

**Factual Record**  
**BC Logging Submission**  
**(SEM-00-004)**

**Prepared in Accordance with**  
**Article 15 of the North American Agreement**  
**on Environmental Cooperation**



## Table of Contents

1. Executive Summary . . . . .	7
2. Summary of the Submission . . . . .	15
3. Summary of Canada’s Response. . . . .	19
4. Scope of the Factual Record . . . . .	20
5. Summary of Other Relevant Factual Information and Facts Presented by the Secretariat with respect to Matters Raised in Council Resolution 01-12 . . . . .	23
5.1 The Process to Gather Information . . . . .	23
5.2 Meaning and Scope of <i>Fisheries Act</i> Sections 35(1) and 36(3). . . . .	27
5.2.1 Section 35(1). . . . .	28
5.2.2 Section 36(3). . . . .	31
5.2.3 Enforcement Options for Violations of s. 35(1) or s. 36(3) . . . . .	34
5.2.3.1 Information Requests and Orders from the Minister . . . . .	34
5.2.3.2 Prosecutions. . . . .	34
5.2.3.3 Court Orders upon Conviction . . . . .	35
5.2.3.4 Injunctions. . . . .	35
5.2.3.5 Civil Suits for the Recovery of Remediation Costs . . . . .	35

5.2.4	Defenses to Prosecution of <i>Fisheries Act</i> Sections 35(1) and 36(3) . . . . .	35
5.2.4.1	The Defenses of Due Diligence and Mistake of Fact . . . . .	36
5.2.4.2	Defenses Based on Actions of the Regulator . . . . .	37
5.3	Policies regarding Enforcement of <i>Fisheries Act</i> Sections 35(1) and 36(3) . . . . .	39
5.3.1	Principle of No Net Loss. . . . .	39
5.3.2	Compliance and Enforcement Policy . . . . .	44
5.3.2.1	Compliance and Enforcement Policy in Effect in 1999 . . . . .	45
5.3.2.2	July 2001 <i>Fisheries Act</i> Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy. . . . .	46
5.3.3	DFO–Pacific Region Policy . . . . .	49
5.4	Indicia of Effective Enforcement . . . . .	52
5.5	Private Land Logging in British Columbia in 1999-2000. . . . .	54
5.5.1	Regulation of Forest Practices on Private Land. . . . .	55
5.5.2	<i>Water Act</i> . . . . .	59
5.5.3	Enforcement of the <i>Fisheries Act</i> in Connection with Crown Land and Private Land Logging Operations . . . . .	61
5.6	Fisheries and Fish Values in the Sooke River Watershed. . . . .	63
5.7	Information regarding TimberWest . . . . .	65
5.8	Logging along the De Mamiel Creek Tributary. . . . .	66
5.8.1	Description and Location of the De Mamiel Creek Tributary and Cutblock . . . . .	66

---

5.8.2	Planning and Logging of the De Mamiel Creek Cutblock . . . . .	68
5.8.3	DFO Inspection and Monitoring Before, During and After Logging . . . . .	73
5.8.4	Canada's Investigation of the Logging Beginning in July 2000 . . . . .	76
5.8.5	Current Status . . . . .	81
5.9	Logging along the Upper Sooke River . . . . .	83
5.9.1	Description and Location of the Upper Sooke River Cutblock . . . . .	83
5.9.2	DFO Involvement in Planning of the Logging . . .	84
5.9.3	Canada's Investigation of the Logging. . . . .	85
5.9.4	Current Status . . . . .	93
6.	Closing Note . . . . .	94
<b>Figures</b>		
Figure 1	Map . . . . .	15
Figure 2	Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat (HADD Decision Framework). . . . .	43
<b>Appendices</b>		
Appendix 1	Council Resolution 01-12, Instruction to the Secretariat of the Commission for Environmental Cooperation regarding the assertion that Canada is failing to effectively enforce sections 35(1) and 36(3) of the <i>Fisheries Act</i> (SEM-00-004). . . . .	97
Appendix 2	Overall Plan to Develop a Factual Record with regard to Submission SEM-00-004 . . . . .	101
Appendix 3	Comments of Canada and the United States on the Overall Plan to develop a Factual Record with regard to Submission SEM-00-004 . . . . .	109

---

Appendix 4	Request for Information describing the scope of the information to be included in the factual record and giving examples of relevant information . . . . .	117
Appendix 5	Information Request to Canadian authorities (1 February 2002) . . . . .	125
Appendix 6	Information Requests to NGOs, JPAC and other Parties to NAAEC . . . . .	129
Appendix 7	List of Nongovernmental Organizations Recipient of a Request for Information for the Development of the factual record for Submission SEM-00-004 . . .	135
Appendix 8	Follow-up Questions to Canada (dated 7 June 2002) regarding the factual record for Submission SEM-00-004 . . . . .	139
Appendix 9	Request for Additional Information/Follow-up (dated 19 July 2002) as discussed during the 12 June 2002 meeting with Canadian authorities . .	149
Appendix 10	Excerpt from “1999-2000 Field Monitoring Report: Vancouver Island Private Managed Forest Land” (October 2001). . . . .	155
Appendix 11	Recent Cases Pursued under the <i>Fisheries Act</i> . . . .	163
Appendix 12	BC Forest Practices Board–Criteria of Appropriate Enforcement. . . . .	169
Appendix 13	Documents received from Canadian authorities for the preparation of the factual record on Submission SEM-00-004 . . . . .	173
<b>Attachments</b>		
Attachment 1	Council Resolution 03-12 . . . . .	181
Attachment 2	Comments of Canada . . . . .	185
Attachment 3	Comments of the United States of America . . . .	203

## 1. Executive Summary

Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) establish the process for citizen submissions and development of factual records relating to assertions that one of the Parties to NAAEC—Canada, Mexico and the United States—is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (CEC) of North America administers this process.

On 16 November 2001, the CEC Council unanimously instructed the Secretariat to develop a factual record with respect to assertions regarding logging at Sooke River and De Mamiel Creek, two sites in the Sooke watershed on Vancouver Island, British Columbia. These two areas were mentioned in submission SEM-00-004 (BC Logging), filed on 17 March 2000, by five environmental nongovernmental organizations from Canada and the United States. The submission asserted that Canada is failing to effectively enforce sections 35(1) and 36(3) 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 s. 35(2). Section 36(3) prohibits the deposit of deleterious substances in waters frequented by fish unless the deposit is authorized by regulation. The submission identified logging by TimberWest Forest Products Corporation (TimberWest) in the two areas referenced in Council Resolution 01-12 as examples of Canada's failure to effectively enforce ss. 35(1) and 36(3) with respect to private land logging in British Columbia.

Council Resolution 01-12 governs the scope of this factual record. The Resolution authorizes a factual record narrower in scope than the factual record that the Submitters sought and that the Secretariat recommended in its notification to Council under NAAEC Article 15(1). Certain information that the Submitters suggested be included or that was discussed in the Secretariat's Article 15(1) notification is generally beyond the scope of the Council Resolution, such as information regarding Canada's enforcement of ss. 35(1) and 36(3) on public land subject to British Columbia's *Forest Practices Code*, province-wide information

regarding the extent to which private land logging in British Columbia fails to comply with ss. 35(1) and 36(3) of the *Fisheries Act* and province-wide information regarding Canada's enforcement of those provisions in connection with private land logging.

Logging in the vicinity of fish-bearing streams can lead to violations of *Fisheries Act* s. 35(1) or s. 36(3). For example, a *Fisheries Act* violation might result if logging activity reduces shade so as to increase the temperature of a stream, destabilizes the bank so as to allow harmful sediment to enter the stream, leads to a decrease in the amount of beneficial nutrients available to the stream or harmfully increases or decreases the amount of woody debris in the stream. Violation of s. 35(1) or s. 36(3) is a strict liability offense, which in Canada means that even if the Crown proves a violation beyond a reasonable doubt, a defendant can avoid conviction with certain defenses. Crown prosecutors consider the viability of possible defenses, such as the defenses of due diligence, mistake of fact, officially induced error and abuse of process, in considering whether to prosecute.

The federal Department of Fisheries and Oceans (DFO) administers the *Fisheries Act*. In its 1986 Habitat Policy, DFO's overall approach to protecting and conserving fish habitat is intended to prevent *Fisheries Act* violations. Under the principle of No Net Loss (NNL), Canada strives to balance unavoidable habitat losses with habitat replacement on a project-by-project basis so as to prevent further reductions to fisheries resources due to habitat impacts and in the long-term to achieve a net gain in fish habitat. The 1998 *Habitat Conservation and Protection Guidelines* (1998 Guidelines) and the 1998 *Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat* (HADD Decision Framework), provide guidance for applying the NNL principle, principally through review of project proposals. DFO personnel stated that DFO rarely applies the HADD Decision Framework in connection with logging operations. Canada explained that since logging plans for the areas referenced in Council Resolution 01-12 were not referred to DFO, neither the HADD Decision Framework nor the project review provisions of the 1998 Guidelines was applied in connection with either of the logging operations.

The July 2001 *Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* (Compliance and Enforcement Policy), which while not then finalized reflects the policy that Canada followed informally in the relevant time period, sets out guiding principles for assuring compliance with and enforcing s. 35(1) and s. 36(3). Consistent with the NNL principle, the policy emphasizes prevention of harm



to fish habitat and pollution of water frequented by fish; consistency, fairness and predictability in enforcement; and encouragement of public complaints regarding possible violations. The policy lists options available for assuring compliance with or enforcing s. 35(1) and s. 36(3).

Based on the Compliance and Enforcement Policy and criteria for effective enforcement used by the British Columbia Forest Practices Board, the factual record presents indicia of effective enforcement which, while not comprehensive or definitive, might be taken into account in considering whether Canada is failing to effectively enforce ss. 35(1) and 36(3) of the *Fisheries Act* at the Sooke River and at the De Mamiel Creek. These indicia are based on such matters as the extent to and manner in which the government compiles and uses information on regulated activities; communicates compliance expectations; acts to prevent violations; responds to public complaints; conducts inspections and investigations; ensures consistency, fairness and predictability in enforcement; and reports on enforcement activity.

The logging that is the subject of this factual record took place on TimberWest's privately owned land in the Sooke River watershed. Both the Sooke River and De Mamiel Creek, which is one of its tributaries, support populations of wild chinook, chum, and coho salmon, as well as steelhead and cutthroat trout and other fish species. DFO considers both areas referenced in Council Resolution 01-12 to be Canadian fisheries waters to which the *Fisheries Act* applies.

At the time of the logging, timber harvesting on Crown (i.e., public) land in British Columbia was regulated under the province's 1995 *Forest Practices Code*, which contained provisions for protection of fish habitat. No enforceable provincial forest practice standards applied to most private land in British Columbia, including the areas referenced in Council Resolution 01-12. Then and now, DFO considered voluntary best management practices adopted by the Private Forest Landowners Association (PFLA), of which TimberWest is a member, and draft provincial regulations for private land logging (now in force) to be inadequate to protect fish habitat. Consequently, DFO enforcement staff in British Columbia stated that they generally focused more attention on compliance with and enforcement of the *Fisheries Act* on logging of private lands than on logging subject to the *Forest Practices Code*, particularly on Vancouver Island, which has the highest concentration of privately managed forests in the province.

DFO conducts monitoring and inspections depending on available resources, development pressures on fish habitat, and public concerns

or complaints. Although DFO–Pacific Region has no formal inspection plan or program for the Sooke watershed, it conducts monitoring and inspections within the watershed and other parts of Vancouver Island. Due to constraints on its resources, DFO does not review all logging plans or schedule ad hoc logging inspections. DFO informed the Secretariat that logging companies are responsible for ensuring their activities comply with the *Fisheries Act*. DFO representatives informed the Secretariat that companies often ask for DFO’s participation at the planning stage, and that DFO personnel in the area are not able to participate as often as they would like.

In light of public concerns, DFO–Pacific Region conducted field inspections of 50 logged sites on private land on Vancouver Island between December 1999 and April 2000, to examine areas logged between January 1998 and July 1999. TimberWest properties were included in the inspection. DFO had received public complaints regarding logging in early 1999 of TimberWest’s land in the areas referenced in Council Resolution 01-12, but those logging operations were not included in the 1999-2000 field inspection. DFO considers the 1999-2000 post-logging field inspections an element of its strategic forest monitoring program for Vancouver Island.

The De Mamiel Creek logging site, referred to in this factual record as the De Mamiel Creek cutblock, contains a small (1.5 meter-wide or less), intermittent, low-gradient, unnamed stream. The site is on land TimberWest acquired in January 1998 in a rural residential area about 10 kilometers from Sooke, British Columbia. The stream flows into De Mamiel Creek 150 meters downstream of the cutblock. Very small low-gradient streams flowing into larger fish-bearing streams like De Mamiel Creek often provide fish habitat for some species of Pacific salmon, particularly coho.

A consultant preparing the logging plan in late 1996 and early 1997 noted possible fishery concerns in the unnamed stream, but in January 1997, a DFO fishery officer told the consultant that the stream was not fish-bearing. DFO did not review the logging plan prior to the logging.

Prior to the logging, at least two local residents told TimberWest of their concerns regarding the planned logging and one resident phoned the DFO office in Sooke to express concerns. In response, a DFO fishery officer visited the De Mamiel Creek cutblock but he did not try to determine if fish were present in the unnamed stream or conduct a follow-up inspection during the logging.

Logging of the De Mamiel Creek cutblock took place from December 1998 to April 1999. In early 1999, the logging operators constructed a spur road that obstructed the unnamed stream and, after wind began blowing trees down, cut all the trees that were to be left along a residential road and the stream. The Secretariat has no information indicating that anyone reported concerns to DFO during the period the logging was underway. A DFO fishery officer drove through the site while logging was underway and four DFO employees briefly stopped at the cutblock near the time logging was completed. DFO did not check for impacts of logging on potential fish habitat in the unnamed stream on either occasion.

On 28 April 1999, after the logging was completed, a fisheries biologist with the Sierra Legal Defence Fund wrote a DFO official in Vancouver, noting concerns with the impacts of the logging operation on the unnamed stream. DFO did not send any personnel to the cutblock to look into those concerns at the time. During the spring and early summer of 1999, the local media ran stories noting public concern regarding logging of the De Mamiel Creek cutblock. In June 1999, several DFO employees drove past the site but made no inspection of it.

In response to the BC Logging submission, filed with the CEC in March 2000, DFO reviewed the logging of the De Mamiel Creek cutblock. On 4 July 2000, two DFO Habitat Management staff inspected the unnamed stream and observed fish. On 5 July 2000, DFO informed TimberWest that a *Fisheries Act* investigation regarding logging of the cutblock had begun. Canada informed the Secretariat that the investigation began following receipt of John Werring's 29 April 1999 letter. There were no field visits during the investigation until July 2000. On 6 July 2000, Canada responded to the submission, informing the Secretariat that the logging of the cutblock was being investigated under the *Fisheries Act*.

DFO proceeded with an intensive investigation, conducting tests on fish presence in the unnamed stream and engaging two experts. Both experts, as well as biologists that TimberWest hired, concluded that the stream contained fish habitat. The DFO experts concluded the logging had significantly impacted fish habitat, and one concluded the logging did not meet either the PFLA's best management practices, the *Private Land Forest Practices Regulation* that came into effect in April 2000, best management practices developed pursuant to the *Forest Practices Code*, or TimberWest Standard Operating Procedures. On 28 December 2000, DFO charged TimberWest with violation of s. 35(1) in connection with the logging of the De Mamiel Creek cutblock. The investigation continued until at least July 2001.

In July 2001, DFO interviewed an employee of the consultant who had been told by a DFO fishery officer in January 1997 that the unnamed stream was not fish-bearing. The federal Department of Justice stayed the proceedings just prior to 4 October 2001. DFO explained that the charges were stayed because, although logging of the cutblock had significant impacts on fish habitat in the unnamed stream, the fishery officer's advice to the logging consultant supported an officially induced error defense.

Canada has no plans for further legal actions in connection with the logging of the De Mamiel Creek cutblock. TimberWest has taken some remedial measures, such as tree-planting along the stream. They require time to have a beneficial effect. To avoid the possibility of an officially induced error defense in future cases, DFO advised fishery officers to be cautious about providing advice about fish presence. DFO also developed a two-day training exercise for fishery officers based on the investigation of the case.

The Sooke River area referenced in Council Resolution 01-12 involves a cutblock, referred to in this factual record as the Sooke River cutblock or Block 954, on TimberWest's private land located along the Upper Sooke River, approximately 13 kilometers upstream of the De Mamiel Creek cutblock. The Sooke River in the area of concern is a large, low-gradient (<5%), relatively straight river more than 15 meters wide, confined by sloping banks.

Logging of the Sooke River cutblock occurred in early 1999. The logging was a clearcut on the west bank of the Sooke River. A fringe of trees 5 to 10 meters wide was left along the edge of the river for approximately 400 meters within the block. Although DFO was generally aware of logging on TimberWest property in the Sooke watershed at the time, it did not review plans for logging of the Sooke River cutblock.

DFO became aware of the logging of the cutblock in early March 1999, when local citizens notified DFO of their concerns regarding the logging. A DFO fishery officer responded immediately by visiting the site. The fishery officer observed that trees had been felled almost to the stream edge, leaving a narrow fringe of trees, and he noted that logs had been stored on the floodplain. The fishery officer believed that the logging was not consistent with good practices but did not appear to violate the *Fisheries Act*.

DFO visited the site again on 17 March, 8 April and 22 June 1999. During the 8 April visit, DFO staff noted several concerns, including

blowdown of trees along the river and potential for sediment to enter the river. They concluded that although fish habitat impacts were not observable, the logging had compromised the function of the riparian zone. In mid-April 1999, DFO notified TimberWest that the logging of the cutblock was under investigation for violations of the *Fisheries Act*. The 22 June site visit included a forestry expert for DFO, whose opinion was relevant to determining whether to lay charges. By that time, TimberWest had removed the logs that had been piled in the floodplain, deactivated the road through the cutblock and done bank stabilization work in the floodplain.

The Secretariat obtained no field notes, expert report or other contemporaneous documentation related to the site visit on 22 June 1999. A report written on 26 June 2000, states that DFO staff concluded during the visit that although the riparian zone had been compromised, there was insufficient observable evidence to proceed with charges under s. 35(1) or s. 36(3). The 26 June 2000 report states that the site had been visited after 22 June 1999 and no further evidence of habitat impact had been observed. Other than the information in the 26 June 2000 report, Canada has no documentation of any activity between 22 June 1999 and 26 June 2000, regarding the investigation into the logging of the Sooke River cutblock.

On 27 June 2000, approximately ten days prior to responding to the submission that led to this factual record, DFO sent a warning letter to TimberWest regarding the logging of the Sooke River cutblock. The warning letter summarized DFO's observations from April to June 1999 and indicated that it served as a warning that TimberWest activities may eventually result in violations of s. 35 of the *Fisheries Act*.

Under DFO policy, enforcement personnel may use warnings when they have reasonable grounds to believe that a violation of the *Fisheries Act* has occurred; where the degree of harm or potential harm to the fishery resource, its supporting habitat and to human use of fish or both appears to be minimal; and where the alleged violator has made reasonable efforts to remedy or mitigate the negative impact of the alleged offenses. DFO personnel informed the Secretariat that the 27 June 2000 warning letter was unusual, in that DFO had not noted a violation of the *Fisheries Act*. DFO informed the Secretariat that it nonetheless issued the warning letter in order to close the investigation, while at the same time notifying TimberWest that future investigation was possible in case significant blowdown caused a harmful impact on fish habitat in the future.

