environmental protections apply."[4] Harmful logging practices on both public and private lands that the Submitters assert result in *Fisheries Act* violations for which Canada is failing to take effective enforcement action include clearcutting to the edge of small fish-bearing and non-fish bearing streams; logging, especially clearcutting, on steep, landslide-prone slopes adjacent to streams; and falling and yarding trees across small streams.[5]

To be clear, the Submitters do not contend that a factual record is warranted regarding whether British Columbia's laws and regulations regarding forest practices on public and private lands are adequate or effective for the purposes under provincial law for which they were adopted. Rather, they contend that Canada's reliance on those provincial laws and regulations amounts to an ineffective means for enforcing provisions of the federal *Fisheries Act*. Further, they contend that Canada has made a broad policy decision to reduce the federal role in reviewing logging practices for compliance with the *Fisheries Act* in reliance on those provincial laws and regulations, and therefore that the alleged ineffective enforcement is systemic throughout British Columbia.

A. Logging on Lands Subject to the B.C. *Forest Practices Code*

The Submitters point to the failure of the *Forest Practices Code* to ensure adequate protection on public lands of so-called "S4 streams," which are defined in the *Forest Practices Code* as fish-bearing streams less than 1.5 metres wide. They refer to a 1997 report examining a number of cutblocks logged or approved for logging in 1996 and indicating that 79% of S4 streams in four forest districts in coastal British Columbia were clearcut to both banks, a practice permissible under the *Forest Practices Code*.[6] As evidence that these practices are continuing, the Submitters attach portions of two specific forest development plans for the years 2000 to 2004. Both plans anticipate an average of only 30% retention of trees along S4 streams, with no minimum level of retention required, and one plan requires that at least 40% of the riparian management zone of S4 streams be cut.[7]

With respect to non-fish bearing streams, classified in the *Forest Practices Code* as "S5 and S6 streams," the Submitters claim that "[w]hile the impact of increased sedimentation or higher temperatures may be minimal in any one stream, the cumulative effect of all tributaries flowing into fish streams can have significant negative impacts on fish habitat."[8] The Submitters state that these streams receive little or no protection under the *Forest Practices Code* and that clearcutting to the banks of these streams is common.

The Submitters identify the logging of landslide-prone areas as another potentially destructive logging practice routinely permitted on public lands under the *Forest Practices Code*. They claim that clearcutting is allowed on Class V terrain, terrain for which the landslide risk is 70% or greater, in a number of instances in British Columbia. They state, for example, that a review of 13 forest development plans showed that 28% of all logging planned was scheduled for Class V terrain and

[4] Submission at 1.
[5] Submission at 10-12.
[6] Submission at 11 and Attachment 2.
[7] Submission at 11-12 and Attachments 9 and 10.
[8] Submission at 5.

that 97% of that terrain was scheduled for clearcutting, the logging method most likely to cause landslides.[9]

The Submitters also assert that falling and yarding of trees across S4 fish-bearing streams is regularly permitted under the *Forest Practices Code*. They refer to a 1997 report indicating that falling and yarding was permitted across 79% of the S4 streams reviewed for the report.[10] The Submitters also assert that falling and yarding across non-fish bearing streams (S5 and S6 streams) is permitted and routinely occurs under the *Forest Practices Code*.[11]

The Submitters claim that sections 35(1) and 36(3) of the *Fisheries Act* "are routinely and systematically violated" by these logging practices and that "no effective and appropriate enforcement action is being taken."[12] According to the Submitters, the harmful logging practices on which they focus lead to *Fisheries Act* violations in several ways. First, they result in loss of streamside vegetation, which can cause a long-term decline in the availability of naturally-occurring woody debris that is needed to create a variety of habitat types beneficial to fish. Second, they can lead to increased stream temperatures due to both the loss of shade along the streams and increased sedimentation. Third, they can adversely affect water quality and quantity, for example by destabilizing stream banks and increasing sedimentation that damages fish respiratory organs, fills in gravel beds necessary for spawning and certain life stages, and reduces dissolved oxygen.[13] The Submitters list a number of specific areas where, they assert, logging operations have caused or are causing harm to fish and fish habitat.[14]

B. Logging on Private Lands

The Submitters also assert that neither British Columbia nor Canada effectively ensures that logging on private land in British Columbia complies with the *Fisheries Act*, "particularly with respect to practices such as clearcutting to the streambanks of small streams and clearcutting landslide prone areas."[15] They assert that the *Forest Practices Code* does not apply to private land and that the proposed *Private Land Forest Practices Regulation*[16] is "sorely inadequate given its

[9] Submission at 11 and Attachment 8.
[10] The Submitters appear to refer to Attachment 2. Attachment 2, however, suggests a somewhat higher figure. According to the report, falling and yarding through streams was expressly prohibited for only 12% of streams and occurred on 82% of streams in the audit of forest development plans, logging plans and silviculture prescriptions (Attachment 2 at 20-21).
[11] Submission at 10 and Attachment 2.
[12] Executive Summary at iii.
[13] Submission at iii and 3-6. Some of the publications that the Submitters cite in support of their assertions about the harmful consequences of certain logging practices are not attached to the submission. The better practice is for submitters to attach relevant pages of all material to which a submission refers, even if in support of a background assertion. At a minimum, to promote timely processing of submissions, submitters should make every effort to attach relevant portions of all documentation supporting assertions that are central to a submission, unless that documentation is easily accessible to the public, the Parties and the Secretariat through the internet or other widespread and readily available means.
[14] Submission at 5, 6, 8-9 and Attachments 2, 6, 8 and 14. Although a number of these examples relate to logging that took place prior to 1994, they are used to illustrate the effects of practices that the Submitters allege are continuing today. The Submitters do not make any allegation that the Party failed to effectively enforce its laws prior to 1994.
[15] Submission at 8.
[16] This regulation came into force 1 April 2000, after the date of the submission.

lack of enforceable standards" and its lack of protection for small streams.[17] Specifically, they contend that the regulation, which is now in effect, provides no protection along streams less than 1.5 metres wide, nominal protection along larger streams, and no meaningful restrictions on clearcutting landslide-prone lands. Consequently, the Submitters contend, Canada's reliance on the regulation as means for ensuring compliance with the *Fisheries Act* amounts to ineffective enforcement of the *Fisheries Act*.