On 30 June 2000, the DFO–Pacific Region notified DFO headquarters that DFO would not be pursuing *Fisheries Act* charges at that time with respect to logging of the Sooke River cutblock. On 4 July 2000, DFO staff visited the site and confirmed that no further evidence of impact on fish habitat was observable.

Field inspections in 2002 indicate that since July 2000, no further blowdown of trees in the leave strip has occurred, and DFO has found no evidence of further alteration of the leave strip or fish habitat. DFO intends to continue to monitor the site for blowdown, with further investigation of *Fisheries Act* violations possible. DFO informed the Secretariat that it considers its investigation of the Sooke River cutblock and the warning letter to be consistent with DFO policy.

DFO regional staff would like to implement a more extensive monitoring program for forest operations on private land on Vancouver Island but have inadequate resources to do so as desired. DFO informed the Secretariat that it continues to rely to a great extent on forest companies to provide information and on the public to bring forward complaints regarding private land logging on Vancouver Island.

The map below shows the location of the De Mamiel Creek and Sooke River cutblocks.

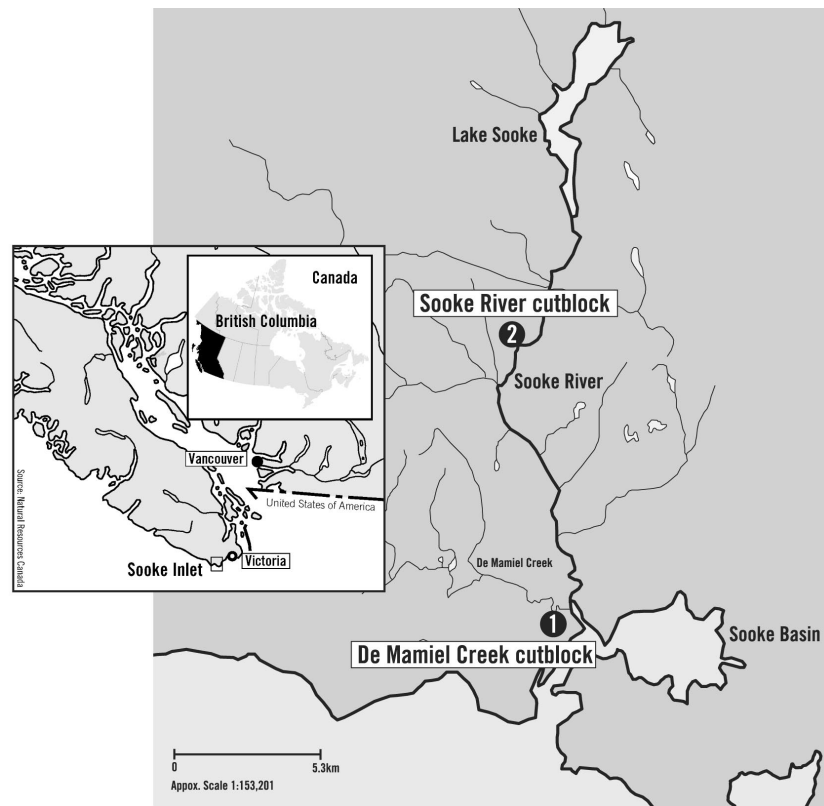


Figure 1: Sooke River watershed

## 2. Summary of the Submission

The submission, filed on 17 March 2000, contains two basic assertions. First, the Submitters assert that Canada is failing to effectively enforce ss. 35(1) and 36(3) 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 s. 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 regard to the alleged failure to effectively enforce the *Fisheries Act*, the Submitters assert that, with respect to logging on public lands in British Columbia, Canada relies heavily on British Columbia's regulation of forest practices under its 1995 *Forest Practices Code* to ensure compliance with the *Fisheries Act* even though British Columbia routinely allows logging practices under the Forest Practices Code that result in *Fisheries Act* violations.<sup>1</sup> They claim that on private lands, "no effective provincial environmental protections apply."<sup>2</sup> They assert that the *Forest Practices Code* does not apply to private land and that the proposed *Private Land Forest Practices Regulation*<sup>3</sup> is "sorely inadequate given its lack of enforceable standards" and its lack of protection for small streams.<sup>4</sup> 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.<sup>5</sup>

The Submitters claim that ss. 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."<sup>6</sup> 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.<sup>7</sup> The Submitters list a number of specific locations in British Columbia where, they assert, logging operations have caused or are causing harm to fish and fish habitat.<sup>8</sup>

---

1. Submission at 10-12.

2. *Ibid.* at 1.

3. This regulation came into force 1 April 2000, after the date of the submission.

4. Submission at 9.

5. *Ibid.* at 10-12.

6. *Ibid.* at iii.

7. *Ibid.* at iii and 3-6.

8. *Ibid.* at 5, 6, 8-9 and Attachments 2, 6, 8 and 14.



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. . . .”<sup>9</sup> 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.<sup>10</sup>

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*.<sup>11</sup> 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 small streams in this province.<sup>12</sup> 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.<sup>13</sup>

With respect to logging on private lands to which the *Forest Practices Code* does not apply, the Submitters assert that Canada does not effectively ensure that the logging complies with the *Fisheries Act*,

---

9. *Ibid.* at 12.

10. *Ibid.* at 12, and Attachment 11.

11. *Ibid.* at 12; Attachment 12, at 17; letters attached to Submitters’ letter of 31 March 2000, to the Secretariat.

12. 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 BC *Forest Practices Code* is required.

13. Letter of 7 March 2000, from G.T. Kosakoski to John Wenger (attached to the Submitters’ 31 March 2000 letter to the Secretariat).

“particularly with respect to practices such as clearcutting to the streambanks of small streams and clearcutting landslide prone areas.”<sup>14</sup> Specifically, they contend that the then-proposed *Private Land Forest Practices Regulation*, which is now in effect, provides no protection along streams less than 1.5 meters 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 a means for ensuring compliance with the *Fisheries Act* amounts to ineffective enforcement of the *Fisheries Act*.

The Submitters cite logging by TimberWest Forest Corporation (TimberWest) of its private land in three areas in the Sooke watershed as “[o]ne particularly troubling example of private land logging. . . .”<sup>15</sup> 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 s. 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*.<sup>16</sup>

The Submitters contend that the alleged failure to effectively enforce the *Fisheries Act* with respect to logging in British Columbia is a failure both to prevent violations as well as to prosecute violations once they occur. 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 s. 37 to protect fish and fish habitat proactively from the impacts of logging operations.<sup>17</sup> 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”<sup>18</sup> and that “[t]hat prosecution was abandoned by DFO due to delay in pursuing the charges.”<sup>19</sup>

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,

---

14. Submission at 8.

15. *Ibid.* at 8-9. See also Attachment 6 (referred to in the Submission as Attachment 5).

16. See *ibid.* at Attachment 6 (referred to in the Submission as Attachment 5).

17. *Ibid.* at iii and 8; Attachment 6; Submitters’ 31 March 2000 letter to the Secretariat.

18. Submission at 12.

19. *Ibid.* at 12.

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.

The submission's second assertion is that the Party is failing to meet its commitments under Articles 6 and 7 of NAAEC through its "consistent intervention and staying of environmental prosecutions. . . ." <sup>20</sup> This assertion relates to the right that Canadian law creates for initiation of private prosecutions against violators of the *Fisheries Act*. The Submitters assert that "there have been 12 private prosecutions in British Columbia in the last 19 years, at least nine of which included charges under the *Fisheries Act*. Eleven of these private prosecutions have been stayed." <sup>21</sup> The Submitters state that "it appears that environmental private prosecutions are being stayed as a matter of course, rather than after the reasonable exercise of discretion." <sup>22</sup> The Submitters claim that this government's conduct constitutes a failure to meet the obligations of Articles 6 and 7 of NAAEC. <sup>23</sup>

### 3. Summary of Canada's Response

The Secretariat received Canada's response on 7 July 2000. Canada does not respond to the Submitters' assertion that logging activities on public and private land in British Columbia routinely violate ss. 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. <sup>24</sup>

Canada responds only to the Submitters' assertions that Canada is not enforcing ss. 35(1) and 36(3) of the *Fisheries Act* in relation to TimberWest's logging operations on privately managed forest lands

---

20. *Ibid.* at 14.

21. *Ibid.* at 13-14.

22. *Ibid.* at 14.

23. *Ibid.* at iv, 14.

24. Response at 1.

adjacent to the Sooke River, Martin's Gulch (tributary to the Leech River), and De Mamiel Creek (referred to in the Submission as Demanuelle Creek).

In regard to the Sooke River site, 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,<sup>25</sup> 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. Canada asserts that a subsequent inspection on 4 July 2000 did not reveal any harmful impact on fish habitat at the site.

In regard to the Martin's Gulch site, 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.<sup>26</sup>

In regard to the logging near 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 offense 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.<sup>27</sup>

#### 4. Scope of the Factual Record

On 27 July 2001, the Secretariat notified the Council under Article 15(1) that the Secretariat considered that the submission, in light of the response, warranted development of a factual record. The Secretariat concluded that "[a]gainst 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 ss. 35 and 36 of the *Fisheries Act*."<sup>28</sup> The Secretariat concluded that Canada's response left these central questions largely unanswered because it provided no response to the Submitters' allegation of a wide-

---

25. Annex 2 to the Response.

26. Response at 2.

27. *Ibid.* at 2.

28. SEM-00-004 (BC Logging), Article 15(1) Notification, at 9 (27 July 2001).

spread failure to effectively enforce the *Fisheries Act* in connection with logging in British Columbia. Accordingly, the Secretariat considered that “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.”<sup>29</sup> In regard to TimberWest’s logging operations, the Secretariat concluded that a factual record was not warranted with respect to logging near De Mamiel Creek as long as the investigation of that logging was active, that a factual record was not warranted in regard to the logging in Martin’s Gulch, and that the recommended factual record should include an examination of the logging along the Sooke River. The Secretariat dismissed the assertions that Canada is failing to effectively enforce Articles 6 and 7 of NAAEC.

In Council Resolution 01-12, which is set out in its entirety in Appendix 1, the Council unanimously agreed

TO INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* for the assertions set forth in submission SEM-00-004 that Canada is failing to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* at the Sooke River and at the De Mamiel Creek.

Council Resolution 01-12 provides, in the preamble, considerations the Council took into account in instructing the Secretariat to prepare the factual record.

In light of this instruction, the scope of this factual record is different from the scope of both the factual record requested in the submission and the factual record that the Secretariat considered to warrant development in its Article 15(1) notification.<sup>30</sup> After Council Resolution 01-12 was released, the Submitters stated:

Resolution 01-12 of the Council, issued November 16, 2001, raises serious concerns about the handling of the BC Logging Submission and the integrity of the citizen submission process generally. The BC Logging Submis-

29. *Ibid.* at 14.

30. It should not be assumed that the Secretariat’s Article 15(1) Notification to Council recommending a factual record for SEM-00-004 was intended to include a recommendation to prepare a factual record of the scope set out in Council Resolution 01-12, or that the Secretariat would have recommended a factual record of this scope.

sion was intended to highlight issues of widespread nonenforcement of the federal *Fisheries Act* engendered by the operation of provincial laws regulating the conduct of logging operations in British Columbia. Specifically, the BC Logging Submission was intended to highlight three particular types of damage routinely permitted under provincial law: clearcutting the riparian areas of certain fish bearing streams; falling and yarding of logs across fish bearing streams; and the clearcut logging of areas that have been determined to be highly prone to landslides. The significant environmental harm from these practices arises not necessarily from any one instance, but more importantly, from the cumulative effects of these practices occurring on a frequent basis in widespread parts of British Columbia. Resolution 01-12 narrows of [sic] the scope of the factual record for the BC Logging Submission, contrary to the recommendation of the Secretariat, and only allows the examination of factually isolated instances and precludes examination of logging conducted under the provincial *Forest Practices Code*. The result is that the factual record that will be prepared in this matter will not address the environmental concerns that prompted the filing of the Submission.<sup>31</sup>

As stated in the overall work plan for the factual record, this factual record presents facts regarding:

- (i) alleged violations of ss. 35(1) and 36(3) of the *Fisheries Act* in connection with the two areas that are referenced in Council Resolution 01-12;
- (ii) Canada's enforcement of ss. 35(1) and 36(3) of the *Fisheries Act* in connection with the two areas referenced in Council Resolution 01-12; and
- (iii) whether Canada is failing to effectively enforce ss. 35(1) and 36(3) of the *Fisheries Act* in the context of the two areas referenced in Council Resolution 01-12.

The following matters raised in the submission and the Secretariat's Article 15(1) notification are, except as relevant to the two areas referenced in Council Resolution 01-12, generally excluded from the factual record:

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

---

31. Letter from Sierra Legal Defence Fund to Council Members (6 March 2002).

- 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 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 overall frequency, number and severity of suspected violations of the *Fisheries Act* by logging operations in British Columbia that are not regulated by either the *Forest Practices Code* or the *Private Land Forest Practices Regulation*;
- 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 (regarding DFO staff concerns about ineffective *Fisheries Act* enforcement by British Columbia).

## 5. Summary of Other Relevant Factual Information and Facts Presented by the Secretariat with respect to Matters Raised in Council Resolution 01-12

This section describes the process used to gather information for the factual record, the meaning and scope of ss. 35(1) and 36(3) of the *Fisheries Act*, background information on policies relevant to Canada's actions in regard to logging of the two areas referenced in Council Resolution 01-12, background information about private land logging in British Columbia, a description of the fishery values in the Sooke watershed in which the logging took place and detailed information regarding Canada's actions to enforce s. 35(1) and s. 36(3) in connection with the logging of the two areas referenced in Council Resolution 01-12.

### 5.1 *The Process to Gather Information*

On 16 November 2001, the CEC Council instructed the Secretariat to develop a factual record in regard to submission SEM-00-004 (BC Logging), pursuant to Council Resolution 01-12 (Appendix 1). Under Article 15(4) of NAAEC, in developing a factual record, "the Secretariat



shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”

On 14 December 2001, the Secretariat published an Overall Plan to Develop a Factual Record (Appendix 2) pursuant to Council Resolution 01-12. The plan stated the Secretariat’s intention to gather and develop information relevant to facts regarding:

- (i) alleged violations of ss. 35 and 36 of the *Fisheries Act* in connection with the two areas that are referenced in Council Resolution 01-12;
- (ii) Canada’s enforcement of ss. 35 and 36 of the *Fisheries Act* in connection with the two areas referenced in Council Resolution 01-12; and
- (iii) whether Canada is failing to effectively enforce ss. 35 and 36 of the *Fisheries Act* in the context of the two areas referenced in Council Resolution 01-12.

To comply with the instruction in Council Resolution 01-12 “to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan,” the Secretariat stated that execution of the plan would begin no sooner than 14 January 2002. The Secretariat received comments on the plan from Canada on 14 January 2002, and from the United States on 23 January 2002 (Appendix 3).

As noted above in Section 4 regarding the scope of the factual record, and as reflected in the overall plan to develop the factual record, the Council, in Resolution 01-12, determined the scope of the information gathered for the factual record. Accordingly, the Secretariat prepared a Request for Information (Appendix 4) limited, as described above, to the matters set out in Council Resolution 01-12. The Request for Information provided the following examples of relevant information falling within the scope of the factual record:

1. Information on TimberWest’s logging operations along the Sooke River or De Mamiel Creek; for example information on:
  - formal or informal plans TimberWest had for complying with the *Fisheries Act*;
  - clearcutting in riparian areas;



- 
- the extent to which standing trees were left in riparian areas;
  - yarding or falling of trees into or across streams; or
  - logging on steep or landslide-prone areas.
2. Information on the impact of TimberWest's logging operations along the Sooke River or De Mamiel Creek on fish and fish habitat, particularly on any harmful alteration, disruption or destruction of fish habitat within the meaning of *Fisheries Act* section 35(1) or any deposit of deleterious substances (including silt, sediment or debris) in waters frequented by fish within the meaning of *Fisheries Act* section 36(3).
  3. Information on whether TimberWest's logging activity along the Sooke River or De Mamiel Creek area complied with British Columbia forest practices laws or regulations, and on whether the logging resulted in harmful alteration, disruption or destruction of fish habitat or in the deposit of deleterious substances in waters frequented by fish even though it complied with forest practices laws and regulations.
  4. Information on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, sections 35(1) and 36(3) of the *Fisheries Act*, specifically ones that might apply to TimberWest's logging along the Sooke River and De Mamiel Creek.
  5. Information on federal, provincial or local enforcement or compliance-related staff or resources available for enforcing or ensuring compliance with sections 35(1) and 36(3) of the *Fisheries Act* in connection with TimberWest's logging along the Sooke River and De Mamiel Creek.
  6. Information on Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* sections 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas, including for example:
    - efforts to prevent violations, such as by placing conditions on or requiring modifications of the logging operations or providing technical assistance;
    - monitoring or inspection activity either during or after the logging operations;
    - warnings, orders, charges or other enforcement action issued to TimberWest;
    - actions to remedy impacts to fish habitat due to logging; or

- coordination between different levels of government on enforcement and compliance assurance.
7. Information on the effectiveness of Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* section 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas, for example its effectiveness in:
    - remedying any violations of *Fisheries Act* sections 35(1) or 36(3) that occurred, or
    - preventing future violations of those provisions.
  8. Information on barriers or obstacles to enforcing or ensuring compliance with *Fisheries Act* sections 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas; and
  9. Any other technical, scientific or other information that could be relevant.

In early February 2002, the Secretariat posted the Request for Information on the CEC Web site and issued a press release notifying the public of its availability. In addition, on 1 February 2002, the Secretariat sent the Request for Information to the Government of Canada, inviting a response by 15 April 2002, in order to allow time to request follow-up information and also requesting meetings with officials from relevant federal, provincial and/or local agencies to discuss the matters to be addressed in the factual record. (Appendix 5). As requested by Canada, requests for information from the Canadian federal government were made in writing through designated points of contact. The Secretariat also sent the Request to the Submitters, the Governments of Mexico and the United States, the Joint Public Advisory Committee (JPAC), TimberWest, and nongovernmental organizations identified as potentially having relevant information, inviting them to respond with any relevant information by 30 June 2002 (Appendix 6). Appendix 7 contains a list of the nongovernmental organizations to whom the Request for Information was sent.

The Secretariat sent the Government of Canada an additional information request on 7 June 2002 with follow-up questions based on the Secretariat's review of information received from Canada on 19 April 2002 and 6 June 2002 (Appendix 8). On 12 June 2002, the Secretariat met with representatives of Environment Canada and DFO in Vancouver, and on 13 June 2002, the Secretariat accompanied representatives of

DFO, the Submitters and TimberWest on a visit to the site of the two logging operations referenced in Council Resolution 01-12.<sup>32</sup> Subsequent to the field visit, the Secretariat, on 19 July 2002, sent Canada another information request, modifying the June 7 information request and seeking clarification or additional information regarding matters discussed during the June 12-13 meetings in British Columbia (Appendix 9). The Secretariat received Canada's response to this information request on 18 September 2002.