The Submitters cite logging by TimberWest of its private land in three areas in the Sooke watershed as "[o]ne particularly troubling example of private land logging. . . ."[18] and claim that while Canada has been made aware of these activities, it has taken no action against TimberWest. The Submitters indicate that, although requested to do so by the Submitters, Canada has not used its power under section 37(2) of the *Fisheries Act* to formally request plans and specifications from TimberWest and to order modifications to TimberWest's operations as necessary to comply with the *Fisheries Act*.[19]

C. Alleged Ineffective Enforcement

The Submitters assert that even though the damage described above is foreseeable and "the functioning of the *Forest Practices Code* does not assure compliance with the *Fisheries Act*, the Government of Canada seems to have simply left the protection of fish and fish habitat to the provincial government. . . ."[20] They state that Canada has stopped active involvement in the planning process relating to logging operations and also is failing to take remedial action after damage has occurred. They point in particular to a 31 January 1996 DFO letter explaining that

> [DFO] is changing its logging referral procedures in view of the increased stream protection afforded by the Forest Practices Code. The Code enhances protection for fish habitat by broadening the definition of a fish stream and widening streamside buffers to include wildlife considerations. In view of this enhanced protection for fish streams detailed block by block responses will no longer be provided on Forest Development Plans. We will continue to participate in planning meetings and watershed restoration plans when our involvement is expected to be beneficial to the fishery resource.[21]

The Submitters also provided documentation indicating a widespread concern among staff of DFO that the *Forest Practices Code* is inadequate to ensure compliance with the *Fisheries Act*.[22] Specifically, DFO staff expressed concern that "current logging practices in [British Columbia] rarely provide riparian leave strips or setbacks that adequately protect [S4, S5 and S6] streams" and confirmed that the federal *Fisheries Act* continues to apply to the practice of logging adjacent to

[17] Submission at 9.
[18] Submission at 8-9. See also Attachment 6 [referred to in the Submission as Attachment 5].
[19] See Attachment 6 [referred to in the Submission as Attachment 5].
[20] Submission at 12.
[21] Submission at 12, and Attachment 11.
[22] Submission at 12; Attachment 12, at 17; letters attached to Submitters' 31 March 2000 letter to the Secretariat.

small streams in this province.[23] DFO staff also outlined interim standards considered acceptable to meet fish habitat objectives, including retention levels approaching 100% in the riparian management zones of S4 streams (fish-bearing) and S5 and S6 streams (non-fish-bearing) that are direct tributaries to fish-bearing streams.[24]

With respect to DFO's alleged failure to take preventive action by being involved in the planning process, the Submitters appear to assert that Canada is failing effectively to use its powers under section 37 to protect fish and fish habitat proactively from the impacts of logging operations.[25] With respect to remedial action, the Submitters state that, despite prosecuting homeowners and others for *Fisheries Act* violations, "DFO statistics for the last three years in BC show that only one prosecution . . . for the type of activities outlined in this complaint has been brought"[26] and that "[t]hat prosecution was abandoned by DFO due to delay in pursuing the charges."[27]

III. SUMMARY OF THE RESPONSE

Canada does not respond to the Submitters' assertion that logging activities in British Columbia routinely violate sections 35(1) and 36(3) of the *Fisheries Act* and that Canada is not taking appropriate and effective enforcement action. In this regard, Canada states:

> While the submission contains a number of general allegations, Canada has found in the submission only three documented assertions of alleged failures to effectively enforce the *Fisheries Act*. These are the only assertions that provide sufficient information to enable Canada to provide a meaningful response to the submission.[28]

Canada responds only to the Submitters' assertions that Canada is not enforcing sections 35(1) and 36(3) of the *Fisheries Act* in relation to TimberWest's logging operations on privately managed forest lands adjacent to the Sooke River, Martins Gulch (tributary to the Leech River), and De Mamiel Creek (referred to in the Submission as Demanuelle Creek).

(a) Sooke River

Canada asserts that it carried out investigations of TimberWest's logging operations on these lands from March to June 1999, and, as a result of the investigation, sent TimberWest a warning letter dated 27 June 2000[29] indicating that although the riparian zone had been compromised, there was insufficient observable evidence to proceed with a charge under either section of the *Fisheries Act*. The letter also indicated that the site would require monitoring in the future and that Canada would proceed with a further investigation if it appeared that harm to fish habitat would likely occur.

[23] Letter of 28 February 2000 from D.M. Petrachenko, Director General, Pacific Region, DFO, to Lee Doney, Deputy Minister, Ministry of Forests (attached to Submitters' 31 March 2000 letter to the Secretariat). This letter also expresses DFO staff's view that a review of the riparian provisions of the B.C *Forest Practices Code* is required.
[24] Letter of 7 March 2000 from G.T. Kosakoski to John Wenger (attached to the Submitters' 31 March 2000 letter to the Secretariat).
[25] Submission at iii and 8; Attachment 6; Submitters' 31 March 2000 letter to the Secretariat.
[26] Submission at 12.
[27] Submission at 12.
[28] Response at 1.
[29] Annex 2 to the Response.

Canada asserts that a subsequent inspection on 4 July 2000 did not reveal any harmful impact on fish habitat at the site.

(b) Martins Gulch

Canada asserts that field inspections on 17 March 1999 and 4 July 2000 indicated that logging operations in that area do not appear to have damaged fish habitat and that the site is low risk for future impacts.[30]

(c) De Mamiel Creek

Canada states that it cannot comment on the Submitters' assertions about logging in this area as the logging is being investigated as a potential offence under the *Fisheries Act*. Canada asserts that, pursuant to Articles 14(3) and 45(3)(a) of NAAEC, it therefore would be inappropriate for the Secretariat to proceed further with respect to De Mamiel Creek.[31]

IV. ANALYSIS

A. Introduction

This submission has reached the Article 15(1) stage of the factual record process. To reach this stage, the Secretariat must first determine that a submission meets the criteria in Article 14(1) and that it merits requesting a response from the Party based upon a review of the factors in Article 14(2). As indicated above, the Secretariat determined on 8 May 2000 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.[32]

The Secretariat concluded that the submission meets the criteria in the opening sentence of Article 14(1). The assertion in the submission that the Party is failing to effectively enforce the federal *Fisheries Act* focuses on a Party's asserted failure to effectively enforce the law, not on the effectiveness of the law itself. In addition, the *Fisheries Act* qualifies as an "environmental law" for purposes of NAAEC in that its primary purpose is "protection of the environment, or the prevention of a danger to human life or health. . . ."[33] Finally, the submission focuses on asserted failures to enforce that are ongoing, thereby meeting the requirement in Article 14(1) that a submission assert that a Party "is failing" to effectively enforce its environmental law.

The Secretariat also found that the submission meets the six specific criteria listed in Article 14(1). The submission is in English, a language designated by the Parties (Article 14(1)(a)). It identifies the organizations making the submission (Article 14(1)(b)). The submission provides sufficient information to allow the Secretariat to review the submission (Article 14(1)(c)). It appears to be aimed at promoting enforcement rather than at harassing industry in that it is focused on the acts or

[30] Response at 2.
[31] Response at 2.
[32] SEM-00-004 (BC Logging), Determination pursuant to Articles 14(1) and (2) (8 May 2000).
[33] Article 45(2)(a).

omissions of a Party rather than on compliance by a particular company or business (Article 14(1)(d)). The submission states that the Submitters communicated the issues raised in the submission to the Party and includes both copies of correspondence the Submitters sent to the Party, and correspondence they received in response (Article 14(1)(e)). And, finally, the submission was filed by a "person or organization residing or established in the territory of a Party" (Article 14(1)(f)).

In regard to the factors in Article 14(2), the Secretariat determined that the Submitters allege that violations by logging operations of *Fisheries Act* sections 35 and 36 cause substantial harm to the environment (Article 14(2)(a)). Further, the submission raises matters whose further study in the Article 14 process would advance the goals of the Agreement in that it asserts that the failure to enforce is significant in scope and that effective enforcement would "foster the protection of an important environmental resource. . .," "promote[.] sustainable development . . .," and "enhance compliance with, and enforcement of, environmental laws and regulations."[34] (Article 14(2)(b)). The Submitters indicate that various parties have "urged DFO to enforce the *Fisheries Act*. . . ." and that they, and others, have brought prosecutions under the *Fisheries Act* which, in each instance, have been taken over by the Provincial Attorney General who stayed the proceedings (Article 14(2)(c)). Finally, the submission is not based exclusively on mass media reports but is supported by considerable documentation (Article 14(2)(d)).

Like previous submissions, this submission alleges a failure to enforce effectively both in specific cases and more broadly. It asserts a widespread, systemic failure by Canada to enforce sections 35(1) and 36(3) against logging operations in British Columbia and illustrates that alleged failure with, among other information, DFO's policy decision to discontinue block-by-block review of Forest Development Plans in reliance on the stream protection afforded in provincial forestry regulations. It also provides the specific example of TimberWest's operations in the Sooke watershed. The Secretariat has previously concluded that Articles 14 and 15 apply both to submissions alleging failures to enforce effectively in regard to particularized incidents and to submissions alleging failures to enforce effectively more broadly or systemically.[35] Likewise, the Council unanimously has instructed the Secretariat to prepare factual records with respect to both particularized allegations of ineffective enforcement[36] and allegations of a widespread, systemic failure to enforce effectively.[37]

The kind of systemic ineffective enforcement alleged in this submission is analogous to the systemic failure to effectively enforce alleged in the *BC Hydro* submission. The submitters of the *BC Hydro* submission contended in part that Canada's systemic reliance on British Columbia's Water Use Planning Process as sufficient to eliminate the need to issue authorizations to BC

[34] Submission at 15, referencing NAAEC Article 1(a), (b), and (g).
[35] See SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2001). For a detailed discussion of the rationale for this conclusion, see, SEM-99-002 (Migratory Birds), Article 15(1) Notification (15 December 2000). See also, SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999) ("Submissions . . . which focus on the effectiveness of enforcement in the context of asserted widespread violations . . . are inherently more likely to warrant scrutiny by the Commission than allegations of failures to enforce concerning single violations. This is so even though it may be appropriate for the Commission to address the latter, depending on the circumstances.").
[36] SEM-96-001 (Cozumel) and SEM-98-007 (Metales y Derivados).
[37] SEM-97-001 (BC Hydro).

Hydro facilities to harm fish habitat under section 35(2) of the *Fisheries Act* amounted to a systemic failure to effectively enforce the *Fisheries Act* and the *Canadian Environmental Assessment Act*.[38] Similarly, the Submitters here contend that Canada's systemic reliance on British Columbia's regulation of forest practices to justify a reduced federal role in enforcing the *Fisheries Act* amounts to a failure to effectively enforce the *Fisheries Act*.