The Submitters provided documents that the Secretariat requested from them. The Secretariat also met with a representative of the Submitters on 11 June 2002, and, as noted above, a representative of the Submitters attended the field visit on 13 June 2002. The Secretariat received additional information from the BC Forest Practices Board and from members of the public. TimberWest did not provide any information in response to the Secretariat's request, but a TimberWest representative was present during the 13 June 2002 field visit. In addition to information received in response to the Secretariat's requests for information, the Secretariat developed information through publicly available sources and contracted independent experts to assist in the development of scientific, technical and other information relevant to the factual record. Keith Moore, a registered professional forester and environmental forestry consultant in British Columbia, who served for five years as chair of the Forest Practices Board of British Columbia, provided the Secretariat with expert assistance in regard to scientific and technical matters. The Secretariat also obtained expert assistance from the Victoria, British Columbia, law firm of Hillyer and Atkins.

Article 15(5) of the NAAEC provides that "[t]he Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter." Pursuant to Article 15(6), "[t]he Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council." The Secretariat submitted the draft factual record to the Council on 15 April 2003 and received comments from Canada and the United States on 2 June 2003. Mexico did not comment on the draft factual record.

## 5.2 *Meaning and Scope of Fisheries Act Sections 35(1) and 36(3)*

This section provides the text of ss. 35(1) and 36(3) and other relevant provisions of the *Fisheries Act*, as well as information regarding the

32. These meetings are referred to below as the 12 June 2002 meeting and the 13 June 2002 site visit.

meaning and scope of ss. 35(1) and 36(3) that is relevant to the factual record.

Under the Canadian Constitution, the federal government has exclusive legislative jurisdiction over “Sea Coast and Inland Fisheries.”<sup>33</sup> The federal *Fisheries Act* was adopted in 1868, a year after confederation.<sup>34</sup> British Columbia became a province of Canada in 1871. British Columbia’s Terms of Union included a requirement for the federal government to “assume and defray the charges for protection and encouragement of fisheries.”<sup>35</sup> Except as provided in the Terms of Union, all generally applicable provisions of the Constitution applied to British Columbia as though it had become a province in 1867.<sup>36</sup>

The courts have indicated that the provisions of the *Fisheries Act* apply to fisheries and that not all fish constitute a “fishery.”<sup>37</sup> The statute defines a “fishery” in s. 2 as “the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract, or stretch of water in or from which fish may be taken by the said pound, seine, net, weir, or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith.” “Fishery” also has been defined as “the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised;” “[t]he business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water;” and “the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.”<sup>38</sup>

Sections 35(1) and 36(3) are in the part of the *Fisheries Act* headed “Fish Habitat Protection and Pollution Prevention.” Both apply throughout Canada on public and privately owned land. Both sections apply to all activities carried on by private individuals and companies and by all levels of government.<sup>39</sup>

---

33. S. 91(12) of the Constitution Act, 1867 (U.K.), 30 and 31 Vict. c. 3.

34. 31 Vict. 1868, c. 60.

35. S. 5(e) of the *Schedule to the British Columbia Terms of Union*.

36. *Ibid.* at s. 10.

37. *R. v. MacMillan Bloedel Ltd.* (1984), 11 C.C.C. (3d) 143 (B.C.C.A.), leave to appeal to S.C.C. refused. For a broader view of what constitutes a fishery, see *R. v. BHP Diamonds Inc.*, [2002] N.W.T.J. No. 91 (N.T.S.C.).

38. *R. v. Fowler*, [1980] 2 S.C.R. 213.

39. The Act is binding on Her Majesty in right of Canada or a province (section 3(2)).

### 5.2.1 Section 35(1)

Section 35(1) provides as follows:

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

Section 35(2) qualifies that prohibition as follows:

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

No regulations exist pursuant to s. 35(2) regarding the protection of fish habitat from the impacts of logging operations.

In order to obtain a conviction for violation of s. 35(1), the Crown must prove (1) that the accused carried on a “work or undertaking” and (2) that the carrying on of a “work or undertaking” resulted in the “harmful alteration, disruption or destruction of fish habitat.”<sup>40</sup> Section 34(1) of the *Fisheries Act* provides that “fish habitat” means “spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.”<sup>41</sup>

Section 35(1) prohibits the harmful alteration, disruption or destruction of fish habitat, not the alteration, disruption or destruction of fish habitat that results in harm to fish.<sup>42</sup> The elements of the offense are established if the Crown proves beyond a reasonable doubt that a defendant carried on a work or undertaking that impaired the value or the usefulness of the habitat for at least one of the purposes described in the definition of fish habitat, together with proof that actual fish in the affected area depend directly or indirectly on the habitat to carry out their life processes.<sup>43</sup> Neither proof of actual harm to fish nor an assumption that such harm occurred is necessary.<sup>44</sup> The courts have indicated

40. *R. v. Leveque* (2001), 43 C.E.L.R. (N.S.) 294 (Ont. Sup. Ct. of Justice), at para. 36.

41. One court stated: “Fish habitat is composed of physical, chemical and biological components and includes such diverse, but interdependent factors as gravel beds, streamside vegetation, water turbidity, aquatic insects and benthic organisms.” *R. v. BC Hydro and Power Authority* (1997), 25 C.E.L.R. (N.S.) 51 (B.C.S.C.), at para. 20.

42. *British Columbia v. Posselt* (1999), 29 C.E.L.R. (N.S.) 213 (B.C.S.C.).

43. *R. v. Maritime Electric Co.* (1990), 82 Nfld. & P.E.I.R. 342; 4 C.E.L.R. (N.S.) 289 (P.E.I.S.C.T.D.); *R. v. Beaulieu* (2001), 40 C.E.L.R. (N.S.) 212 (N.T.S.C.); *R. v. Bowcott* (1998) (B.C.S.C.).

44. *British Columbia v. Posselt* (1999), 29 C.E.L.R. (N.S.) 213 (B.C.S.C.).

that trivial, non-permanent, passing or minimal alterations or disruptions of fish habitat will not be subject to penal consequences<sup>45</sup> and that harmful alteration or disruption of fish habitat must be of a somewhat permanent nature.<sup>46</sup>

In its periodically-published *Habitat Enforcement Bulletin*, DFO has described the importance of waterside vegetation to fish habitat, noting that “[t]rees and vegetation provide shade that cools the water temperature, insects that are food for fish, roots that stabilize the banks, and cover from predators.”<sup>47</sup> Logging in the vicinity of streams can be a “work or undertaking” resulting in the harmful alteration, disruption or destruction of fish habitat in violation of s. 35(1). For example, a violation might result if logging reduces shade so as to increase the temperature of the stream, destabilizes the bank so as to allow harmful sediment to enter the stream or leads to a decrease in the amount of beneficial nutrients or woody debris in the stream.<sup>48</sup> A violation of s. 35(1) can also result if trees are felled across, along or into a stream.<sup>49</sup> Appendix 10 contains a description of the logging-related issues of riparian management, water management, sediment management and water quality management of potential concern to DFO habitat managers.<sup>50</sup> Whether logging has resulted in such harmful alteration, disruption or destruction of fish habitat is a question of fact. Although proof of harm to fish is not required to establish a violation of s. 35(1), “evidence of fewer fish or of less-healthy fish after the logging would be cogent circumstantial evidence of damage to [fish] habitat.”<sup>51</sup>

Under s. 40(1) of the *Fisheries Act*, violations of s. 35(1) are offenses punishable either on summary conviction (carrying fines of up to \$300,000 for a first offense, with the possibility of a \$300,000 fine and/or imprisonment for up to six months for repeat offenders) or on indictment (with fines of up to \$1M for a first offense and fines of up to \$1M and/or prison terms of up to three years for repeat offenders). Every day on which a *Fisheries Act* violation continues is a separate offense (s. 78.1).

---

45. *R. v. Leveque*, [2001] O.J. No. 4437; 43 C.E.L.R. (N.S.) 294 (Ont. Sup. Ct. of Justice), at para. 44.

46. *Ibid.*

47. Fisheries and Oceans Canada, *Habitat Enforcement Bulletin* No. 6 (June 1999).

48. *British Columbia v. Posselt* (1999), 29 C.E.L.R. (N.S.) 213 (B.C.S.C.); *R. v. Bowcot*, [1998] B.C.J. No. 2342 (Quicklaw) (B.C.S.C.).

49. *R. v. Fletcher Challenge Ltd.*, [1994] B.C.J. No. 184 (Quicklaw) (B.C.S.C.).

50. This information was excerpted from a DFO publication entitled *1999-2000 Field Monitoring Report: Vancouver Island Private Managed Forest Land* (October 2001).

51. *Ibid.*

### 5.2.2 Section 36(3)

Section 36(3) provides as follows:

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

Under ss. 36(4) and 36(5), the federal government can adopt regulations prescribing when, where, under what circumstances and in what concentrations the deposit of specified deleterious substances, waste or pollutants is authorized. No such regulations are in force specifically relevant to logging activities such as those that are the subject of this factual record.

To succeed in a prosecution, the Crown must be able to prove beyond a reasonable doubt that a person “deposited” or “permitted the deposit of” a “deleterious substance” into or near “water frequented by fish.”<sup>52</sup>

Section 34(1) defines a “deposit” as any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing.<sup>53</sup> A “deposit” takes place whether or not the act resulting in the deposit is intentional.<sup>54</sup> In addition, a “deposit” includes both a deposit directly into fish-bearing water or a deposit in a place and under conditions where the substance deposited may enter fish-bearing water.<sup>55</sup> A deposit may occur if someone is in a position to exercise continued control of a deposit and prevent it from occurring, but fails to do so.<sup>56</sup>

A “deleterious substance” in the *Fisheries Act* is a substance that, if added to water, would cause the water to become harmful to fish.

52. See *R. v. Northwest Territories (Commissioner)*, [1994] 1 W.W.R. 44 (N.W.T. Terr. Ct.), appeal dismissed, [1994] 8 W.W.R. 405 (N.W.T.S.C.), for an analysis of the elements of an offense under s. 36(3).

53. S. 34(1).

54. S. 40(5)(a) of the *Fisheries Act*.

55. *R. v. Western Stevedoring Co.* (1984), 13 C.E.L.R. 155 (B.C.C.A.), leave to appeal to S.C.C. refused (1984), 13 C.E.L.R. 155n (S.C.C.).

56. *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 and *R. v. Northwest Territories (Commissioner)*, [1994] 1 W.W.R. 441 (N.W.T. Terr. Ct.), appeal dismissed, [1994] 8 W.W.R. 405 (N.W.T.S.C.).

“Deleterious substance” is defined in s. 34(1) as

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c).

The focus is on the substance that is added to the water, rather than the water after the addition of the substance.<sup>57</sup> The courts have held that if a substance is “deleterious” in and of itself (such as acutely lethal effluent), the Crown does not have to prove that depositing such a substance into water frequented by fish actually caused harm to fish or fish habitat in order to secure a conviction under s. 36(3).<sup>58</sup> Once it is determined that a substance is deleterious and that it has been deposited, courts have

57. *R. v. MacMillan Bloedel (Alberni) Limited* (1979), 47 C.C.C. (2d) 118 (B.C.C.A.), leave to appeal to S.C.C. refused (1979), 47 C.C.C. (2d) 118n (S.C.C.).

58. In determining whether a substance is deleterious, courts have held it is sufficient to prove that the substance deposited is capable of making water harmful to fish. For instance, in *R. v. MacMillan Bloedel (Alberni) Limited* (1978), 42 C.C.C. (2d) 70 (B.C. Co. Ct.) at 73-74; affirmed 47 C.C.C. (2d) 118 (B.C.S.C.); leave to appeal to S.C.C. refused (1979), 47 C.C.C. (2d) 118n (S.C.C.); the Court held that “[t]he effect of the Act is to provide that if such a substance has had a harmful effect on fish elsewhere when added to water, then it qualifies as a deleterious substance under the *Fisheries Act*.” See also *R. v. Abitibi Consolidated* (2000), 190 Nfld. and P.E.I.R. 326; 2000 Nfld. and P.E.I.R. LEXIS 238; 576 APR 326 (Nfld. Prov. Ct.), at para. 51: “In determining whether the Crown has established that there was a deposit of a deleterious substance beyond a reasonable doubt, I agree with the Crown’s assertion that it is not necessary to establish actual harm or damage to fish or fish habitat.”



held the offense is complete without ascertaining whether the water itself was thereby rendered deleterious.<sup>59</sup> Representatives of the federal government informed the Secretariat that in their view, sediment, soil or other matter deposited or permitted to be deposited into water frequented by fish in the course of or as a result of logging operations can be a “deleterious substance” for purposes of s. 36(3).<sup>60</sup>

“Water frequented by fish” is defined as “Canadian fisheries waters,” but it is not “water frequented by fish” for the purposes of the *Fisheries Act* if the defendant can prove that at all times material to the proceedings the water is not, has not been and is not likely to be frequented by fish.<sup>61</sup> Noting that the definition of fish in the *Fisheries Act* is broad, one court held that the word “water” could not be limited to the few cubic feet into which the substance was discharged because to do so would disregard the fact that both water and fish move.<sup>62</sup> Thus, “water frequented by fish” may include water where no fish are present in the immediate vicinity. Specifically, where the water into which a deposit is made is part of a larger body of water—for example a water body that is tidal in nature and fish-bearing—it is inappropriate to isolate and separate the smaller area of water from the larger water body.<sup>63</sup>

Under s. 40(2) of the *Fisheries Act*, violations of s. 36(3) are offenses punishable either on summary conviction (carrying fines of up to \$300,000 for a first offense, with the possibility of a \$300,000 fine and/or imprisonment for up to six months for repeat offenders) or on indictment (with fines of up to \$1M for a first offense and fines of up to \$1M and/or prison terms of up to three years for repeat offenders). Every day on which a *Fisheries Act* violation continues is a separate offense (s. 78.1).

59. *R. v. MacMillan Bloedel (Alberni) Limited* (1979), 47 C.C.C. (2d) 118 (B.C.C.A.), leave to appeal to S.C.C. refused (1979), 47 C.C.C. (2d) 118n (S.C.C.).

60. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting). Some courts have indicated that, in the case of a substance that is not inherently deleterious, such as sediment, it must be proven that the substance was deposited over such a period of time and in such a concentration as to make the substance deleterious. *R. v. BHP Diamonds Inc.*, [2002] N.W.T.J. No. 91 (N.T.S.C.). Citing *Fletcher v. Kingston*, [2002] O.J. 2324, the *BHP Diamonds* opinion notes that at least one court has used a two-tier test under which, “unless the particular substance was proven to be an inherently toxic substance, it would be necessary under s. 36(3) to consider the quantity and concentration of the deposit as well as the time frame over which the deposit took place.”

61. Ss. 34(1) and 40(5)(b) of the *Fisheries Act*. It has been held that even if there are no fish in the vicinity of the deposit, where the surrounding water is tidal in nature and fish-bearing, the deposit is considered to have been made to water frequented by fish; *R. v. Stora Forest Industries Ltd.*, [1993] N.S.J. No. 330 (Prov. Ct.).

62. *R. v. MacMillan Bloedel (Alberni) Limited* (1979), 47 C.C.C. (2d) 118 (B.C.C.A.), leave to appeal to S.C.C. refused (1979), 47 C.C.C. (2d) 118n (S.C.C.).

63. *R. v. Stora Forest Industries Ltd.*, [1993] N.S.J. No. 330 (Prov. Ct.).

Where there has been an unauthorized deposit of a deleterious substance or a serious threat that a deposit may occur, s. 42 provides the authority for the federal or provincial government to take measures to prevent the deposit or to remedy any adverse effects and to recover costs incurred from the persons responsible.

### 5.2.3 *Enforcement Options for Violations of s. 35(1) or s. 36(3)*

The *Fisheries Act* lists a range of potential responses to alleged or apprehended violations of s. 35(1) or s. 36(3), including information requests and orders from the Minister of Fisheries and Oceans of Canada (the “Minister”), prosecutions, court orders upon conviction, injunctions, and civil suits for recovery of remediation costs. Information regarding these types of responses is provided below.

#### 5.2.3.1 Information Requests and Orders from the Minister

The *Fisheries Act* gives the Minister the power to request information in connection with any work or undertaking that results or is likely to result in the harmful alteration, disruption or destruction of fish habitat or the deposit of a deleterious substance contrary to the *Fisheries Act* (s. 37 (1)). Specifically, the Minister can request the production of information relating to the work or undertaking; whether there is or is likely to be harmful alteration, disruption or destruction of fish habitat or a deposit of a deleterious substance by reason of the work or undertaking; and what measures, if any, would mitigate the effects thereof. On the basis of such information and any representations made by the party who provided it, the Minister can, with the approval of the Governor in Council, order modifications to the work or undertaking, restrict its operation, or direct its closing for a specified period.

#### 5.2.3.2 Prosecutions

Another potential response to an alleged violation of s. 35(1) or s. 36(3) is to initiate a prosecution against the party responsible for the alleged violation. Prosecution may proceed by way of summary conviction or, in rare cases, by indictment. Proceedings by way of summary conviction in relation to an offense under s. 35(1) or s. 36(3) must be instituted not later than two years after the time the federal government becomes aware of the offense (s. 82). Maximum sentences upon conviction are set out in sections 5.2.1 and 5.2.2 above.

### 5.2.3.3 Court Orders upon Conviction

The *Fisheries Act* gives the courts broad powers to issue orders upon conviction, in addition to any punishment imposed (s. 79.2). A court can order the convicted party to do or refrain from doing anything in order to prevent the continuation or repetition of the offense or to remedy harm to fish or fish habitat resulting from the commission of the offense, and it can secure compliance with this order by requiring posting of a bond or payment of an amount of money into court. It can order the convicted party to compensate the Minister of Fisheries and Oceans for any remedial or preventive action taken by or on behalf of the Minister as a result of the commission of the offense. Finally, it can require the convicted party to report to the court on its activities following conviction and can set any other conditions it considers appropriate to secure the party's good conduct and to prevent repetitions of the offense or commission of other violations of the *Fisheries Act* by that party. Violation of such an order makes the convicted party liable to the punishment provided for the underlying offense (s. 79.6). Under the *Fisheries Act*, money owed under court orders becomes a debt due to the Crown (s. 79.4(1)).

### 5.2.3.4 Injunctions

The Attorney General can apply for an injunction to enjoin anything punishable as an offense under s. 40 of the *Fisheries Act*, whether or not a prosecution has been instituted (s. 41(4)).

### 5.2.3.5 Civil Suits for the Recovery of Remediation Costs

Where there is a deposit of a deleterious substance in water frequented by fish that is not authorized under s. 36 or a serious and imminent danger of such a deposit, the Crown may institute a civil action for recovery of all costs and expenses reasonably incurred by federal or provincial officials to prevent, counteract, mitigate or remedy any adverse effects that result or may reasonably be expected to result from the unauthorized deposit of a deleterious substance or serious and imminent threat of a deposit (s. 42(1)).

### 5.2.4 Defenses to Prosecution of *Fisheries Act* Sections 35(1) and 36(3)

Violation of s. 35(1) or s. 36(3) is a strict liability offense. Under the *Fisheries Act*, this means that even if the Crown succeeds in proving all the elements of the offense beyond a reasonable doubt, a defendant will

not be convicted for violating s. 35(1) or s. 36(3) if the defendant enters a defense and can prove on a balance of probabilities that the facts support that defense.<sup>64</sup> For example, even if the Crown proves beyond a reasonable doubt that someone violated s. 35(1) or s. 36(3), the defendant will be acquitted if the defendant can prove on a balance of probabilities that it was duly diligent in trying to prevent the violation from occurring.