Accordingly, following the same approach consistently taken in previous submissions, the Secretariat concluded that both the alleged failure to enforce sections 35(1) and 36(3) with respect to TimberWest's logging operations in the Sooke watershed and the alleged systemic failure to enforce sections 35(1) and 36(3) against logging operations in British Columbia are within the scope of Article 14.

Article 15(1) of NAAEC now requires the Secretariat to consider whether the submission, in light of Canada's response, warrants developing a factual record. Article 15(1) requires that if the Secretariat determines that a factual record is warranted, it must inform the Council and provide reasons for its determination. As discussed below, the Secretariat has determined that development of a factual record is warranted to compile additional information concerning the effectiveness of Canada's enforcement of the *Fisheries Act* in relation to logging operations in British Columbia.

B. Why Development of a Factual Record is Warranted

The Secretariat is of the view that development of a factual record is warranted regarding several matters raised in the Submission. The Submitters allege a widespread failure by Canada to effectively enforce sections 35 and 36 of the *Fisheries Act* in the context of logging on both public and privately owned land in British Columbia. Against a background of a documented serious decline in the salmon fishery in British Columbia, the submission raises central questions regarding Canada's reliance on British Columbia's regulation of forest practices as a means for enforcing and ensuring compliance with sections 35 and 36 of the *Fisheries Act*.

The submission contains detailed information regarding only one specific logging operation -- TimberWest's logging in the Sooke watershed -- that according to the Submitters violated sections 35 and 36 in three instances. However, the Secretariat does not share Canada's view that the Submitters do not provide enough information about the Submitters' allegation of a widespread, systemic failure of effective enforcement to allow for a meaningful response or further review.

The Submitters allege that Canada places undue reliance on provincial forestry laws and regulations that as written and as applied do not, in the Submitters' view, provide adequate protection of small fish-bearing streams and non-fish-bearing streams tributary to fish-bearing streams. The Submitters support these assertions with, among other things, information regarding the serious decline in salmon populations in British Columbia, information regarding how British Columbia's regulation of logging practices on both public and private lands do not prohibit activities likely to harm fish and fish habitat, statistics regarding the extent to which forest development plans that British Columbia has approved have allowed -- as written and as

[38] SEM-97-001 (BC Hydro), Final Factual Record at para. 54 (11 June 2000).

implemented -- logging practices that are likely to harm fish and fish habitat, information on the ways in which those practices harm fish and fish habitat, documentation of DFO's relaxed review of forest development plans in light of British Columbia's *Forest Practices Code*,[39] information regarding the lack of *Fisheries Act* prosecutions regarding logging operations in British Columbia and documentation of concern among DFO staff that provincial forestry regulations are failing to ensure adequate protection of fish habitat. The submission also provides an example of a logging operation that, in the Submitters' view, and apparently in the view of Canada as well, appears to have resulted in *Fisheries Act* violations.

While Canada has responded to the allegations regarding TimberWest, it provided no response to the Submitters' allegation of a widespread, systemic failure to enforce the *Fisheries Act* effectively in regard to logging operations in British Columbia. Specifically, Canada provided no information regarding its approach for ensuring that logging operations in British Columbia comply with sections 35 and 36, and for taking enforcement action when violations occur, and no information regarding whether that enforcement approach is effective.[40] This lack of a response leaves unanswered the central questions that the submission raises. Accordingly, development of a factual record is warranted in relation to the matters described below.

1. The Asserted Widespread Ineffective Enforcement of *Fisheries Act* Sections 35(1) and 36(3) in British Columbia

The Submitters make a number of assertions, for which they cite to supporting documentation, regarding Canada's alleged ineffective enforcement of the *Fisheries Act* in relation to logging on public and private lands in British Columbia. Taken together, these assertions raise central questions regarding whether, as the Submitters allege, Canada is ineffectively enforcing the *Fisheries Act* in British Columbia with regard to logging.

First, by way of background, the Submitters assert that fisheries are an important Canadian resource and that the decline and extinction of fish stocks in western Canada has a significant adverse impact from an ecological, aboriginal and economic perspective.[41] The enactment of the pollution prevention and habitat protection provisions of the *Fisheries Act* reflects a broad recognition in Canada of the importance of Canadian fisheries. Citing to several studies, the Submitters also describe the importance of riparian areas in forests as fish habitat.[42]

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[39] Submission at 12, and Attachment 11.

[40] Presumably, however, information regarding these issues is available or could be developed. For example, it would be relevant to gather any analysis Canada may have conducted to support its province-wide policy decision to reduce the level of federal review of Forest Development Plans in light of the stream protections provided under provincial regulations.

[41] Submission at 2.

[42] Submission at 2-3. In support of these background assertions, notes ii and iii of the submission refer to two publications that are not attached to the submission and were not readily available to the Secretariat.

In addition to the reports that the Submitters cite, some of the material that the Submitters did attach to the submission support their assertions regarding the importance of riparian areas in forests as fish habitat. See Attachment 2 at 1, 3; Attachment 3 (bull trout); Attachment 14 at 9-14; Letter of 28 February 2000 from D.M. Petrachenko, Director General, Pacific Region, DFO, to Lee Doney, Deputy Minister, Ministry of Forests; Letter of 7 March 2000 from G.T. Kosakoski to John Wenger.

Next, the Submitters assert that certain logging activities have profound, long-term, and destructive impacts on fish habitat, including loss of streamside vegetation; altered water temperature; and degradation of water quality and quantity by, among other things, the deposit of silt or sediment.[43] Canada's response confirms that logging practices as to which the Submitters voice concern can result in impacts to fish and fish habitat that violate the *Fisheries Act*.[44] The Submitters point out that in addition to fish-bearing streams, non-fish bearing streams play a significant role in preserving fish habitat and are also prone to destructive impacts from logging, which in turn harm fish and fish habitat.[45]

The Submitters also point to studies in specific areas in British Columbia that link a decline in salmon numbers and salmon health to logging.[46] While the studies referred to by the Submitters appear to have examined primarily logging practices that pre-date enactment of the *Forest Practices Code* and the entry into force of the NAAEC, the Submitters assert that logging activities contributing to a decline in salmon numbers and salmon health continue today. In particular, they point to TimberWest's operations and identify recent logging plans that allow logging practices likely to harm fish and fish habitat to occur.[47] Moreover, they contend that the harm to fisheries due to the logging practices on which they focus is systemic because those practices are routinely and systemically allowed under British Columbia's forest practices regulations.

Finally, and most significantly, the Submitters make assertions regarding the ineffectiveness of Canada's reliance on provincial regulation of forest practices to ensure compliance with the *Fisheries Act*. They point to provincial regulation of forest practices on public lands as well as to British Columbia's regulation of forestry on private lands. Further, to show that the alleged failure to effectively enforced is widespread and systemic, they point to a specific DFO policy decision to reduce the level of review of Forest Development Plans throughout the province in light of the stream protections provided by provincial regulation of forest practices.

With regard to public lands, they assert that British Columbia regulates logging on public land under the *Forest Practices Code* but routinely permits activities that are likely to result in damage to fish and fish habitat. They focus in particular on the falling and yarding of logs across fish habitat, logging of landslide-prone lands, and clearcutting of riparian areas, with an emphasis on the adverse impacts of those practices on small fish-bearing streams (classified as S4 streams) and non-fish-bearing streams (classified as S5 and S6 streams).[48] The Submitters note that protections that apply to larger fish-bearing streams (S1, S2 and S3 streams) under the *Forest Practices Code* do not apply to S4, S5 and S6 streams.[49] Among other information, they rely on a 1997 paper and field

[43] Submission at 3-5 and Attachment 2. In support of this assertion, the Submitters cite a number of publications that they do not attach to the Submission. See Submission, notes v-xvi. These assertions find additional support in the materials attached to the submission. See Attachment 2 at 1, 3: Attachment 3 (bull trout); Attachment 8 at 9.
[44] Response at Annex 2. Canada's warning letter to TimberWest notes that clearcutting all but a narrow strip of trees in a riparian area could lead to increased water temperatures, streambank destabilization and introduction of sediment.
[45] Submission at 5 and publications referred to in the submission, notes xvii and xviii, but not attached to the Submission. These assertions find additional support in the materials attached to the submission. See Attachment 2; Attachment 14 at 12.
[46] Submission at 5-6 and publications referred to in Submission, notes xix-xxxi.
[47] See notes 7-11 supra and accompanying text.
[48] Submission at 10-12; Attachments 2, 9, 10, and 14.
[49] Submission at 9, 11.

audit report of 13 forest development plans in British Columbia showing that falling and yarding, as well as clearcutting to both banks, was allowed for 79% of S4 streams and that 28% of all logging was planned for Class V terrain -- terrain for which the risk of landslides is 70% or greater. They also identify specific forest development plans containing no mandatory retention of trees along S4 streams and, in one case, a requirement to cut at least 40% of the riparian area along S4 streams. These planned and actual retention levels are far less than the 100% retention along S4 streams and along S5 and S6 streams directly tributary to fish-bearing streams that DFO staff proposed as interim standards that would provide adequate protection for fish.[50]

The Submitters assert that the logging practices that harm fish and fish habitat on public land also are common on private land. They assert that the overall harm caused by logging activities in British Columbia includes harm due to logging activities on private land and that certain logging activity on private lands results in violations of the *Fisheries Act*. The Submitters' assertion of Canada's widespread failure to enforce the *Fisheries Act* provisions in relation to logging on private land in British Columbia must be viewed in light of the Submitters' specific allegations regarding TimberWest as well as the concerns they set forth regarding the alleged inadequacy of the *Private Land Forest Practices Regulation* for ensuring compliance with the *Fisheries Act*. They claim that regulation of logging practices on private land in British Columbia is less stringent and less effective than on public land. In particular, they allege that the *Forest Practices Code* does not apply to private land and that the *Private Land Forest Practices Regulation*,[51] which applies to some but not all private land,[52] is (where applicable) inadequate as a means for enforcing the *Fisheries Act* because it does not contain enforceable standards or protect small fish-bearing and non-fish-bearing streams.[53]

In light of the cumulative information regarding the decline of fisheries in British Columbia, the logging practices likely harmful to fish and fish habitat that are allowed under British Columbia's forest practices laws and regulations, and Canada's seeming reliance on provincial forest regulations as a means for enforcing the *Fisheries Act*, the Submitters conclude that Canada is failing to enforce the *Fisheries Act* effectively on a widespread basis by not prosecuting violations of sections 35(1) and 36(3) under section 40; by not exercising its powers under section 35(2); and by not exercising its powers under section 37. In particular, the Submitters make the following

[50] See notes 22-24 supra and accompanying text.
[51] The Regulation came into force 1 April 2000.
[52] The Submitters criticize the overall regulatory approach of the *Private Land Forest Practices Regulation*, claiming that it applies not to all logging on private lands but only where owners of private land have volunteered to abide by the *Regulation* in exchange for beneficial tax treatment. They conclude that "[t]here is no regulation of private lands where a landowner foregoes government subsidies" and that the *Private Land Forest Practices Regulation* is "far worse than having no regulation at all." Submission at 9. However, it appears that while it is correct that the *Private Land Forest Practices Regulation* does not apply to all private land, it could apply to logging practices on private land in the Forest Land Reserve in British Columbia that is not eligible for maximum property tax benefits under the *Assessment Act*. For purposes of this submission, the essential point is that the regulation does appear to leave logging on some private land unregulated.
[53] Submission at 9. Again, the Submitters do not contend that the regulation is ineffective for the purposes for which it was adopted under provincial law, and the Secretariat would not examine that issue in a factual record. Instead, the issue is whether Canada's reliance on the regulation as a means for enforcing and ensuring compliance with the federal *Fisheries Act* amounts to effective enforcement of the *Fisheries Act*.