Canada informed the Secretariat that, although the evidentiary onus is on the accused to prove a defense, the investigating law enforcement agency or department typically considers potential defenses to a case before the Crown prosecutor approves the laying of charges.<sup>65</sup> The facts regarding the logging referenced in Council Resolution 01-12, together with the information provided below, are relevant to a consideration of whether the defenses of due diligence or officially induced error might counter any violations of s. 35(1) or 36(3) resulting from the logging at the De Mamiel Creek tributary or the Sooke River.

#### 5.2.4.1 The Defenses of Due Diligence and Mistake of Fact

The defenses of due diligence and mistake of fact are embodied in s. 78.6 of the *Fisheries Act*. Under the *Fisheries Act*, a defendant will avoid conviction if it can prove that it was duly diligent in trying to prevent the occurrence of the offense or reasonably and honestly believed in mistaken facts that, had they been true, would render the defendant's conduct innocent (s. 78.6).

In advancing a due diligence defense, "the onus on an accused is to establish, on a balance of probabilities, that he took all reasonable care to avoid the event."<sup>66</sup> Where the alleged offense is based on "inaction" on the part of the defendant and the defendant is accused of "permitting" a violation, the courts have suggested that "[...] the real issue is whether the accused had exercised due diligence."<sup>67</sup> Due diligence does not require superhuman efforts, but rather a high standard of awareness and decisive, prompt, and continuing action. In determining whether the accused took all reasonable steps to avoid the particular event, what is considered reasonable is what a reasonable person would have done in the circumstances.<sup>68</sup> Thus, due diligence requires the taking of all rea-

---

64. S. 78.6 of the *Fisheries Act*.

65. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

66. *R. v. BHP Diamonds Inc.*, [2002] N.W.T.J. No. 91 (Quicklaw) (N.T.S.C.).

67. *R. v. Rivtow Straits Ltd.* (1993), 12 C.E.L.R. (N.S.) 153 (B.C.C.A.) at para. 45.

68. *R. v. Sault Ste. Marie (City)*, [1978] 2. S.C.R. 1299 at 1326.

sonable steps, not all conceivable steps.<sup>69</sup> To establish a due diligence defense, an accused need only to have taken reasonable care in respect to risks that were reasonably foreseeable.<sup>70</sup>

A defendant might demonstrate that he or she had exercised all reasonable care by establishing procedures to prevent the commission of the offense and by taking reasonable steps to ensure that the procedures operated effectively.<sup>71</sup> On the other hand, a defendant who is aware of a risk of harmful alteration, disruption or destruction of fish habitat or of discharge of a deleterious substance into fish-bearing water and fails to exercise all reasonable care, for example, by establishing procedures to prevent the offense and taking steps to ensure the effective operation of the procedures, might be found not to have demonstrated due diligence.<sup>72</sup>

The “mistake of fact” defense embodied in paragraph 78.6(b) requires both an honest belief in the existence of facts that, if true, would render the person’s conduct innocent, and that, on an objective rather than a subjective basis, a person in the position of the accused must reasonably have believed in the existence of those facts.<sup>73</sup>

#### 5.2.4.2 Defenses Based on Actions of the Regulator

Other defenses or excuses are available under the common law. These include “officially induced error” and “abuse of process,” both of which prevent someone from being convicted for action or inaction that, at the time it occurred, appeared (from the perspective of a reasonable person) to meet with government approval. The facts regarding the logging at the De Mamiel Creek tributary and Sooke River areas referenced in Council Resolution 01-12, together with the information provided

69. *R. v. Ontario (Ministry of the Environment)*, [2001] O.J. No. 2581 (Ont. Ct. of Justice) at para. 177. Factors that must be weighed and balanced in assessing due diligence include: 1) the nature and gravity of the adverse effect; 2) the foreseeability of the effect, including abnormal sensitivities; 3) the alternative solutions available; 4) legislative or regulatory compliance; 5) industry standards; 6) the character of the neighbourhood; 7) what efforts have been made to address the problem; 8) over what period of time, and promptness of the response; 9) matters beyond the control of the accused, including technological limitations; 10) skill level expected of the accused; 11) the complexities involved; 12) preventive systems; 13) economic considerations; and 14) actions of officials; *R. v. Commander Business Furniture* (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. J. (Prov. Div.)).

70. *R. v. BHP Diamonds Inc.*, [2002] N.W.T.J. No. 91 (Quicklaw) (N.T.S.C.).

71. *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at 1331.

72. *R. v. Northwest Territories (Commissioner)*, [1994] 1 W.W.R. 441 (N.W.T. Terr. Ct.), appeal dismissed, [1994] 8 W.W.R. 405 (N.W.T.S.C.).

73. *R. v. Leveque* (2001), 43 C.E.L.R. (N.S.) 294 (Ont. Sup. Ct. of Justice), at para. 74.

below, raise the question of the applicability of the defense of officially induced error or abuse of process in connection with any violations of s. 35(1) or 36(3) resulting from those logging operations.

The courts have indicated that a defendant must satisfy four conditions to invoke the defense of officially induced error of law successfully.<sup>74</sup> It must have (1) considered its legal position; (2) consulted an appropriate official about it; (3) obtained erroneous advice that was reasonable in the circumstances; and (4) relied on that advice.<sup>75</sup> The Supreme Court of Canada has suggested that because it functions as an “excuse” and not as a “justification” for wrongful behavior—and therefore results in a stay of proceedings rather than an acquittal—an officially induced error of law argument “will only be successful in the clearest of cases.”<sup>76</sup>

One Canadian court explained officially induced error as follows:

The defence of “officially induced error” is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that this reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.<sup>77</sup>

Whether advice from a particular government official regarding the requirements of a federal statute can provide a basis for a defense of officially induced error depends on whether “. . . a reasonable person would consider that particular government organ to be responsible for the law in question. The determination relies on common sense rather than constitutional permutations.”<sup>78</sup> The defendants must also demonstrate that the advice was reasonable in the circumstances. Generally, if an appropriate official is consulted, the advice obtained will be presumed to be reasonable unless it appears on its face to be utterly unreasonable.<sup>79</sup> Last, the defendant must demonstrate reliance on the advice, for example, by proving that the advice was obtained before the actions

---

74. See *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 129 D.L.R. (4th) 510, reasons of Lamer J. at paras. 25-38. The majority of the Court did not address officially induced error.

75. *Ibid.*

76. *Ibid.* at para. 38.

77. *R. v. Cancoil Thermal Corporation* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.).

78. *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 129 D.L.R. (4th) 510, reasons of Lamer J. at para. 31.

79. *Ibid.*

in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation.<sup>80</sup>

"Abuse of process" can be invoked by a defendant in cases where entering a conviction would be unconscionable, risking bringing the administration of justice into disrepute. This would be the case, for example, if a person were charged with an offense after having been assured that no enforcement action would be taken, or after having agreed on a plan of remedial action and a timetable with the regulator and having implemented the plan in accordance with the timetable.<sup>81</sup> This remedy is also only available in the clearest of cases, and past non-enforcement alone may not be enough, absent an express or implied promise not to prosecute, to make this defense available. The Supreme Court of Canada has stated that to amount to one of the clearest of cases, there must be "overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice."<sup>82</sup>

### 5.3 *Policies regarding Enforcement of Fisheries Act Sections 35(1) and 36(3)*

A number of policies, principles and guidelines regarding the *Fisheries Act* pertain to the application of the Act's fish habitat protection and pollution prevention provisions. This section summarizes policies, principles and guidelines that are relevant to a consideration of whether Canada failed to effectively enforce the *Fisheries Act* in connection with logging along the tributary to De Mamiel Creek and the Sooke River.

#### 5.3.1 *Principle of No Net Loss*

The principle of No Net Loss (NNL) is central to Canada's approach to protecting and conserving fish habitat. The NNL principle is described in the 1986 *Policy for the Management of Fish Habitat* (the 1986 Policy). The 1986 Policy states that the NNL principle is fundamental to the first goal of the policy—habitat conservation—and that, under the NNL principle, "the Department will strive to balance unavoidable habitat losses with habitat replacement on a project-by-project basis so that further reductions to Canada's fisheries resources due to habitat loss or damage may be prevented."<sup>83</sup> The 1986 Policy also states that it is a

80. *Ibid.*

81. *Re Abitibi Paper Co. and the Queen* (1969), 47 C.C.C. (2d) 487 (Ont. C.A.).

82. *R. v. Power*, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, at para. 12.

83. Department of Fisheries and Oceans, *Policy for the Management of Fish Habitat*, 1986, at 12.



long-term policy objective to achieve an overall net gain in the productive capacity of fish habitat. It indicates that Canada will achieve this objective through the application of the guiding principle that there will be no net loss of habitat's capacity to produce fish.

Canada has developed a series of policies to provide additional guidance on the implementation of the NNL guiding principle since issuing the 1986 Policy. These include the *Directive on the Issuance of Subsection 35(2) Authorizations*, Department of Fisheries and Oceans (1995); the *Habitat Conservation and Protection Guidelines*, Department of Fisheries and Oceans (1998); and the *Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat*, Department of Fisheries and Oceans, Habitat Management Branch (1998).

Canada's 1998 *Habitat Conservation and Protection Guidelines* (the 1998 Guidelines) focus on the application of the NNL guiding principle and address the habitat conservation and protection aspects of the 1986 Policy. The Guidelines apply to habitat that (1) currently produces fish that are harvested in a subsistence, commercial or recreational fishery; (2) although not directly supporting fish, provides nutrients or food supply to adjacent or downstream habitat or contributes to water quality for fish; (3) could sustain a new fishery in the future; or (4) has been identified by the DFO or a provincial fisheries agency as a candidate for enhancement.

The focus of the 1998 Guidelines is on planning and prevention of harmful alteration, disruption or degradation of fish habitat. However, the 1998 Guidelines also recognize the role of enforcement, providing as follows:

The Department will enforce the *Fisheries Act* so as to protect fish and fish habitat. If the proponent does not comply with the terms and conditions as stated by DFO and fish or fish habitat are harmed, enforcement procedures will be initiated pursuant to the Act in accordance with departmental compliance policies.<sup>84</sup>

The 1998 Guidelines contain a hierarchy of management options that may be considered for habitat conservation and protection if it appears in assessing a project that the current habitat productive capacity cannot be maintained. Under this hierarchy, where project assessment indicates that current habitat productive capacity cannot be maintained, the Guidelines recommend changing project design

---

84. Guidelines at section 4.0, Step VI.



through relocation or redesign. If neither relocation nor redesign is feasible, and the project does not pose a threat to critical or important habitat, mitigation measures can be considered. Where relocation, redesign and mitigation are not viable and the habitat requires only moderate or minimum protection, habitat compensation and artificial propagation can be used to achieve “no net loss” of fish habitat productive capacity.<sup>85</sup>

The *Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat* (the HADD Decision Framework) is another policy developed to apply the NNL principle. The HADD Decision Framework clarifies that s. 35(2) authorizations legalize activities that otherwise might be illegal because of the harm they cause to fish habitat. The HADD Decision Framework indicates that the approach to applying the NNL guiding principle involves evaluating two central questions in reviewing projects:

- Is HADD (harmful alteration, disruption or destruction of fish habitat) likely to result?
- If so, should a s. 35(2) authorization be issued?

The formal starting point for applying the HADD Decision Framework is a project proposal. A project proponent is not required to seek DFO approval or to submit the project to review pursuant to the HADD Decision Framework. However, a project proponent may choose to seek formal DFO review and possibly an authorization. Alternatively, a proponent may choose to seek informal DFO review or to proceed without any DFO involvement. Without an authorization under s. 35(2), a proponent risks DFO’s subsequently seeking information regarding, or inspecting, the work or undertaking to determine compliance with the *Fisheries Act*. Without an authorization, a proponent ultimately risks prosecution under the *Fisheries Act*.

The 1986 Policy provides that under s. 37(1), DFO may ask a project proponent “to provide a statement of information so that the Department can assess the potential impacts of existing or proposed works and undertakings on the fisheries resource.”<sup>86</sup> This is likely to happen only in the case of major projects. “Major projects” are

Those works, undertakings and activities that could potentially have, or be perceived to have, significant negative impacts on the habitats supporting Canada’s important fisheries resources. Examples include: large-scale aerial biocide spraying of forest and agricultural lands; deep-draft marine

85. See the Guidelines at section 3.0.

86. 1986 Policy at 17.

terminals; hydroelectric dams and diversions; integrated mining operations; offshore oil and gas exploration and development; large industrial and municipal waste discharges; large pipelines, rail lines, roads and transmission lines; large forest harvesting operations; large dredging operations; and other similar projects.<sup>87</sup>

With respect to obtaining adequate information, the HADD Decision Framework elaborates as follows:

[D]etermining if HADD of fish habitat is likely to result requires adequate information about the project, fish habitat characteristics and fish populations in the project area. HADD is determined by combining knowledge of the proposed project with knowledge of the specific habitats and fish populations that may be impacted. In cases where either DFO reviewers or their provincial or territorial counterparts do not have sufficient information, the proponent is responsible for providing, and will be requested to supply, the necessary information. However, in cases where there is doubt about the impact of a project on fish habitat and if sufficient information is not provided to enable for a conclusion that a HADD is not likely to result, reviewers should adopt a precautionary approach and conclude that a HADD is likely to result.<sup>88</sup>

The *Fisheries Act* defines “fish habitat,” as noted above, but does not provide a definition of what constitutes a harmful alteration, disruption or destruction (HADD) of fish habitat. The HADD Decision Framework defines HADD of fish habitat as “any change in fish habitat that reduces its capacity to support one or more life processes of fish.”<sup>89</sup>

The HADD Decision Framework also differentiates between harmful alteration, disruption and destruction according to the severity of impacts and their duration, as follows:

- **harmful alteration**—any change to fish habitat *indefinitely* which reduces its capacity to support one or more life processes of fish but *does not completely eliminate the habitat*;
- **disruption**—any change to fish habitat occurring for a *limited period* which *reduces* its capacity to support one or more life processes of fish; and
- **destruction**—any *permanent* change of fish habitat which *completely eliminates* its capacity to support one or more life processes of fish.<sup>90</sup>

---

87. 1986 Policy, Glossary.

88. HADD Decision Framework at s. 3.2.2.2.

89. *Ibid.* at 6.

90. *Ibid.* at 6.

A figure<sup>91</sup> depicting the decision framework for the determination and authorization of HADDs is reproduced below.

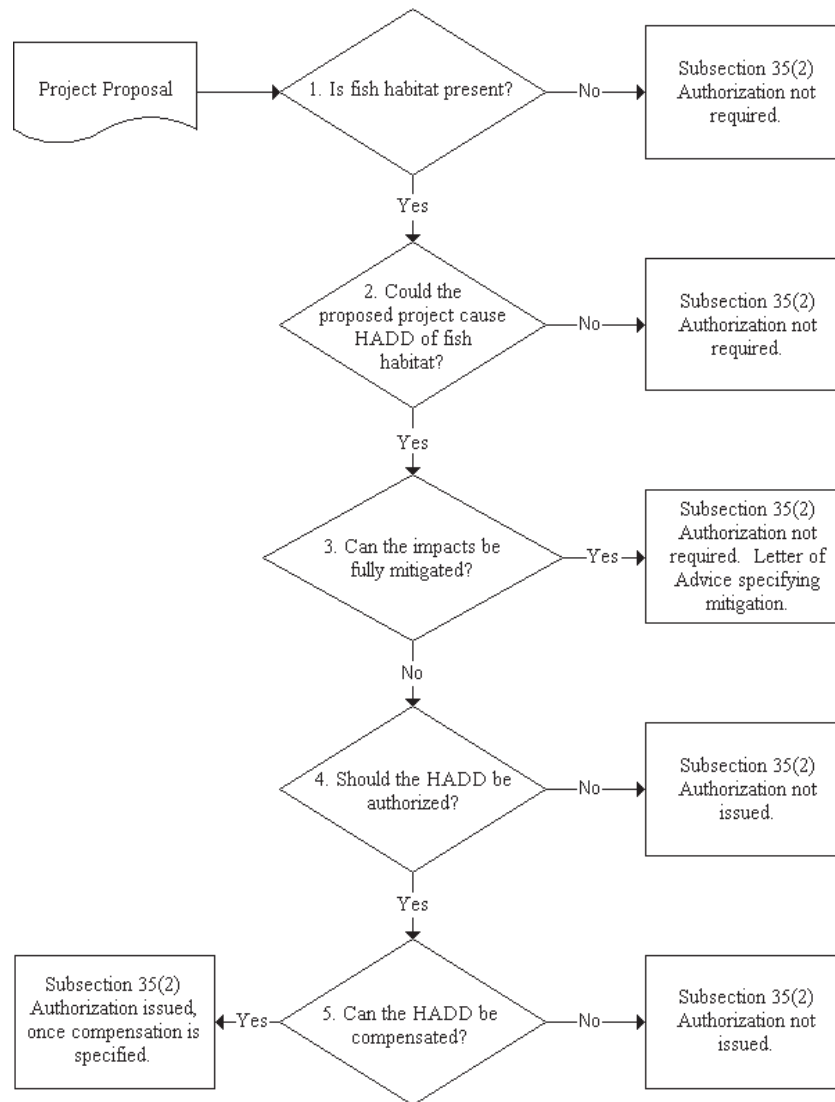


Figure 2: A decision framework for the determination and authorization of harmful alteration, disruption or destruction of fish habitat

91. *Ibid.* at 3.

Canada informed the Secretariat that the HADD Decision Framework is almost never applied in practice in connection with logging operations and that neither it nor the project review provisions of the 1998 Guidelines was applied in connection with either of the logging operations referenced in Council Resolution 01-12.<sup>92</sup> Specifically, Canada informed the Secretariat as follows:

The Conservation and Protection Guidelines and the HADD Decision Framework documents provide a consistent policy framework for DFO staff to review proposals that have the potential to harm fish habitat. The logging plans were not referred to DFO and therefore DFO could not advise the proponent on how to avoid harmful alteration of fish habitat.<sup>93</sup>

Canada was generally aware of TimberWest's logging in the Sooke watershed. Canada did not use its discretionary authority under s. 37 of the *Fisheries Act* to obtain information regarding the logging of the areas referenced in Council Resolution 01-12.

### 5.3.2 Compliance and Enforcement Policy

By law, the federal Minister of Fisheries and Oceans is responsible for the administration and enforcement of the *Fisheries Act*.<sup>94</sup> However, in 1978, the Prime Minister assigned to the Minister of the Environment responsibility for administration and enforcement of s. 36(3) (formerly s. 33(2)). A 1985 Memorandum of Understanding ("MOU") between the Department of Fisheries and Oceans and Environment Canada outlines the responsibilities of both departments for the administration and enforcement of the pollution prevention provisions of the *Fisheries Act*.<sup>95</sup>

Under the MOU, DFO and Environment Canada agree to cooperate and communicate openly and regularly on all matters related to the administration of s. 36(3) (s. 1). They also make joint decisions on enforcement actions (s. 4), but Fisheries and Oceans Canada reserves the right to take action directly in circumstances where the fisheries resource is being affected by the deposit of a deleterious substance and Environment Canada is unable or unwilling to take action (s. 8). Canada has explained that DFO generally assumes the lead regarding enforcement of both s. 35(1) and s. 36(3) in connection with forestry operations

---

92. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

93. DFO Response to the CEC Secretariat Follow-up Questions (30 July 2002).

94. S. 4(1)(a) of the *Department of Fisheries and Oceans Act*, R.S.C., c. F-15.

95. Memorandum of Understanding between the Department of Fisheries and Oceans and the Department of the Environment on the Subject of the Administration of Section 33 of the *Fisheries Act* signed at Ottawa, Ontario, 6 May 1985.

in the Pacific Region.<sup>96</sup> Only DFO, and not Environment Canada, was involved in the investigations related to the logging along the De Mamiel Creek tributary and the Sooke River.