assertions regarding Canada's allegedly ineffective enforcement approach in relation to logging in British Columbia:

- Even though damage from activities associated with logging is foreseeable, and harmful alteration, disruption or destruction of fish habitat and the deposit of deleterious substances is likely to be occurring despite compliance with the *Forest Practices Code*, Canada is not enforcing the *Fisheries Act* in relation to these destructive logging activities permitted on public land under the *Forest Practices Code*.[54]

- As with logging on public lands, Canada has not addressed the limitations of British Columbia's regulation of forest practices on private lands by exercising its powers to prevent violations of the *Fisheries Act* from occurring or to take remedial action once violations have occurred. The Submitters cite one example of Canada's allegedly ineffective approach in regard to destructive logging practices on private land - TimberWest's logging of its land in the Sooke watershed.[55] They assert that despite Canada's knowledge that TimberWest's logging practices were violating the *Fisheries Act*, Canada took no enforcement action.

- In the last three years only one prosecution, abandoned because of delay, has been brought for *Fisheries Act* violations by logging operations even though *Fisheries Act* prosecutions have been brought in relation to other kinds of activities.[56]

- Canada effectively withdrew from enforcing the preventive provisions of the *Fisheries Act* in relation to logging activities in British Columbia after the province introduced the *Forest Practices Code*, as evidenced by Canada's province-wide policy decision to provide for reduced federal review in the logging referral process.[57] Specifically, Canada no longer provides block by block responses on Forest Development Plans in relation to stream protection even though DFO staff perceive the *Forest Practices Code* as not providing adequate protection for fish and fish habitat along small fish-bearing and non-fish-bearing streams.[58]

- Canada does not exercise its powers under section 37 to require logging companies to submit relevant information where the logging activities will result or are likely to result in the harmful alteration, disruption or destruction of fish habitat or the deposit of a deleterious substance. [59]

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[54] Submission at 12-13.
[55] Submission at 8-9; Attachments 5, 6, and 7.
[56] Submission at 12 and Attachment 13.
[57] Submission at 1.
[58] Submission at 12 and Attachments 11, 12 and 13 (p. 5). Attachment 12 is a report by Dovetail Consulting which describes itself as a "summary of a two-day workshop", "the purpose of which was to consult with scientists to obtain their input on ecological aspects of MacMillan Bloedel's BC Coastal Forest Project." The Submission indicates in Note xlvi that Dovetail Consulting prepared the report, which is dated 5 March 1999 for DFO. The letters from the Department of Fisheries and Oceans to the BC Ministry of Forests provided to the Secretariat subsequent to the submission, provide further support for the assertion that Canada has general concerns about logging practices adjacent to small fish-bearing streams and non-fish bearing direct tributaries to fish-bearing streams. See notes 22-24 supra, and accompanying text.
[59] Submission at iii and 8, Attachment 6; Submitters' 31 March 2000 letter to the Secretariat. Section 37 empowers the Minister to request information about a project where the project will result or is likely to result in harmful alteration,

> By way of example, the Submitters assert that although requested by the Submitters, Canada did not use its powers under section 37(2) of the *Fisheries Act* to request plans and specifications from TimberWest and to order modifications to the work, if necessary. Nor, according to the Submitters, does Canada invoke its permitting powers under section 35 to allow harmful alteration, disruption or destruction of fish habitat on conditions.[60]

These cumulative assertions, together with the supporting material, raise central questions about Canada's enforcement of the *Fisheries Act* in relation to logging on public and private land in British Columbia. In effect, the Submitters assert that harm to fish and fish habitat is taking place as a result of logging due to a gap in the protection of fish and fish habitat in British Columbia. They maintain that provincial regulation of forest practices is not effectively protecting fish and fish habitat, and that because this deficiency is built into Canada's province-wide approach for ensuring the compliance of logging activities with the *Fisheries Act*, it is systemic. They assert that Canada, by relying on British Columbia's regulation of forest practices instead of fulfilling its distinct responsibilities for enforcing the *Fisheries Act*, is allowing that province-wide gap to persist. Most significantly, they identify a wide discrepancy between the level of fish protection along S4, S5 and S6 streams that DFO staff indicate is needed and the level achieved in practice through implementation of British Columbia's strictest forestry laws and regulations.

As indicated above, Canada has provided no information in response to the Submitters' allegations that Canada's reliance on British Columbia to ensure protection of fish and fish habitat from the adverse impacts of logging amounts to ineffective enforcement of *Fisheries Act* sections 35 and 36. Canada did provide information indicating that, in response to concerns from residents in the Sooke watershed in March 1999, it has commenced a criminal investigation and issued a warning letter regarding the logging activities of TimberWest as to which the Submitters voice concern in the submission. However, Canada is otherwise silent about the exercise of its powers under sections 35, 36, 37 and 40 of the *Fisheries Act* in regard to logging in British Columbia. In short, Canada provides no information on its overall approach for enforcing the *Fisheries Act* in the context of logging on public and private land in British Columbia or on whether that approach is effective. This lack of a response leaves unanswered the central questions that the Submission raises regarding Canada's reliance on provincial regulation of forestry as a means for enforcing the *Fisheries Act* in relation to logging throughout British Columbia.