#### 5.3.2.1 Compliance and Enforcement Policy in Effect in 1999

At the time of the logging referenced in Council Resolution 01-12, DFO's 1986 *Policy for the Management of Fish Habitat* provided as follows:

The Department prefers to prevent damage to habitat and avoid losses to the fisheries resource, rather than to take court action against offenders after the fact. However, when voluntary compliance fails to produce the desired objective, and the *Fisheries Act* is contravened and the habitats supporting fisheries resources are altered, destroyed or degraded, enforcement officers of the Department will carry out enforcement action.<sup>97</sup>

DFO's *Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act, Annual Report 1999-2000* (1999-2000 Annual Report), also provides an indication of the compliance and enforcement policy in effect at the time of the logging. Regarding compliance and enforcement, the report provides as follows:

The enforcement and compliance monitoring activities of Fishery Officers are vital to the Habitat Management Program and are key to protecting Canada's fish and fish habitat. The focus of their work is on preventing harm to fish, fish habitat or human use of fish caused by physical alteration of fish habitat or pollution of waters frequented by fish. Priority for action to deal with suspected violations is guided by:

- the degree of harm to fish, fish habitat or human use of fish caused by physical alteration of habitat or pollution of waters frequented by fish, or the risk of that harm; and/or
- whether or not the alleged offense is a repeat occurrence.

Fishery Officers use warnings:

- when they have reasonable grounds to believe that a violation of the Act has occurred;
- where the degree of harm or potential harm to the fishery resource, its supporting habitat, and to human use of fish or both appears to be minimal; and

96. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

97. DFO, *Policy for the Management of Fish Habitat* at 18 (1986).

- where the alleged violator has made reasonable efforts to remedy or mitigate the negative impact of the alleged offences on the fishery resources and its habitat.

In deciding to use warnings or another enforcement response, Fishery Officers may also consider:

- whether reasonable efforts have been taken to remedy or mitigate the negative consequences of the alleged offense or further offences;
- whether the alleged violator has a good history of compliance with the habitat protection and/or the pollution provisions of the *Fisheries Act*; and
- whether sufficient action has been taken to ensure that future offences are not committed.

The preferred course of action preferred is prosecution where evidence establishes that:

- the alleged violation resulted in risk of harm to fish or fish habitat;
- the alleged violation resulted in harmful alteration, disruption or destruction of fish habitat (not authorised by the Minister of Fisheries and Oceans);
- the alleged violator had previously received a warning for the activity and did not take all reasonable measures to stop or avoid the violation; and
- the alleged violator had previously been convicted of a similar offence.<sup>98</sup>

#### 5.3.2.2 July 2001 *Fisheries Act* Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy

Fisheries and Oceans Canada and Environment Canada officially issued a *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* (“Compliance and Enforcement Policy”) in July 2001.<sup>99</sup> The Compliance and Enforcement Policy, applicable to all who exercise regulatory authority under the *Fisheries Act*, sets out the general principles for application of the pollution prevention and habitat protection provisions of the *Fisheries Act*. Although the final

---

98. Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* (1 April 1999 to 31 March 2000), Annex II.

99. Policy at 3. Environment Canada.

Compliance and Enforcement Policy was not in effect at the time of the logging referenced in Council Resolution 01-12, Canada informed the Secretariat that at the time of the logging Canada informally followed a draft version of the policy that is in most respects the same as the final policy.<sup>100</sup>

The Compliance and Enforcement Policy states that regulatory officials will secure compliance with the habitat protection and pollution prevention provisions of the *Fisheries Act* through compliance promotion and enforcement.<sup>101</sup> The Compliance and Enforcement Policy distinguishes between compliance and enforcement measures. It states that enforcement is achieved through the exercise or application of powers granted under legislation and includes the following: site inspections; investigations; issuance of warnings, directions by fishery inspectors, authorizations, and Ministerial orders; and court actions, such as injunctions, prosecutions, court orders upon conviction, and civil suits for recovery of costs. Compliance measures outlined in the Compliance and Enforcement Policy include review of works or undertakings and issuance of authorizations, education and information dissemination, promotion of technology development and evaluation, technology transfer, public consultation on regulation development and amendment, development of guidelines and codes of practice, promotion of environmental audits and compliance monitoring.

The Compliance and Enforcement Policy sets out guiding principles for the application of the habitat protection and pollution prevention provisions of the *Fisheries Act*.<sup>102</sup> The guiding principles provide that compliance with the Act and accompanying regulations is mandatory. Enforcement action will be fair, predictable and consistent, using rules, sanctions and processes securely founded in law. Enforcement personnel will administer the statutory provisions and accompanying regulations with an emphasis on preventing harm to fish, fish habitat or human use of fish caused by physical alteration of fish habitat or pollution of waters frequented by fish. Priority for action to deal with suspected violations will be guided by degree of harm or risk of harm to fish, fish habitat or human health, and whether or not the alleged offense is a repeat occurrence. Enforcement personnel will take action consistent with the Compliance and Enforcement Policy, and the public will be encouraged to report suspected violations. Compliance will be promoted through communication with stakeholders.

100. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

101. Policy at 5.

102. *Ibid.* at 6.

Under “Responses to Alleged Violations,” the Compliance and Enforcement Policy states that “[e]nforcement measures are directed towards ensuring that violators comply with the *Fisheries Act* within the shortest possible time and that violations are not repeated.”<sup>103</sup> The Compliance and Enforcement Policy provides that

[e]nforcement personnel will respond to suspected violations. They will take into account the harm or risk of harm to fish, fish habitat and/or human use of fish. If they determine that there is sufficient evidence a violation has occurred, they may take enforcement action.<sup>104</sup>

If enforcement personnel are able to substantiate that an alleged violation has occurred and there is sufficient evidence to proceed, the Compliance and Enforcement Policy states that they will decide on an appropriate action, taking into account certain criteria.<sup>105</sup> The Compliance and Enforcement Policy lists these criteria under three headings: (1) nature of the alleged violation; (2) effectiveness in achieving the desired result with the alleged violator; and (3) consistency in enforcement.

In considering the nature of the violation, enforcement personnel will consider the seriousness of the environmental damage; the intent of the alleged violator; whether it is a repeat occurrence; and whether there were attempts by the alleged violator to conceal information or otherwise circumvent the objectives and requirements of the habitat protection and pollution prevention provisions.<sup>106</sup>

In regard to the effectiveness of a response,

[t]he desired result is compliance with the Act in the shortest possible time and with no further occurrence of violations, in order to protect fish and fish habitat and human use of fish.<sup>107</sup>

Factors to be considered are the alleged violator’s history of compliance; willingness to cooperate with enforcement personnel; and the existence of enforcement actions by other federal or provincial/territorial authorities.<sup>108</sup>

---

103. *Ibid.* at 20.

104. *Ibid.* The draft of the Compliance and Enforcement Policy that was in circulation at Environment Canada at the time of the filing of the BC Logging submission states “[i]f they determine that there is sufficient evidence a violation has occurred, they will take enforcement action” [emphasis added].

105. Policy at 20.

106. *Ibid.*

107. *Ibid.*

108. *Ibid.*



In regard to consistency, enforcement personnel will consider how similar situations in Canada are being or have been handled when deciding what enforcement action to take.<sup>109</sup> At a June 2002 meeting with the Secretariat, federal officials explained that in general, field case studies during training of *Fisheries Act* enforcement personnel are intended to help to ensure that similar situations are handled consistently.<sup>110</sup> Appendix 11 contains a list of selected recent cases in the Pacific Region in which DFO either brought charges or achieved a conviction under the *Fisheries Act*. Although these cases are merely examples and are not intended to reflect comprehensively Canada's enforcement record, they may be relevant in assessing whether the approach taken in the cases referenced in Council Resolution 01-12 is consistent with the approach taken in similar cases.

Warnings are one enforcement option that does not require the government to lay charges or to meet the burden of proof required for prosecution.<sup>111</sup> Warnings do not have the legal force of an order and are not a finding of guilt or liability. Nonetheless, they become part of an alleged violator's compliance history file. The Compliance and Enforcement Policy provides that enforcement personnel may use warnings when they have reasonable grounds to believe that a violation of the *Fisheries Act* has occurred; where the degree of harm or potential harm to the fishery resource, its supporting habitat and to human use of fish or both appears to be minimal; and where the alleged violator has made reasonable efforts to remedy or mitigate the negative impact of the alleged offenses. In addition to considering whether such reasonable efforts have been taken, enforcement personnel are to consider the alleged violator's *Fisheries Act* compliance history and whether the alleged violator has taken sufficient action to prevent future offenses.

### 5.3.3 DFO–Pacific Region Policy

This section provides information regarding the overall approach to *Fisheries Act* enforcement of the DFO–Pacific Region (British Columbia and the Yukon). Canada informed the Secretariat that the DFO–Pacific Region is organized as follows:

DFO follows an Area-based delivery model in the Pacific Region, having a Regional Director General with six Area Directors overseeing operations

109. *Ibid.* at 21.

110. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

111. Warnings are discussed in detail in the Compliance and Enforcement Policy at 21-22.

at the field level in British Columbia and the Yukon Territory. Additionally, the regional headquarters in Vancouver and the research facilities in Nanaimo, Lower Mainland and Sidney, provide support to field operations throughout the region. Coastal BC South (Vancouver Island, south of Campbell River) is managed by an Area Director from the Nanaimo office. There is one habitat staff stationed in Duncan who deals with logging plans in the Sooke watershed, and this person has professional support from the Habitat Management staff in Nanaimo. Additionally, Fishery Officers stationed in Victoria provide enforcement support to the Habitat Management staff in the lower Vancouver Island area.<sup>112</sup>

In an article entitled *Enforcing the Habitat Sections of the Fisheries Act: Frequently Asked Questions*,<sup>113</sup> DFO explains that in the Pacific Region the habitat sections of the *Fisheries Act* are generally enforced by one or more of the following four agencies: DFO, Environment Canada, Department of Indian Affairs and Northern Development (DIAND) Canada (Yukon only) and British Columbia Ministry for Water, Land, and Air Protection (MWLAP).

The key DFO personnel involved in conducting inspections and investigations that can lead to charges or other enforcement action are fishery officers, habitat inspectors and fishery guardians. Fishery Officers coordinate investigation teams. Their enforcement powers include the authority to trespass during the course of duty; enter premises to inspect (other than dwelling houses, which generally require a warrant to enter and search); take samples, conduct tests, open containers, and examine and copy records during inspections; seize evidence; and make arrests without warrants.<sup>114</sup>

When an investigation is complete,

the “lead” investigating agency may recommend a prosecution by the federal Department of Justice (for federally investigated cases), or by the Provincial Ministry of the Attorney General (for MWLAP investigations). The investigating agencies do not have authority in themselves to prosecute.

- 
112. DFO response to CEC Secretariat Follow-up Questions (30 July 2002). Canada further informed the Secretariat that DFO’s habitat staff in Duncan and Nanaimo deal “with all fish habitat issues in the lower Vancouver Island area (South of Parkville).” Canada’s comments on draft BC Logging factual record (2 June 2003).
113. See *Enforcing the Habitat Sections of the Fisheries Act*, <[http://www-heb.pac.dfo-mpo.gc.ca/habitat\\_policy/enforcing\\_the\\_act\\_e.htm](http://www-heb.pac.dfo-mpo.gc.ca/habitat_policy/enforcing_the_act_e.htm)>.
114. *Ibid.*

The article states:

Collecting evidence to prove all the elements of a charge may take six months or more. Some evidence may be difficult to obtain. For example, prosecutions involving pollution often depend on having samples of the polluting substance. If no qualified staff were present to take a sample with the proper equipment at the time of the spill, it may be difficult to prove to a judge that a spill had even taken place.

Some of the elements of a charge are not straightforward to prove with physical evidence. It may be difficult to prove that, for example, the alteration to fish habitat was “harmful.” Elements like these are established in court by opinion testimony from an expert. The judge accepts (or rejects) certain people as experts depending on their experience and credentials.

Of course, a defendant may also rely on expert opinions. Defence counsel may call experts who could testify that, in their opinion, the area was not habitat for fish; the alteration was not harmful; or that the deposit was not deleterious. The judge must decide between contradicting opinions of experts.

The article also points out the defenses, such as the defense of due diligence, that may be available to the accused even if the elements of the offense are proven beyond a reasonable doubt.

With respect to the decision to prosecute, the article states:

It is not enough to simply “want” to lay charges when damage to fish habitat is discovered. Before DFO can recommend that charges be laid by the Department of Justice, there must be:

- a. staff with authority and training to collect evidence,
- b. a thorough and complete investigation,
- c. evidence to prove all elements of a charge beyond a reasonable doubt.

Further, the federal Attorney General (the “Crown”) will not proceed with a prosecution unless:

- d. the prosecution is in the public interest, and
- e. there is a reasonable likelihood of conviction.

Commencing a criminal prosecution has significant consequences for an accused, with respect to both the finances and reputation of the accused.

The Crown has the responsibility to ensure that only cases meeting the above requirements are prosecuted.

DFO–Pacific Region informed the Secretariat as follows:

DFO conducts monitoring and inspections depending on available resources, development pressures on fish habitat, and public concerns/complaints. While there is no formal plan or program for conducting inspections within the Sooke watershed specifically, DFO does conduct monitoring and inspections within this watershed. DFO also works cooperatively with provincial habitat protection and enforcement staff to address issues of concern.<sup>115</sup>

#### 5.4 *Indicia of Effective Enforcement*

Consistent with NAAEC, this factual record does not reach any conclusion as to whether or not Canada is failing to effectively enforce ss. 35(1) and 36(3) of the *Fisheries Act* in connection with the logging along the unnamed tributary of De Mamiel Creek or the Sooke River. While no conclusions are presented in the factual record, this section presents indicia of effective enforcement that could be taken into account in considering that question. These criteria were drawn from two documents: the Compliance and Enforcement Policy discussed above and *The Forest Practices Board Enforcement Audit Reference Manual* (Version 1.0, May 2002) (FPB Manual).<sup>116</sup> They are presented only to provide indicia of effective enforcement relevant to the matters raised in Council Resolution 01-12, and are not intended to be comprehensive or to establish a definition of effective enforcement.

The FPB Manual describes nine criteria of appropriate enforcement developed by the Forest Practices Board in British Columbia to carry out its statutory obligation to audit the appropriateness of government enforcement of the *Forest Practices Code*.<sup>117</sup> Although the *Forest Practices Code* is not directly applicable to private land logging or to enforcement of ss. 35(1) and 36(3), it contains provisions regarding streamside protection, and the Board's criteria provide a possible basis for assessing the actions taken in regard to the logging along the De Mamiel Creek tributary and the Sooke River. Reference to these criteria is not intended to imply that Canada considers them, or has adopted

---

115. DFO response to CEC Secretariat Follow-up Questions (30 July 2002).

116. Available on the Internet at <[http://www.fpb.gov.bc.ca/audits/manuals/earm1\\_0.pdf](http://www.fpb.gov.bc.ca/audits/manuals/earm1_0.pdf)>.

117. See *Forest Practices Code of British Columbia Act*, Part 8 (available on the Internet at <[http://www.qp.gov.bc.ca/statreg/stat/F/96159\\_00.htm](http://www.qp.gov.bc.ca/statreg/stat/F/96159_00.htm)>).

them, as indicators of effective enforcement. The nine criteria that the Forest Practices Board has established for enforcement audits are set out in Appendix 12.

Taking the Compliance and Enforcement Policy and the Forest Practices Board criteria into account, the following indicia of effective enforcement might be considered in assessing the action taken in respect to the two logging operations referenced in Council Resolution 01-12:

- Government agencies obtain, use and maintain adequate information on the forest activities subject to enforcement.
- Compliance is encouraged through communication with parties affected by the relevant laws and regulations, and agencies establish, through operational plan approval and related processes, expectations for forest practices which are enforceable and in accordance with the law.
- Enforcement personnel administer the law and accompanying regulations with an emphasis on preventing harm to fish and fish habitat.
- The public is encouraged to report suspected violations of the habitat protection and pollution preventions of the *Fisheries Act*, and when information or complaints are brought to the attention of enforcement personnel, additional inspections are carried out as required.
- Government agencies have an effective way of identifying risks associated with forest activities and utilize risk in inspection planning.
- A program of inspections to verify compliance is carried out, prioritized on the basis of compliance history and the risk to the fishery resource. A sufficient number of inspections are conducted in a fair, objective and effective way with the results accurately recorded and reported.
- Investigations are conducted in all applicable situations and only when warranted. They are performed in a fair, objective and consistent way and are accurately recorded and reported.
- Determinations of non-compliance are made in all applicable situations and only when warranted. They are made in a fair, objective, predictable and consistent way and are accurately

recorded and reported. Rules, sanctions and processes securely founded in law are used.

- Priority to deal with suspected violations is guided by the degree of harm to fish, fish habitat or human use of fish caused by physical alteration of habitat or pollution of waters frequented by fish, or the risk or that harm; whether or not the alleged offense is a repeat occurrence; and the intent of the alleged violator, including attempts to conceal information or circumvent the law.
- Enforcement measures are directed towards ensuring that violators comply with the law within the shortest possible time and that violations are not repeated.
- Enforcement personnel bring any charges in as short a time as possible, having regard for proper substantiation of the alleged violation and gathering of sufficient and appropriate evidence.
- Organizational structures, policies and processes that contribute to and support appropriate law enforcement are in place.
- The decisions and actions of different parts of government responsible for law enforcement are appropriate and co-ordinated.
- Reporting systems provide adequate information on agency performance in relation to enforcement objectives.

### 5.5 *Private Land Logging in British Columbia in 1999-2000*

This section presents background information regarding private land logging in British Columbia at the time of the logging of the De Mamiel Creek and Sooke River cutblocks. Information is provided on provincial regulation of forest practices only to provide background and context relevant to Canada's actions to enforce ss. 35(1) and 36(3) of the *Fisheries Act* in connection with that logging. This factual record is not intended to address in any way whether British Columbia is failing to effectively enforce any of its laws.

The logging activities that are the subject of this factual record took place on privately owned land in British Columbia. The total land area in British Columbia is 94.8 million hectares (366,000 square miles). Ninety-two percent of the total land area is provincial Crown land and

one percent is federal Crown land. Five percent of the land base in British Columbia is privately owned and two percent is covered by water.<sup>118</sup>

About two percent of the provincial land base is private forest land, of which 75% is on Vancouver Island.<sup>119</sup> Nearly half of that privately-owned land, 920,000 hectares (roughly one percent of the total area of British Columbia), is in the Forest Land Reserve.<sup>120</sup> Of this, 140,000 hectares are in tree farm licenses covered by the *Forest Practices Code*.<sup>121</sup> The De Mamiel Creek and Sooke River sites are in the portion of the Forest Land Reserve that was not regulated under the *Forest Practices Code* during the relevant time period.