The Secretariat is therefore of the view that the Submission, in light of Canada's Response, warrants development of a factual record to consider the unanswered questions raised by the submission. Specifically, a factual record is warranted to examine what formal or informal policies Canada has in place for enforcing the *Fisheries Act* in respect to logging on public and private lands in British Columbia, whether and how those policies are being implemented, and whether those policies and their implementation amount to effective enforcement of the Act. Within this framework, and with a focus on the logging practices that the Submitters discuss in the submission, matters to address in a factual record include:

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disruption or destruction of fish habitat or the deposit of a deleterious substance and, with Cabinet approval, to require modifications to or restrict or close the project.

[60] Submission at iv and 8. Section 35(2) contemplates that a proponent of a work or undertaking will seek authorization to commit harmful alteration, disruption or destruction of fish habitat rather than that DFO will issue such authorizations on its own initiative.

- the extent to which, and the circumstances in which, Canada exercises its powers under section 37 of the *Fisheries Act* in order to prevent or mitigate harmful impacts to fish and fish habitat of logging on public land and private land in British Columbia;

- the extent to which and the circumstances under which Canada exercises its powers under section 35(2) in the context of logging on public land in British Columbia and the effectiveness of actions taken under section 35(2) to prevent the harmful alteration, disruption and destruction of fish habitat;

- information underlying or supporting Canada's decision to reduce the level of review of Forest Development Plans in British Columbia in light of stream protections provided in the *Forest Practices Code*;

- the extent to which Canada works with the British Columbia Ministries of Forest and Environment, Lands and Parks, to prevent or mitigate harmful impacts to fish and fish habitat of logging activities on public and private land;

- the extent to which Canada monitors logging operations regulated in British Columbia by the *Forest Practices Code* or the *Private Land Forest Practices Regulation* to determine compliance with the *Fisheries Act*, and the results of monitoring activities including the frequency, number and severity of suspected violations of the *Fisheries Act* by logging operations on public and private land in British Columbia;

- the extent to which Canada monitors logging operations in British Columbia that are not regulated by either the *Forest Practices Code* or the *Private Land Forest Practices Regulation* to determine compliance with the *Fisheries Act*, and the results of monitoring activities including the frequency, number and severity of suspected violations of *Fisheries Act* by such logging operations;

- the extent to which and the circumstances under which Canada investigates suspected violations of the *Fisheries Act* by logging operations on public and private land in British Columbia;

- the type, number and effectiveness of enforcement actions taken in recent years in connection with *Fisheries Act* violations by logging operations in British Columbia, including, but not limited to, the number of *Fisheries Act* charges, prosecutions, and convictions, and the sentences handed down; and

- actions taken by Canada to follow up DFO's letter of 28 February 2000 to the British Columbia Deputy Minister of Forests, and related letters sent to the District Managers of the Ministry of Forests.[61]

[61] See notes 22-24 supra and accompanying text.

2. The Assertion of Ineffective Enforcement Against TimberWest

Canada responds briefly to the Submitters' specific allegations relating to TimberWest's logging operations on private land in the Sooke area, but not to their broader assertion of a widespread failure to enforce the *Fisheries A*ct effectively in relation to logging operations on private land in British Columbia. The Secretariat is of the view that certain aspects of the Submitters' allegations regarding Canada's enforcement approach in regard to TimberWest's logging operations warrant examination in a factual record, while other aspects do not warrant further review.

a. Whether the specific allegations regarding TimberWest's De Mamiel Creek logging operations are subject to pending administrative or judicial proceedings

As noted above, Canada submits that the assertions in the Submission concerning the enforcement of the *Fisheries Act* in relation to TimberWest's logging operations in the vicinity of De Mamiel [or Demanuelle] Creek in Sooke are the subject of pending judicial or administrative proceedings within the meaning of Article 14(3)(a) and Article 45(3)(a). Article 14(3)(a) provides that the Secretariat "shall proceed no further" where the matter alleged in the submission is the subject of "a pending judicial or administrative proceeding."

A "judicial or administrative proceeding" is defined in Article 45(3) as

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

In previous determinations, the Secretariat has stated that the threshold consideration of whether an administrative or judicial proceeding is pending should be construed narrowly to give full effect to the object and purpose of the NAAEC, and more particularly, to Article 14(3). Only those proceedings specifically delineated in Article 45(3)(a), pursued by a Party in a timely manner, in accordance with a Party's law, and concerning the same subject matter as the allegations raised in the submission should preclude the Secretariat from proceeding further under Article 14(3).[62] Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, and that are not designed to culminate in a specific decision, ruling or agreement within a definable period of time should not be considered as falling within Article 45(3)(a).[63]

[62] SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998); SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2001).
[63] SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).

Bearing these parameters in mind, the investigative actions Canada has taken in relation to logging around De Mamiel Creek do not fall within the definition of "judicial or administrative proceedings" within the meaning of Articles 14(3) and 45(3). Most significantly, a criminal investigation is not among or of the same nature as the actions explicitly mentioned in Article 45(3)(a). While a criminal investigation might lead in some cases to a proceeding listed in Article 45(3)(a), it is not an integral part of "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; [or] the process of issuing an administrative order." It might result in a criminal charge leading to a judicial or administrative proceeding seeking sanctions or remedies within the scope of Article 45(3)(a). On the other hand, an investigation could also culminate in a warning letter, some other kind of enforcement action not contemplated in Article 45(3)(a) or no enforcement action at all. Further, a criminal investigation does not always have a clear and definable beginning or endpoint. In short, therefore, a criminal investigation is not a pending judicial or administrative proceeding designed to culminate in a specific ruling or decision within a definable period of time and is not encompassed in Article 45(3)(a).