#### 5.5.1 Regulation of Forest Practices on Private Land

At the time the logging referenced in Council Resolution 01-12 took place, that is, the last days of 1998 and the first months of 1999, there was no specific legislation analogous to the *Forest Practices Code*<sup>122</sup> regulating forest practices on most private land in the province. Prior to April 2000, forest practices on private land, other than private land in tree-farm licenses and woodlot licenses, were regulated less directly, through federal legislation such as the *Fisheries Act*; provincial legislation such as the *Water Act*, the *Waste Management Act* and the *Wildlife Act*; and local legislation such as zoning laws.<sup>123</sup> Since April 2000, the *Private Land Forest Practices Regulations*, issued under authority of amendments to the *Forest Land Reserve Act*, have regulated forest practices on private land in the Forest Land Reserve.<sup>124</sup>

According to the provincial government in June 1999, “[w]hile existing statutes may indirectly influence some aspects of forest man-

118. From the web site of Land and Water British Columbia, Inc., the government agency charged with administering much of the publicly owned land in the province: <[http://lwbc.bc.ca/about\\_crown\\_land/](http://lwbc.bc.ca/about_crown_land/)>.

119. <[http://apps.icompasscanada.com/lrc/FP/Vancouver Island Audit Report Final.pdf](http://apps.icompasscanada.com/lrc/FP/Vancouver%20Island%20Audit%20Report%20Final.pdf)>.

120. In 1995, the Provincial government added 15 million hectares of Crown Provincial Forest land to the FLR, but this Crown land was removed from the FLR on 1 November 2002. <[http://apps.icompasscanada.com/lrc/flr/establishing\\_the\\_FLR.stm](http://apps.icompasscanada.com/lrc/flr/establishing_the_FLR.stm)>.

121. *Forest Practices on Private Forest Land: Summary of Standards and Administration*, Government of British Columbia (June 1999).

122. The *Forest Practices Code*, which has four components—the *Forest Practices Code of British Columbia Act*, the regulations, the standards and the guidebooks—regulates forest practices on Crown land.

123. Forest practices on private land in a tree farm license or a woodlot license were and continue to be regulated by the *Forest Practices Code*. The two sites under examination in this factual record are not in either a tree farm or a woodlot licence.

124. R.S.B.C. 1996, c. 158.

agement, there is currently no regulation focused specifically on forest practices, though many landowners have committed to reforestation in return for the preferred tax status<sup>125</sup> of managed forest.”<sup>126</sup> At the time of the logging that is the subject of this factual record, the federal *Fisheries Act* was one of the primary enforceable measures applicable to forest practices on private land in British Columbia for protection of fish and fish habitat.

According to a June 1999 report of the British Columbia government,<sup>127</sup>

Government first examined the regulation of forest practices on private land in 1991, while contemplating the development of the Forest Practices Code. In its [sic] 1992 paper, “Providing the Framework: A Forest Practices Code,” the Forest Resources Commission recommended that a code of forest practices be applied to private managed forest land.

The report goes on to state:

In 1995, government challenged private forest landowners to propose a form of regulation acceptable to them, and the challenge was accepted. By October that year, the newly formed Private Forest Landowners Association (PFLA) presented to government a proposal that formed the basis for future discussions. From that point forward, government and the PFLA continued to work together toward a mutually agreeable approach to regulation.

The objectives of this collaborative approach were:

- development of results-oriented standards to protect fish habitat, water quality, soil conservation and critical wildlife habitat;
- an efficient and cost-efficient administrative system;
- recognition of private property rights, and landowners’ freedom to manage; and,
- encouragement of landowner investment in private land forestry.

---

125. Certain forest reserve land benefits from lower property taxes. There is no minimum harvesting requirement or minimum dollar value for production or harvesting to maintain this preferred property tax status. However, if the Land Reserve Commission approves the removal of land from the Forest Land Reserve, there is a recapture of tax benefits payable by the owner. *Forest Land Reserve Act*, R.S.B.C. 1996.

126. *Forest Practices on Private Forest Land: Summary of Standards and Administration*, Government of British Columbia (June 1999).

127. *Ibid.*



The report also states:

On 19 December 1998, the Ministers of Forests; Environment, Lands and Parks; and Finance and Corporate Relations signed a Memorandum of Understanding (MOU) with the Private Forest Landowners Association which outlined a package of regulation, administration and incentives to promote good forest stewardship on private forest land in the Forest Land Reserve and private managed forest land in the Agricultural Land Reserve. As part of that MOU, government committed to a number of actions, including:

- introduction in 1999 of legislation to allow the Forest Land Commission to administer the regulation of forest practices;
- regulation of forest practices to the level of the August 5th, 1998 draft of the standards agreed to with the PFLA; and
- improved incentives for good stewardship of private managed forest lands.

At the time of the logging referenced in Council Resolution 01-12, the PFLA had published its *Handbook of Best Management Practices for Private Forest Land in British Columbia*. The PFLA Web site states the following in regard to its best management practices:

Adopted by the Membership in 1997, the PFLA's Best Management Practices are standards for private forest landowners and forest resource managers to achieve the protection of the key public environmental values. The standards set out management practices for riparian zones, roads and drainage construction, harvesting, site rehabilitation and preparation, reforestation, critical wildlife habitat and handling hazardous substances management. They are designed to support other educational materials and regulatory information available to the forestry practitioner.<sup>128</sup>

In regard to protecting water quality and fish habitat, the PFLA's best management practices in 1999 called for the establishment of riparian management zones. The *Handbook* stated the following:

Prior to operation close to a stream:

- Collect available information on the stream, especially information about any fish that the stream may support;
- Contact the Ministry of Environment, Lands and Parks and other available sources concerning licensed water users and information about the presence or absence of fish in the stream;

---

128. PFLA web site, <<http://www.pfla.bc.ca/>>.

- Where such information is not available, undertake an assessment for the presence of fish;
- Collect all available information about the riparian terrain, especially information about the stability of slopes and susceptibility of soils to erosion;
- Review relevant legislation that must be complied with, such as the *Water Act*, and *Pesticide Control Act*;
- Review applicable BMI's;
- Assess activities upstream from your planned operation that may be affecting water quality prior to it entering your site;
- Ensure field operators are fully briefed on the measures to be taken to protect water quality and fish habitat.<sup>129</sup>

The *Handbook* calls generally for the retention of 10 “representative trees” per 100 meters of streambank and within five meters of the stream for streams less than 15 meters wide containing salmon or sport trout, such as the unnamed tributary to De Mamiel Creek that is the subject of this factual record. It calls for retention of 20 “representative trees” per 100 meters of streambank and within 10 meters of the stream for streams greater than 15 meters wide, such as the stretch of the Upper Sooke River that is the subject of this factual record.<sup>130</sup> Materials that Canada provided to the Secretariat indicate that DFO considers these standards to be similar to standards for streamside retention in the *Private Land Forest Practices Regulation* adopted in 2000<sup>131</sup> and that “the Department of Fisheries and Oceans’ opinion is that the PLFR [*Private Land Forest Practices Regulation*] does not offer adequate protection for fish habitat, particularly regarding the limited retention of riparian trees.”<sup>132</sup>

Amendments to the *Forest Land Reserve Act* to enable regulation of forest practices came into force on 1 April 2000.<sup>133</sup> At that time, the *Pri-*

---

129. *Handbook*, at 5.13 and 5.14.

130. *Ibid.*

131. The *Private Land Forest Practices Regulation* is somewhat different. For streams between 1.5 and 3.0 meters wide, they call generally for retention of 10 trees within 10 meters of the stream, per 100 meters of streambank. For streams wider than 3.0 meters, they call for retention of 20 trees, within a riparian zone of 10 meters to 30 meters, per 100 meters of stream. *Private Land Forest Practices Regulation*, sections 11 and 12.

132. Memorandum from Habitat Technologist, Habitat and Enhancement Branch, to Fishery Officer (15 January 2001).

133. See *Forest Land Reserve Amendment Act, 1999*, S.B.C. 1999, c. 11.

*Private Land Forest Practices Regulation*<sup>134</sup> also came into force. This new regulation created enforceable standards for forest practices on forest reserve land not regulated by the *Forest Practices Code*. Changes to provincial regulation of forest practices that occurred subsequent to the logging that is subject of this factual record are mentioned so that the information regarding the logging activity presented here can be viewed in light of the evolving regulatory framework applicable to forest practices in British Columbia up to the present.

According to the provincial government, the standards that came into effect in April 2000 were not intended to be as stringent as those governing forest practices on Crown land at the time. In a 1999 report<sup>135</sup> the province states the following about the newly established standards of forest practice:

For each value [i.e., water quality, fish habitat, soils and critical wildlife habitat], the regulation describes standards of forest practice against which the landowners' performance can be assessed. Some are prescriptive, but many describe an end result which must be achieved. This allows the landowners as much freedom as possible to achieve the results in their own way.

The standards are not as stringent as those found in the *Forest Practices Code* because fewer values are being addressed, and because private property rights were taken into account. They do, however, represent a significant improvement in the level of protection provided for fish, water quality, soil conservation, and critical wildlife habitat.

The April 2000 regulations remain in effect.

### 5.5.2 *Water Act*

As noted above, prior to 1 April 2000, there was no specific provincial legislation governing forest practices on private land. Depending on the circumstances, however, existing legislation could have an impact on private land forest practices. The most relevant provincial legislation in place at the time of the De Mamiel Creek and Sooke River logging operations was the *Water Act*.

Under the *Water Act*,<sup>136</sup> the property in and the right to the use and flow of all water in streams in the province is vested in the government.

134. BC Reg. 318/99.

135. *Forest Practices on Private Forest Land: Summary of Standards and Administration*, Government of British Columbia (June 1999).

136. R.S.B.C. 1996, c. 483.

“Stream” is broadly defined and includes a natural watercourse or source of water supply, whether usually containing water or not, lakes, rivers, swamps and ground water.<sup>137</sup> The *Water Act* prohibits anyone from making changes in and about a stream that are not permitted by the legislation without written approval, a license or order under the Act.<sup>138</sup>

“Changes in and about a stream” means

- (a) any modification to the nature of a stream including the land, vegetation, natural environment or flow of water within a stream, or
- (b) any activity or construction within the stream channel that has or may have an impact on a stream.<sup>139</sup>

Approvals for changes in and about a stream are issued by either the Comptroller of Water Rights or a regional water manager. The Comptroller or regional water manager may attach conditions to an approval. Approvals are subject to suspension or cancellation for non-compliance with the provisions of the *Water Act* or regulations or with the terms and conditions of the approval. Generally, conditions in an approval will reflect the concerns of various levels of government about water quality, downstream flooding, the potential effect of the changes on downstream licensees, and habitat and ecosystem concerns.

Regulations made under the *Water Act* specify standards for protection of water quality and habitat. For example, unless authorized by an approval, license, order or under the regulations, changes in and about a stream must not result in sediment or debris entering the stream that could adversely impact the water quality, or disturb stable natural materials and vegetation that contribute to stream channel stability.<sup>140</sup> The regulations also specify in some detail the kinds of changes that can be made without authorization under the Act, and logging activity is not explicitly included in those exemptions.<sup>141</sup> The regulations also include provisions specifically relating to the protection of fish habitat from changes in and about a stream.<sup>142</sup>

The *Water Act* creates a number of administrative remedies and offenses for certain violations of the Act and regulations, including making changes in and about a stream without authority. Anyone making

---

137. At the present time, however, the *Water Act* does not apply to ground water.

138. *Water Act*, s. 9.

139. Definitions, *Water Act*, s. 1.

140. *Water Regulation*, BC Reg. 204/88, s. 41.

141. *Water Regulation*, s. 44.

142. *Water Regulation*, s. 42.

changes in and about a stream without approval or contrary to the regulations could be subject to prosecution.<sup>143</sup>

The Secretariat received no information indicating whether or how the *Water Act* was applied to the logging along the De Mamiel Creek tributary or the Sooke River, or that the federal government relied on enforcement or application of the *Water Act* in any way to ensure compliance with ss. 35(1) or 36(3) of the *Fisheries Act* in connection with that logging. Provisions of the *Water Act* are taken into account in TimberWest's standard operating procedures that were in effect at the time of the logging.<sup>144</sup>

#### 5.5.3 *Enforcement of the Fisheries Act in Connection with Crown Land and Private Land Logging Operations*

In a publication entitled *Complying with the Fisheries Act*,<sup>145</sup> DFO “explains how various economic and industrial activities can harm fish habitat, and provides the fisheries habitat protection sections of the federal *Fisheries Act*.”<sup>146</sup> This document identifies logging and log storage as one of the common threats to fish habitat.<sup>147</sup>

At the time the logging referenced in Council Resolution 01-12 took place, timber harvesting on Crown land in British Columbia was regulated under the 1995 *Forest Practices Code*.<sup>148</sup> At the time, the *Forest Practices Code* contained provisions related to the protection of fish habitat. In light of those protections, a 31 January 1996 DFO letter explained that

143. *Water Act*, s. 41.

144. TimberWest Forest Company, *Standard Operating Procedures Pursuant to the BC Water Act*, Section 9, and Regulation 204/88, Part 7.

145. *Complying with the Fisheries Act*, Habitat Policy Unit (Pacific Region), Fisheries and Oceans Canada, at 2, available on the Internet at <[http://www-heb.pac.dfo-mpo.gc.ca/habitat\\_policy/hab\\_law\\_article/hablaw\\_e.htm](http://www-heb.pac.dfo-mpo.gc.ca/habitat_policy/hab_law_article/hablaw_e.htm)>.

146. *Ibid.* at 1.

147. *Ibid.* at 2.

148. On 17 December 2002, streamlining amendments to the *Forest Practices Code* came into effect. The British Columbia Ministry of Forests summarizes these changes as follows:

Under the revised framework, government and industry resource professionals will focus on results and resource protection rather than process and paperwork. Government will set objectives and desired outcomes, and forest companies will propose results or strategies to achieve government objectives. The forest companies are then accountable for the results through a rigorous government compliance and enforcement regime.

Excerpt from the Ministry of Forests web site at <<http://216.210.103.125/overview.html>>.

[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.<sup>149</sup>

Despite these additional protections, DFO staff subsequently expressed concern that “current logging practices in [British Columbia] rarely provide riparian leave strips or setbacks that adequately protect [small fish] streams” and confirmed that the federal *Fisheries Act* continues to apply to the practice of logging adjacent to small streams in British Columbia.<sup>150</sup> DFO staff also outlined interim standards considered acceptable to meet fish habitat objectives, including retention levels approaching 100% in the riparian management zones of streams classified as S4 streams under the *Forest Practices Code* (small fish-bearing streams) and as S5 and S6 streams (small non-fish-bearing streams) that are direct tributaries to fish-bearing streams.<sup>151</sup>

As noted above in section 5.5.1, in contrast to logging of lands subject to the *Forest Practices Code*, no binding provincial statutes or regulations specifically regulating forest practices on most private lands were in place at the time of the logging operations referenced in Council Resolution 01-12. Representatives of DFO with whom the Secretariat met during the preparation of the factual record informed the Secretariat that, as a result, DFO enforcement staff in British Columbia generally focused more attention on compliance with and enforcement of the *Fisheries Act* on logging on private lands than on logging subject to the *Forest Practices Code*.<sup>152</sup> In particular, Canada informed the Secretariat as follows:

The scrutiny given to private land logging varies across the province of BC. The highest concentration of privately managed forest land is found

---

149. Attachment 11 to the Submission.

150. 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 BC *Forest Practices Code* is required.

151. Letter of 7 March 2000 from G.T. Kosakoski to John Wenger (attached to the Submitters' 31 March 2000 letter to the Secretariat).

152. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

on Vancouver Island, hence it has been given more scrutiny than crown land. In other parts of the province crown land is given a higher level of attention.<sup>153</sup>

In light of public concerns regarding private land logging on Vancouver Island, DFO–Pacific Region conducted field inspections of 50 logged sites on private land on Vancouver Island between December 1999 and April 2000. DFO explained this field monitoring as follows:

DFO received concerns from the public regarding forest practices adjacent to fish streams on the east side of Vancouver Island. On October 4, 1999, DFO wrote to the Private Forest Landowners' Association (PFLA) and several of its larger member companies outlining its intention to monitor forest harvesting activities where they occurred around fish-bearing reaches of their private managed forest land on Vancouver Island. The objective of the monitoring initiative was to determine how certain private forest owners were managing their land adjacent to fish-bearing waters prior to the implementation of the Private Forest Land Regulation, which came into force on April 1, 2000. These inspections focussed on the larger companies (TimberWest and Weyerhaeuser) due to the large area of land held by these companies and the ease of communication with these companies. It did not attempt to assess practices of other landowners of various sizes operating inside and outside of the Forest Land Reserve. The inspections were site specific at the cutblock and road crossing level. They were not intended to address larger watershed level issues.<sup>154</sup>

The focus of the field inspections was on cutblocks harvested between January 1998 and July 1999, which “reflects the time period where companies began to implement the practices contained in the Handbook of Best Management Practices for Private Forest Land, developed by the PFLA.”<sup>155</sup> Private lands that TimberWest owned were included in the field inspections. However, the TimberWest lands referenced in Council Resolution 01-12 were not included, even though, as further explained below in section 5.8 and 5.9, DFO had received public complaints regarding TimberWest's logging operations in those areas prior to conducting the field inspections.

#### 5.6 *Fisheries and Fish Values in the Sooke River Watershed*

Both of the cases discussed in this factual record occur in the watershed of the Sooke River on the south west coast of Vancouver Island,

153. DFO Response to the CEC Secretariat Follow-up Questions (30 July 2002).

154. DFO, 1999-2000 *Field Monitoring Report: Vancouver Island Private Managed Forest Land* at 2 (October 2001).

155. *Ibid.* at 3.

British Columbia. The Sooke River watershed, including all its tributaries has an area of 34,000 hectares.<sup>156</sup> The total stream length is just over 16 km.

The main stem of the Sooke River supports populations of wild chinook, chum, and coho salmon, all of which spend the early part of their life cycle within the river or its tributaries. These fish migrate to the Pacific Ocean for their adult lives and then return to the Sooke River to spawn and die. All three of these species of salmon are caught in commercial fisheries off the coast of British Columbia and the Sooke River contributes significantly to these commercial stocks. The reported average annual number of salmon returning to the Sooke River over the ten-year period (1989-98) was 600 chinook, 23,400 chum and 50 coho. The maximum reported number of returning fish was 3500 chinook, 75,000 chum and 3500 coho.<sup>157</sup>

The Sooke River also supports a population of steelhead trout, which spends the early phases of its life in the freshwater of the Sooke River, then migrates downstream to the ocean before returning to the river to spawn. The steelhead is a prized fish for recreational anglers and the Sooke River is reported to be one of the 20 best steelhead rivers on Vancouver Island.

Cutthroat trout and Dolly Varden Char, Pacific lamprey and other species are also found in the river.

The salmon and steelhead are only found in the portion of the river downstream of a series of waterfalls and canyons, which create a barrier to their upstream movement. Above these barriers, only resident fish are found naturally. However in the last 15 years, there have been a number of projects, undertaken by nongovernmental organizations and supported by government, to enhance salmon populations in the watershed and provide additional fish for the commercial and sport fisheries. These projects include hatching eggs taken from adult chinook, coho and steelhead in small hatcheries or incubation boxes and then planting the fry in the waters above the barriers to rear for a period of time before they migrate downstream over the barriers.

De Mamiel Creek is one of several large tributaries of the Sooke. It enters the main stem of the Sooke River just above tidewater and down-

---

156. K. Moore, *An Inventory of Watersheds in the Coastal Temperate Forests of British Columbia* (Earthlife Canada Foundation and Conservation International 1991).

157. All from DFO Stream Escapement data for the Sooke River. Fisheries Data Warehouse-FISS report. Available on the Internet at <[www.dfo-mpo.gc.ca](http://www.dfo-mpo.gc.ca)>.



stream of the natural waterfall barrier. The three species of salmon, steelhead trout and cutthroat also utilize the waters of De Mamiel Creek. The reported ten-year average number of salmon (1989-1998) in De Mamiel Creek is 35 chinook, 12,500 chum and 595 coho. The maximum reported number is 210 chinook, 55,000 chum and 7500 coho. De Mamiel Creek also contributes to the commercial and recreational fisheries of the area.<sup>158</sup>

Representatives of the federal government informed the Secretariat that, in their view, both areas referenced in Council Resolution 01-12 were Canadian fisheries waters to which the *Fisheries Act* applies.<sup>159</sup>

### 5.7 Information regarding TimberWest

According to information on an “Annual Information Form” for calendar year 1999 that was included in materials that Canada provided to the Secretariat, TimberWest Forest Corp. was established under the laws of British Columbia on 31 January 1997. TimberWest Forest Corp., along with its subsidiaries and their respective interests, is referred to on the form as TimberWest. The form states:

[TimberWest] is one of Canada’s largest businesses operating exclusively in the solid wood segment of the forest industry. It operates entirely in the coastal region of British Columbia, where it is engaged primarily in the harvesting and sale of logs. . . . TimberWest owns in fee simple approximately 334,000 hectares (825,000 acres) of Private Timberland, two lumbermill complexes and rights to Crown timber tenures from the Province of British Columbia and 5,500 hectares of higher use properties.

At the time of the logging activity referenced in Council Resolution 01-12, TimberWest was a member of the Private Forest Landowners Association. In addition, TimberWest had in place Standard Operating Procedures “Pursuant to the BC Water Act, Section 9 and Regulation 204/88, Part 7.”<sup>160</sup> The Standard Operating Procedures stated that “[a] fish stream will be considered a stream which has a fish population at some time of the year” and provided measures for protection of fish habitat. Those measures included restrictions on design and installation of culverts and stream-crossing structures, measures for preventing siltation and debris from entering fish streams, measures to protect streamside vegetation, and mitigation or restorative work in the event of sedimentation or damage to stream banks.

158. *Ibid.*

159. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting and 13 June 2002 site visit).

160. These are the provisions concerning changes in or about a stream.

TimberWest owned 33 of the 50 sites included in DFO's 1999-2000 field inspection of private-managed forest land on Vancouver Island that was logged between January 1998 and July 1999. During the inspection, DFO inspectors checked for harm or potential harm to fish habitat according to twelve monitoring variables: stream bank integrity, sources of large woody debris, riparian vegetation, windthrow management, maintenance of natural drainage, culverts, ditches, bridges, point source management, nonpoint source management, slope stability and contaminants near streams.<sup>161</sup>

DFO observed impacts to fish habitat at 4 of the 33 TimberWest cutblocks observed, and potential impacts to fish habitat at 12 of those sites.<sup>162</sup> DFO observed a total of eight instances on TimberWest cutblocks in which a monitoring variable showed impact to fish habitat and a total of 24 instances in which monitoring variable showed a potential impact to fish habitat.<sup>163</sup> In its report on the field inspections, DFO indicated that "[i]t was understood at the outset that blocks [at which an observable impact to fish habitat was noted] would be investigated as violations under the *Fisheries Act*."<sup>164</sup> While not comprehensive, information regarding the impacts or potential impacts to fish habitat observed during the field inspections on TimberWest cutblocks provides facts regarding TimberWest's history of *Fisheries Act* compliance, a factor relevant under the DFO policy for determining appropriate enforcement action.

### 5.8 *Logging along the De Mamiel Creek Tributary*

This section presents information regarding the logging along the De Mamiel Creek tributary, referenced in Council Resolution 01-12.<sup>165</sup>

#### 5.8.1 *Description and Location of the De Mamiel Creek Tributary and Cutblock*

The De Mamiel Creek logging referenced in Council Resolution 01-12 involves a small stream and a small patch of forest bounded by

---

161. DFO, *1999-2000 Field Monitoring Report: Vancouver Island Private Managed Forest Land* at 15-17.

162. *Ibid.*

163. *Ibid.*

164. *Ibid.* at 3.

165. Unless otherwise noted, information presented in this section is from documents from DFO's investigation file related to the logging operation that Canada provided to the Secretariat during preparation of the factual record. Appendix 13 contains a list of the documents in DFO's investigation file, not all of which were provided to the Secretariat.

three roads in a rural residential area near Sooke, on the south west coast of Vancouver Island in British Columbia. The stream flows into De Mamiel Creek, a fish-bearing tributary of the Sooke River. The tributary is unnamed on maps and has not been given a name by local residents. It is referred to as the “unnamed tributary to De Mamiel Creek” in much of the correspondence related to the factual record and was called “Creek 1” in the logging plans and various documents related to the logging of the adjacent forest.

The unnamed tributary is a small (1.5 m. wide or less), intermittent, low gradient stream that meanders through a series of small ponds and wetlands. It runs through the logging area referenced as De Mamiel Creek in Council Resolution 01-12 for approximately 500 meters. It then crosses a road and runs along a residential property before entering De Mamiel Creek approximately 150 meters downstream of the logging. By 1999, it was widely known by DFO staff and logging companies that very small low gradient streams flowing into larger fish bearing streams like De Mamiel Creek often provide fish habitat for some species of Pacific salmon, particularly coho, which can pass through seemingly impassable culverts and prefer very small streams and seasonally wet areas for habitat in the winter.<sup>166</sup> The unnamed tributary has a defined channel for most of its length within the logging area. There are pockets of gravel and undercut banks along its length. In the stream classification terminology used in the British Columbia *Forest Practices Code*, it would be classified as an S4 stream, meaning that it is less than 1.5 meters wide, has less than a 20% gradient and is considered a fish bearing stream.<sup>167</sup> The Code restricts logging practices along S4 streams to protect some streamside vegetation and to prevent direct impacts to the stream channel.<sup>168</sup>

The area around this small stream is a mix of forest land with past and current logging activities, and rural residential homes and small

166. Personal communication from Keith Moore to Geoffrey Garver (June 2002).

167. In the absence of an inventory of the fish present and the absence of identified barriers to fish movement, the Operational and Site Planning Regulation of the *Forest Practices Code* requires that the stream be considered a “fish stream.” The definition of “fish stream” is in Part 1, and the classification of streams is in Part 8, Section 59, of the Operational and Site Planning Regulation, BC Reg. 107/98, available on the Internet at <<http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcaregs/oplanreg/opr.htm>>.

168. For a description of requirements along S4 streams, see Section 59 of the *Operational and Site Planning Regulation*, BC Reg. 107/98; Sections 8-15 of the *Timber Harvesting and Silvicultural Practices Regulation*, BC Reg. 352/2002, and the *Riparian Area Management Guidebook* (December 1995) of the *Forest Practices Code*. All are available on the Internet at <<http://www.for.gov.bc.ca/tasb/legsregs/fpc/fpcguide/riparian/rip-toc.htm>>.

farms. The specific area referenced in Council Resolution 01-12 is triangular in shape. It is bounded by two paved public roads, Otter Point Road and Young Lake Road, that provide access to homes, an industrial site and a Boy Scout camp, and by a gravel logging road, Butler Main Road, that provides access to logging sites in the Sooke River watershed. One of the paved roads crosses the unnamed tributary approximately 150 meters above its confluence with De Mamiel Creek. The gravel logging road crosses the unnamed tributary stream approximately 500 meters further upstream.

The logging that is the subject of this factual record occurred in this triangular area of land in Lot 15, in the Otter Land District, bounded by Otter Point Road, Young Lake Road and Butler Main Road. This piece of land is entirely private forest land that was acquired by TimberWest in January of 1998. As noted above, the unnamed tributary runs through the middle of the area.

The logging was part of a larger logging operation that included an area of provincial crown land west of Otter Point Road, as well as an area of private land to the west of Butler Main, which encompasses the upper reaches of the unnamed tributary. The cutblock was logged in two parts. The area west of Butler Main Road was logged in 1997. The logging of the 14.9 hectare area that is the subject of the factual record began in December 1998 and ended in April 1999. The area referenced in Council Resolution 01-12 is referred to below as the De Mamiel Creek cutblock.

#### *5.8.2 Planning and Logging of the De Mamiel Creek Cutblock*

In December 1996, Pacific Forest Products Ltd., the owner of the land on both sides of the small unnamed tributary to De Mamiel Creek at the time, began making plans to log the area. Their consultants, HA Forest Management Ltd., visited the site and prepared plans and maps for logging. In the course of preparing the logging plans, HA Forest Management considered whether there were fish in the unnamed tributary. This was a routine part of planning logging operations in coastal British Columbia at that time, particularly on crown land, where the presence of fish led to enforceable provincial restrictions on the timing of operations, restrictions on logging practices, and requirements for specific practices in the riparian zone adjacent to the stream.<sup>169</sup>

---

169. Personal communication from Keith Moore to Geoffrey Garver (June 2002).

On 4 January 1997, Ken Hart, an employee of HA Forest Management, discussed the De Mamiel Creek cutblock site with a DFO Fishery Officer who was assigned to the Sooke area.<sup>170</sup> Hart subsequently stated, in an interview with a different DFO Fishery Officer on 3 July 2001, that he “walked the site with [the first Fishery Officer]” and “was told categorically ‘no fish’ by [him] when asked about Creek 1.”<sup>171</sup> The first Fishery Officer, who has since retired from DFO, also subsequently confirmed that he told the consultant there were no fish in the small tributary stream.<sup>172</sup> The Secretariat has no information or documentation regarding the basis for the Fishery Officer’s opinion. However, the information available to the Secretariat indicates that in January 1997, the first Fishery Officer advised the forestry consultant responsible for planning the logging operation that there were no fish in the tributary stream.

On 7 January 1997, around the time of the conversation with the Fishery Officer, Ken Hart wrote a note to Pacific Forest Products regarding several concerns for logging within the block. The note stated that the unnamed tributary, referred to as Creek 1, was to be checked for fish.<sup>173</sup> The logging plan that they prepared for the block on 10 January 1997 noted “possible fisheries concern Creek 1.”<sup>174</sup> However, the Secretariat received no information indicating that HA Forest Management, Pacific Forest Products, TimberWest, DFO or anyone else set fry traps or engaged a biologist to check for fish presence in the stream before logging began.

In the summer of 1997, the part of the planned cutblock west of the Butler Main Road, and above the culvert on the unnamed tributary (referred to in subsequent documents as the 2nd culvert) was logged. This logging removed all trees on both sides of the unnamed tributary stream. No logging occurred at the time on the site referenced in Council Resolution 01-12, which is downstream of the area logged in 1997.

---

170. Internal company file note prepared by Timber West during the DFO investigation. The “Note to File: Re A039/A071 Timber Sale, Otter Point” dated 16 January 2001, states that there is an entry in Ken Hart’s diary on 4 January 1997, which reads “[Fishery Officer’s name]; ok, no fish; also talked re culvert on Butler.”

171. Diary notes of Fishery Officer’s 3 July 2001 interview with Ken Hart as part of DFO’s investigation. A Statement of Witness prepared on 3 July 2001, but not signed by Ken Hart, does not record either a date of the discussion or a field visit.

172. DFO officials informed the Secretariat at the meeting of 12 June 2002, that the Fishery Officer had confirmed this in an interview in 2001.

173. The note is described in a TimberWest “Note to File: Re A039/A071 Timber Sale, Otter Point Road,” prepared on 16 January 2001, as an internal company note during the DFO investigation.

174. The logging plan is described in TimberWest “Note to File: Re A039/A071 Timber Sale, Otter Point Road,” prepared on 16 January 2001, as an internal company note during the DFO investigation.

TimberWest acquired the land containing the De Mamiel Creek cutblock in January 1998. In November 1998 they sold the remaining standing timber in the block to Richmond Plywood Corp. Ltd., which then contracted P.V. Services Ltd., to log it on their behalf. TimberWest retained the responsibility for planning the logging, since they retained ownership of the land, but delegated the responsibility for logging according to the plan to P.V. Services. TimberWest planned to clearcut the area, but planned to mark the unnamed tributary with ribbons and to instruct the loggers to fall and yard trees away from the stream. A spur road was to be built into the block across the unnamed tributary stream so that equipment could more easily yard trees away from the stream. TimberWest's Operating Plan Summary for the logging, approved internally by TimberWest on 3 November 1998, states "Creek #1 flows into fish bearing water, water quality must be maintained at all times. Fall and Yard away from Creek #1."<sup>175</sup> An undated plan, which includes some handwritten notes that are typed into the 3 November plan, states "All streams in the setting are non-fish bearing. Downstream impacts a concern. Stream 1 flows to De Mamiel Creek (fish bearing)." Consistent with the November 3 plan, this plan also states "Fall away from creek 1" and "Yard away from creek 1."<sup>176</sup>

DFO told the Secretariat that it was generally aware that there were plans to log in the vicinity of the De Mamiel Creek tributary. The consultant, Ken Hart, had discussed these plans with a Fishery Officer in January 1997, two years prior to the logging. DFO also told the Secretariat that DFO Habitat Management staff saw and discussed TimberWest's plans for logging on their private land in the Sooke area closer to the time of the logging of concern in the factual record.<sup>177</sup> However, DFO did not review the detailed plans that contained specific information about the proposed logging at the De Mamiel Creek cutblock or any measures to protect any potential fish habitat at the site.<sup>178</sup> They did not request plans either informally or under the discretionary authority of s. 37(2) of the *Fisheries Act*.<sup>179</sup>

This is consistent with DFO's approach on other private lands on southern Vancouver Island. DFO advised the Secretariat that, due to

175. The Operating Plan Summary is an internal TimberWest plan. The date of 3 November 1998 is typed in on the line stating "Approval Date." The plan is not signed.

176. This plan is apparently an earlier version of the 3 November 1998 plan. The text describing the stream as "non-fish-bearing" has been dropped and replaced by requirements to fall and yard trees away from the stream.

177. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

178. *Ibid.*

179. *Ibid.*

resource constraints, it does not have the time or people available to review all plans or to schedule *ad hoc* or surprise inspections of planned or active logging areas on southern Vancouver Island. One DFO person in an office in Duncan, approximately two hours from Sooke, is responsible for logging operations involving many companies on the lower quarter of Vancouver Island. This person can request assistance from habitat staff in the Nanaimo regional office and from fisheries officers who have local responsibilities in the Sooke area. DFO informed the Secretariat that, because of the large number of logging operations, and the relatively few fisheries staff, logging companies are responsible for their own activities but they often ask for DFO's participation.<sup>180</sup> In this case, a consultant for the original land owner asked DFO for information on the presence of fish in the unnamed tributary in early 1997, but DFO did not receive any later plans or have any further discussion with TimberWest or its consultants about the De Mamiel cutblock between that time and the time of logging in late 1998 and early 1999.

In December 1998, just before beginning to log the De Mamiel Creek cutblock, TimberWest contacted people who had homes near the block and along Otter Point and Young Lake Roads. At least two residents expressed concern to TimberWest about the planned logging because it was close to their homes. Their concerns related primarily to the potential for blowdown of trees along the road and on their property following logging and the need for a leave strip along Young Lake Road. At least one resident of the area also expressed concerns to TimberWest about the impact of logging on the water quality and fish in the small unnamed tributary.

TimberWest's discussions with the local residents were verbal, informal and on-site and there were no formal meetings at which minutes or notes were recorded. The Secretariat has no information indicating that any of the residents followed up the discussions with any written correspondence either to TimberWest or to any government agencies. However, one resident phoned the DFO office in Sooke on 16 December 1998, to express her concern about the proposed logging and its impact on water quality. In response, a Fishery Officer<sup>181</sup> visited the site of the proposed logging the same day and he noted that there was no logging activity on that date. He did not note any concerns and the Secretariat has no information indicating that, in exercising his discretion, he looked closely at the stream or attempted to determine if fish were present or if the stream should be considered a fish stream.

---

180. *Ibid.*

181. This is not the Fishery Officer who spoke to the logging consultant in January 1997.



After having discussions with the residents, TimberWest made provisions to retain a strip of trees along Young Lake Road as a visual screen and a windbreak for the residents, and to retain small trees and shrubbery along the stream edge. These plans were communicated to the logging contractor, but do not appear in any of the written Operating Plan Summaries provided to the Secretariat.

Logging began on 26 December 1998. Nearby residents were angry about this timing, in part because they were unable to reach any government or TimberWest officials over the holidays to discuss the logging. A spur road (referred to in subsequent documentation as the “rock road”) was constructed in early January 1999 from the Butler Main Road into the logging area and across the unnamed tributary. Sometime during the logging operations in early 1999, wind started to blow trees down along the unnamed tributary and in the leave strip along Young Lake Road. The contractor, P.V. Services, decided to fall all the trees that were to be left along Young Lake Road and the stream.

During the logging operations, several individuals noted concerns with the logging. John Brohman, a member of the Sooke Watershed Society, visited the cutblock on two occasions. After his first visit, on January 28, he met with staff of TimberWest, other members of Sooke Watershed Society and members of Sooke First Nation and expressed concerns that trees were being felled within the ribboned riparian area along the creek and that debris was being left in Creek 1. He visited the ongoing operations again on March 14 with a provincial Conservation Officer who expressed an opinion that the logging might violate the BC *Water Act* but did not appear to be in violation of the *Fisheries Act*. A local resident, Bren Keetch, visited the site in January and had concerns about cross-stream yarding, and debris in the stream. He had earlier pointed out fish in the stream to the contractor and, following the visit in January, convinced the contractor to hire a person to clean the debris out of the stream. BC Ministry of Forests officials visited the site during the logging in January and issued a Stop Work Order because trees were being illegally felled on adjacent Crown land. The order did not apply to the De Mamiel Creek cutblock.

Despite all these concerns, the Secretariat has no information indicating that anyone contacted DFO with any concerns about the impact of the logging on fish habitat or the De Mamiel creek tributary during the period the logging was actually underway.



### 5.8.3 DFO Inspection and Monitoring Before, During and After Logging

DFO advised the Secretariat that it was generally aware of the planned logging before it began and had an opportunity to review the TimberWest plans for the site. DFO also had an opportunity to determine if fish were present and to evaluate the potential impact of the planned logging of the cutblock immediately before the logging began but did not do so. As noted above, a consultant involved in planning the logging operation contacted a DFO Fishery Officer early in 1997 and was told that there were no fish in the stream. The Fishery Officer may also have visited the site at this time. A concerned resident contacted a different DFO Fishery Officer in December 1998. That Fishery Officer did visit the site in response to the phone call and he noted that logging had not begun and that “[n]o concerns were identified in the area in question.”<sup>182</sup> In its 2 June 2003 comments, Canada informed the Secretariat that DFO advised the resident to contact DFO again if siltation was observed, and DFO received no further communication from the resident. The Secretariat has no information indicating that the second Fishery Officer was aware of the previous Fishery Officer’s opinion that the unnamed tributary was not fish-bearing. The second Fishery Officer did not attempt to determine if fish were present or whether the company planned any measures to protect potential habitat. Because the Fishery Officer concluded prior to the logging activities that there were no violations to investigate, he did not plan for any follow-up inspections when logging would be underway. In its 2 June 2003 comments on the draft factual record, Canada stated that “it is the proponent’s responsibility—not DFO’s—to determine if there are fish present and to apply the appropriate measures of protection.”