Although the ongoing criminal investigation regarding De Mamiel Creek is not a judicial or administrative proceeding that under Article 14(3)(a) requires the Secretariat to proceed no further, the Secretariat nonetheless believes that a factual record with respect to De Mamiel Creek is not warranted as long as the criminal investigation remains active and ongoing. In previous determinations, the Secretariat considered the rationale underlying Article 14(3) and identified two reasons for excluding matters that fall within Article 45(3)(a) – a need to avoid duplication of effort and a need to refrain from interfering with pending litigation. [64] The Secretariat has noted in the past that these considerations can also be relevant for a Party's proceedings that fall outside Article 45(3)(a) but nonetheless relate to the same subject matter as is raised in a submission.[65]

The concerns that weigh against development of a factual record when pending litigation is addressing the same subject matter as is raised in a submission[66] are similar to the concerns relevant to whether a factual record is warranted with regard to a matter that is also subject to a timely, active, pending criminal investigation. The Secretariat has observed that "[c]ivil litigation is a complex undertaking governed by an immensely refined body of rules, procedures and practices," and that the factual record process "may unwittingly intrude on one or more of the litigant's strategic considerations."[67] Similarly, a criminal investigation often involves a degree of secrecy and sensitivity that make it uniquely vulnerable to unintended interference. The factual record process presents a risk of interfering, possibly seriously, with a criminal investigation. In many cases, the mere fact that a criminal investigation is underway is kept secret in order to ensure its success. If a Party is required to disclose information relating to an ongoing criminal investigation, the disclosure could jeopardize or compromise the investigation by disclosing closely-held investigative techniques or the identity of investigators, informers or witnesses. The Secretariat is reluctant to embark on a process which a party demonstrates may intrude in these ways on timely,

[64] SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).
[65] SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).
[66] The Secretariat is not precluding the possibility that in a future submission involving proceedings to which Article 14(3)(a) does not apply, these concerns might be outweighed by other factors warranting preparation of a factual record.
[67] SEM-96-003 (Oldman River I), Determination pursuant to Articles 14 and 15 (2 April 1997).

active and ongoing criminal investigations carried out by a Party to ensure compliance with its environmental laws.

Here, Canada has stated that as of the time of its response, an investigation was ongoing regarding De Mamiel Creek, and the Secretariat has no information indicating that Canada's investigation relating to De Mamiel Creek was not timely or that it is no longer active. Accordingly, if a factual record is developed for this submission, the Secretariat will not consider whether Canada is failing to effectively enforce the provisions of the *Fisheries Act* in relation to logging operations at De Mamiel Creek as long as the investigation remains active and charges may result. However, the Secretariat is not precluded from looking at all matters relating to De Mamiel Creek. For example, in examining the Submitters' allegation that Canada is failing to enforce the *Fisheries Act* effectively against logging operations in British Columbia generally, information regarding the circumstances leading to the TimberWest investigation might be relevant to a description of why investigations are pursued in some circumstances and not others.

b. Whether a factual record is warranted in regard to TimberWest's Sooke River and Martins Gulch logging operations

Canada's response indicates that TimberWest's forest harvesting practices at the Sooke River site gave rise to concerns over the year preceding the response. These concerns resulted in an investigation and, ultimately, a warning letter detailing the concerns. After the investigation, DFO staff concluded that the riparian zone had been compromised and was unstable.[68] DFO staff also concluded that the site would require monitoring in future years. The Secretariat considers a factual record to be appropriate with respect to the Sooke River logging operation to gather information as to whether the warning letter, any continued monitoring of the site and other aspects of Canada's enforcement approach have been effective. Particularly in light of the widespread nature of the allegations in the submission, this examination would provide an example of Canada's ongoing compliance and enforcement activities at a site where there is a known risk that logging activities could result in violations of the *Fisheries Act*.

The Secretariat considers that development of a factual record is not warranted in relation to TimberWest's specific logging activities in the Martins Gulch area. In its response, Canada indicates DFO inspected these activities and the site and found little or no impact on fish habitat. Canada also asserts that the site is considered low risk for future impacts. The Secretariat sees no value in the development of a factual record in relation to whether Canada is failing to take effective enforcement action in regard to the Martins Gulch logging operation given the results of compliance activities already undertaken. Nonetheless, information regarding Canada's approach in regard to Martins Gulch might be useful in the broader context of examining how Canada generally assesses the risk of future impacts due to particular logging operations and the need for ongoing monitoring and enforcement.

V. RECOMMENDATION

[68] Response at Annex 2

For the reasons stated above, the Secretariat considers that the submission, in light of the Party's response, warrants development of a factual record. The Submitters have raised central questions regarding the effectiveness of Canada's enforcement of the *Fisheries Act* in connection with logging in British Columbia. They have supported their allegations with statistics on the extent to which logging practices likely to be harmful to fish and fish habitat are allowed under the British Columbia *Forest Practices Codes* and *Private Land Forest Practices Regulation*, the example of TimberWest's logging practices on private land in the Sooke River watershed, Canada's province-wide policy to reduce the level of federal review of Forest Development Plans in light of stream protections provided in provincial forest practices regulations and documentation of concern among DFO staff regarding the ability of provincial forestry regulations to ensure compliance with the *Fisheries Act*. The Submitters have also described the declines in salmon populations in British Columbia and the nature of the harm due to logging practices as to which they contend Canada is failing to take effective enforcement action. Canada's response has persuaded the Secretariat that a factual record is not warranted with respect to the allegations concerning ineffective enforcement of the *Fisheries Act* regarding TimberWest's logging near Martins Gulch and De Mamiel Creek. However, Canada's response leaves entirely unanswered the central questions the submission raises regarding the effectiveness of Canada's enforcement generally of sections 35(1) and 36(3) of the *Fisheries Act* in connection with logging on public and private lands in British Columbia. Accordingly, in accordance with Article 15(1), and for the reasons set forth in this document, the Secretariat informs the Council of its determination that the purposes of the NAAEC would be well served by developing a factual record regarding the Submission.

Respectfully submitted on this 27th day of July 2001.

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Executive Director