Similarly, no DFO staff monitored or investigated the logging practices while logging was underway. As explained above, the Fishery Officer did not follow up his December visit. Another Fishery Officer drove past the site on 7 March 1999, while logging was underway, on his way to investigate a logging site in the Upper Sooke Watershed (the other area referenced in Council Resolution 01-12). The logging was taking place along the road and was in a flat area with ponded water along a small stream 150 meters from De Mamiel Creek, a coho stream. The Secretariat has no information indicating that the Fishery Officer considered the possibility that fish were present or that the logging operation could impact fish habitat.

---

182. Fishery Officer’s Sworn Information to Obtain a Search Warrant (21 December 2000).

Four DFO employees stopped at the same stream at the culvert on the Young Lake Road on 8 April 1999, near the time the logging was completed, and looked at the stream. One of the DFO employees asked the Fishery Officer who visited the site in December 1998 if he knew whether there were fish in the stream. The Fishery Officer stated he did not know, but no DFO staff made any attempt at the time to determine if fish were present or to investigate the impact of the logging on potential fish habitat.<sup>183</sup>

The first formal concerns came to DFO after the logging was completed. On 28 April 1999, John Werring, a fisheries biologist employed by the Sierra Legal Defence Fund, wrote a letter to the Regional Director of DFO's Habitat Enhancement Branch. Werring had visited the site in early April with members of the Sooke Renfrew Forest Society. Logging was completed at that time. Werring, who had experience in assessing fish habitat in small streams within cutblocks, believed that Creek 1 was likely fish habitat because of its low gradient and proximity to the main stem of De Mamiel Creek. He took photos and filmed 1 to 2 minutes of video footage of the logged area along Creek 1 within the cutblock. His April 28 letter to the Regional Director covered a number of broad subjects and asserted that DFO was doing little to prevent damage to rivers and streams. His letter also described logging at three specific sites in the Sooke River watershed, including the De Mamiel Creek cutblock, as examples.

Werring's letter stated:

I observed where Timber West clearcut an area on Otter Point Road immediately adjacent to Demanuelle (sp?) Creek, Sooke's most important salmon producing tributary. A small ephemeral stream, that was directly tributary to the main creek flowed through this cutblock. TimberWest has pushed a spur road across the creek at one location without installing a culvert. At three locations they have stacked huge piles of woody debris right on top of, and in, the stream channel. The stream channel is now choked off and the water, when it flows, is diverted out of its natural course. DFO knows about this and has done nothing about it.

The Regional Director responded to Werring in a letter of 19 July 1999. He thanked Werring for the description of logging in the De Mamiel Creek cutblock and other sites but made no mention of any subsequent DFO actions in regard to the cutblock at De Mamiel Creek. He also asked for assistance from organizations like Sierra Legal Defence Fund in bringing such cases forward for DFO investigation.

---

183. Chronology of Events prepared by Fishery Officer and provided to the Secretariat.

In its 2 June 2003 comments, Canada informed the Secretariat that DFO's investigation of the logging began upon receipt of Werring's 28 April 1999 letter. TimberWest was informed of the investigation in early July 2000.

Nobody from DFO visited the site in the spring or summer of 1999 to investigate the information that John Werring provided in his letter. As noted above, Canada informed the Secretariat that its investigation of the logging had begun at this time. During this period, news stories about the logging practices in the De Mamiel block appeared in the Victoria Times Colonist and the Sooke Mirror. Video footage of the block taken by John Werring was shown on the local cable TV in Victoria in the spring of 1999. Canada informed the Secretariat that the video was provided to DFO only after several requests were made.<sup>184</sup> DFO staff were aware of the news stories and had noted them as part of the investigation on Block 954 in the Upper Sooke River that was then underway (as described below in Section 5.9). In June of 1999, several DFO employees drove past the site on their way to the investigation site in the Upper Sooke River. They made no notice of the logging of the De Mamiel Creek cutblock that was already completed at the time.

DFO told the Secretariat that, consistent with the 2001 Compliance and Enforcement Policy, it relies in part on public complaints to identify potential problems with logging practices on private lands.<sup>185</sup> In this case DFO received two complaints—first, the December 1998 phone call from the local resident just before the logging began; and, second, the letter from John Werring just after the logging was completed. DFO did not conduct a detailed field inspection to assess the presence of fish in response to either of them.<sup>186</sup> DFO did not include the De Mamiel Creek cutblock in its field inspection, conducted from December 1999 to April 2000, of private managed forest land logged between January 1998 and July 1999. In its 2 June 2003 comments, Canada informed the Secretariat that the purpose of the monitoring program was to survey other areas.

Although DFO did not know there were fish in the De Mamiel Creek tributary prior to the logging, other people did. In conducting a review of files and conducting interviews to prepare this factual record, the Secretariat identified six people who have stated that they knew,

---

184. Canada's comments on draft BC Logging factual record (2 June 2003).

185. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

186. The Fishery Officer did visit the site, and he noted that there was no activity. While not required to do so, he did not examine the site, or request any other DFO personnel to inspect the site, to assess the presence of fish and the potential impacts of logging on fish habitat.

prior to the logging, that the unnamed tributary to De Mamiel Creek was used by salmon. Three of these people were local residents who had lived along the stream for more than 15 years and who had seen adult salmon and fry that made it through the culvert and reared in the pools within the cutblock. A fourth was the logging contractor who had walked the stream with one of the residents and stated that he saw fry in the stream prior to logging in the area between Butler Road and Young Road. He stated that he knew it was fish habitat, but did not know if the fry were salmon or trout. The owner of P.V. Services Ltd. and an individual hired to clean out the stream during the logging operation also told DFO during the investigation that they were aware, prior to the logging, that there were fish in the stream. The Secretariat has no information indicating that DFO contacted any of these people before or during the logging—when no DFO investigation was underway<sup>187</sup>—to determine if fish were present in the stream.

Unlike streams in remote forest areas, the unnamed tributary to De Mamiel Creek is approximately 10 minutes by car from downtown Sooke, and accessible by paved public road. It is observable and accessible at the point in which it passes through the culvert under Young Lake Road and, as shown later during the investigation, it is relatively easy to observe or to place fry traps in the stream to determine if there are fish or not.

#### *5.8.4 Canada's Investigation of the Logging Beginning in July 2000*

Approximately a year after the logging was completed, and nearly 11 months after John Werring wrote to the Regional Director, five environmental non-government organizations represented by Sierra Legal Defence Fund and Earthjustice Defence Fund made the submission to the Secretariat that included reference to the De Mamiel Creek cutblock and that led to the preparation of this factual record. On 8 May 2000, the Secretariat requested Canada to respond to the submission. The response was due on 7 July 2000. DFO personnel informed the Secretariat that the filing of the submission prompted the federal government to review the logging of the De Mamiel Creek cutblock.<sup>188</sup>

On 4 July 2000, two DFO Habitat Management staff arrived by helicopter to inspect the unnamed tributary in the De Mamiel Creek block.

---

187. In its 2 June 2003 comments, Canada informed the Secretariat “that interviews do not occur prior to an investigation taking place.”

188. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

They observed two fry in a pool within the block. Early the next day, one of them phoned the Fishery Officer who had visited the site in December 1998 and arranged a meeting on site for 10 July. She told the Fishery Officer that she would contact TimberWest to advise them that an investigation was underway. Later that afternoon, she phoned the Fishery Officer again and requested that he visit the site and try to catch fry as soon as possible.

The Fishery Officer visited the block on 6 July. He caught a small trout and observed 3 other fish in the pool described by the DFO Habitat Management staff. On the same day, Canada sent its response to the submission to the Secretariat. The response stated: “The logging that took place at Otter Point Road is being investigated as a potential offence under the *Fisheries Act*.”<sup>189</sup>

A fisheries biologist, Steve Voller of Sea-Mount Consulting, also visited Creek 1 on 6 July 2000 at the request of TimberWest. He walked the whole length of Creek 1 from its confluence with De Mamiel Creek to above the Butler Main road and subsequently wrote a detailed report on stream conditions and the impacts of logging. He observed fish in De Mamiel Creek and in Creek 1 at the Young Lake Road culvert. He caught 1 trout within the block but decided not to undertake intensive sampling because the water was very low and the stream temperature was too warm. His report stated that the potential impacts of logging were lethal summer stream temperature, reduced streamflow and pool area, and increased predation from herons and kingfishers.<sup>190</sup> He also noted that the spur road constructed in January 1999 had no culvert and created a “dam” forming a barrier to fish movement.<sup>191</sup>

Between 6 and 12 July 2000, DFO set fry traps in 7 additional locations on Creek 1 within the cutblock and caught several fry. The DFO Fishery Officer made four trips to the site in the month of July. TimberWest also continued its assessment of the situation. TimberWest fisheries biologist Dave Lindsay and geomorphologist Al Chatterton visited the site on 11 July. Lindsay wrote a memo on 25 July 2000, describing Creek 1 as “marginal fish habitat” and “low capability fish habitat” in which “the removal of streamside trees by logging, blow-down salvage and firewood collection has further decreased habitat quality.”<sup>192</sup>

189. Response at 2.

190. S. Voller, *De Mamiel Creek Tributary Stream Assessment* (July 2000).

191. *Ibid.* at 4

192. Internal TimberWest memorandum from Dave Lindsay to John Mitchell re: Young Lake Road Block Fisheries Assessment (25 July 2000).

On 28 July 2000, the DFO Area Chief of Habitat and Enhancement Branch signed a one page Habitat Incident Investigation Report prepared by the Fishery Officer. He recommended charges against TimberWest in regard to the logging of the De Mamiel Creek cutblock and assigned two DFO staff to the case to be experts.

On 16 August 2000, the Fishery Officer wrote to TimberWest stating: "Your company was informed by [a DFO] Habitat Technician . . . of the start of an investigation related to logging activity at this site in early July 2000." The letter requested permission for access to allow DFO staff "to gather information that may assist in, or define if, habitat related charges under the *Fisheries Act* would be pursued."

DFO then undertook an extensive investigation from October 2000 until at least July 2001. Fishery officers interviewed and took statements from numerous potential witnesses, searched corporate offices, obtained documents and maintained contact with legal counsel at Department of Justice and DFO. DFO prepared a lengthy file of transcribed interviews and documents.

Two DFO officials, a Habitat Biologist and a Habitat Technologist, conducted detailed investigations and prepared what the investigation file terms "expert reports." The Habitat Biologist visited the site 7 times between August 2000 and December 2000. He undertook further fry trapping (a total of 30 fry traps in Creek 1) and detailed stream measurements as part of an expert assessment of the impact of the logging on fish habitat. On 26 January 2001, he provided an 11-page report titled "Expert Witness Statement - Habitat Alteration of Unnamed Tributary of De Maniel Creek [sic], Sooke, BC." His report contains the following conclusion:

This drainage was and still is salmon habitat. Prior to harvest, the tributary of De Maniel [sic] Creek that I examined would have contained a few pools of water capable of supporting summer-rearing salmonids. The tributary would have been considered excellent juvenile salmonid over-wintering habitat prior to harvest. Although a local resident reported seeing adult salmon within the drainage, I found no evidence of spawning activity.

Activities associated with logging have harmfully altered salmon-rearing habitat within the drainage. A culvert and a stream crossing have stopped the migration of juvenile fish into and from rearing habitat. The removal of riparian vegetation has harmfully altered fish habitat.<sup>193</sup>

---

193. Expert Witness Statement of [Habitat Biologist] (26 January 2001).

The report also states:

The removal of trees from within the riparian zone of this channel will reduce the stability of stream banks. Tree roots now holding the bank together will begin to disintegrate. This will increase bank erosion and increase the volume of fine materials moving through the system. In the next 5-10 years floods, created by heavy rain events will erode portions of the channel banks even though the terrain is flat (low energy channel).

In my opinion, following harvest, sediment and organic materials have been deposited in pools within the drainage (reduced depth in pools). Water depth is a form of habitat refuge. The removal of the riparian zone combined with an increase in sediment equates to a loss of habitat. . . .

The increases in sediment associated with harvesting activities and through increased rate of erosion will be detrimental to benthic invertebrate production. Benthic invertebrate production (fish food) can be reduced or eliminated by filling in of substrate with fines (Culp et al. 1986), thus reducing growth and survival of rearing fish. . . .

. . . I observed that large alder trees have been cut and left to rot within this drainage. The removal of riparian vegetation has resulted in a loss of benthic invertebrates that are a major source of coho salmon and cutthroat trout food.<sup>194</sup>

The Habitat Technologist visited the site twice—in September 2000 and January 2001. On 15 January 2001, he wrote a five-page technical memo providing an expert opinion on several aspects of the logging activities in the De Mamiel Creek block. He described the “aggressive removal” of trees within the riparian zone and the blockage of the stream by the spur road. His opinion was that the unnamed tributary to De Mamiel Creek was a “fish stream” according to the definition applicable to private forest land and that the logging did not meet either the PFLA’s best management practices, the *Private Land Forest Practices Regulation* that came into effect in April 2000, best management practices for logging and control of windthrow adjacent to small fish streams developed pursuant to the *Forest Practices Code*, or TimberWest’s Standard Operating Procedures.

On 28 December 2000, the Fishery Officer swore an Information charging TimberWest Forest Corp. with harmful alteration, disruption or destruction of fish habitat in an unnamed tributary of De Mamiel Creek contrary to s. 35(1) of the *Fisheries Act*. After a first Court Appearance on 24 April 2001, pre-trial dates were set for week of 9 October 2001

---

194. *Ibid.*



and trial was set for the period beginning 26-29 November and ending 3-7 December 2001.

DFO continued its investigation in 2001, and on 3 July 2001, the Fishery Officer interviewed and took an unsigned statement from the consultant from H.A. Forest Management that had planned the logging operation, Ken Hart. According to the Fishery officer's notes, a now-retired Fishery Officer told Hart in January 1997 that there were no fish in the De Mamiel Creek tributary and that the stream had been classified on the basis of that information.<sup>195</sup> He also stated that he did not recall any mention of fish in the stream from the two individuals who did the layout of the block for H.A. Forest Management. The investigating Fishery Officer provided Hart's statement to legal counsel at DFO and the Department of Justice.

After a review of this information and a subsequent interview with the previous Fishery Officer (who had retired from DFO by this time) to confirm the statement of Ken Hart, the Department of Justice decided to stay the proceedings sometime just prior to 4 October 2001.<sup>196</sup> On 4 October 2001, the Habitat Field Supervisor on Vancouver Island wrote an e-mail to several of his staff to advise them that the Department of Justice had stayed the charges on De Mamiel Creek. The memo stated: "The reason is that a DFO staff member (who is no longer with the department) visited the site prior to logging and advised the proponent that the stream was not utilised by fish and therefore protection was not required for fish habitat. It was the Crown's opinion that this is a clear defence of officially induced error."

On 16 October 2001, DFO's legal counsel sent a memo to senior staff in the Pacific and Yukon Region regarding the logging of the De Mamiel Creek cutblock. The memo stated: "Although there was significant habitat impacts, the advice of DFO staff precluded prosecuting the company." A note attached to the memo provided advice to DFO staff. It stated:

A DFO representative advised the company during the development of the logging plan that the area was not utilized by fish; therefore protection was not required for fish habitat. There was no inventory of fish use on this ephemeral stream. Accordingly the company did not provide a riparian buffer and significant in-stream machine activity occurred when the area was eventually logged two years later.

---

195. See footnote 171.

196. DFO officials informed the Secretariat during the 12 June 2002 meeting that legal counsel for DFO had interviewed the Fishery Officer who had advised Hart in January 1997.



An investigation into the incident determined that the stream provided important over-wintering habitat for coho salmon.

It was the prosecutors opinion that the advice from DFO provided the company with a defence of officially induced error.

This case serves as an important reminder that DFO staff must be cautious about providing advice unless it is based on sound observations or inventory data. If field staff is unsure, they should advise the proponent to conduct the necessary survey to determine fish utilization. In such cases it is the proponents responsibility to determine fish utilisation and to provide appropriate protection for fish and fish habitat.<sup>197</sup>

#### 5.8.5 *Current Status*

Four biologists who visited the De Mamiel Creek tributary and provided written assessments share the opinion that there was a harmful alteration of fish habitat in the small tributary stream as a result of the logging that took place in the De Mamiel Creek cutblock. Their reports state that the removal of streamside vegetation, introduction of debris, reduction of stream flow, increased exposure to predators and blockage of fish movement by the spur road are the harmful effects. The 16 October 2001 memo from DFO legal counsel confirms DFO's opinion that the logging had significant habitat impacts on fish habitat in the small stream.

TimberWest took some measures during and after the logging to reduce the impacts. The logging contractor hired two people to remove logging debris from the stream after a local resident alerted him to this problem in March 1999. In October 2000, in response to a written request from DFO, TimberWest removed the rocks that created a dam on the stream at the spur road. TimberWest also planted cottonwood trees along the edge of the stream in an attempt to create some shade for the stream in the future. There have been no other rehabilitation efforts and DFO advised the Secretariat that there is little else that can be done now to further remedy the harmful effects of the logging.<sup>198</sup> Time is required to re-establish the streamside vegetation and forest cover that will improve the stream habitat that remains.

DFO has no plans for further legal actions or other sanctions. The Secretariat has no information that DFO informed John Werring or other

197. Memorandum from Counsel, Fisheries and Oceans, to four senior regional DFO staff (16 October 2001).

198. Canada's comments on draft BC Logging factual record (2 June 2003).

members of the public of the outcome of the investigation at the time the decision was made to drop charges. There is no legal obligation that DFO do so.

To avoid providing a basis for an officially induced error defense in future cases, shortly after charges were stayed DFO sent an e-mail to all coast Fishery Officers and habitat staff advising them to be cautious about providing advice to forest companies unless it is based on sound observations or inventory data. The note reminded staff that it is the responsibility of the proponent to determine fish utilization and provide appropriate protection measures. The Department of Justice later prepared a region-wide communiqué, also advising field staff to exercise caution before declaring a stream non-fish bearing. DFO also developed a 2-day training exercise for Fishery Officers and expert witnesses based on the De Mamiel Creek events to include in its Habitat enforcement course. This training exercise provides staff with field training in the investigation of damage to fish habitat on a small stream, and the De Mamiel Creek site was selected as the first field site for the exercise. TimberWest attended the mock field investigation at the De Mamiel Creek site and demonstrated techniques to rehabilitate riparian vegetation.<sup>199</sup>

In the 19 July 1999 letter to John Werring, DFO stated that DFO wanted to respond to the concerns raised by NGOs about the impacts on fish habitat associated with logging on private land. The Regional Director of the Habitat Enhancement Branch stated that “we are initiating a strategic monitoring program for private lands on Vancouver Island in the coming weeks and would like to discuss this further with you.” By June 2002, DFO had not had any discussions with John Werring or the Sierra Legal Defence Fund regarding this project.<sup>200</sup> DFO had no legal obligation to do so. DFO informed the Secretariat that the 1999-2000 field monitoring of logging on private managed forest land on Vancouver Island, which focussed entirely on cutblocks that already had been logged, was part of the strategic monitoring program noted in the 19 July 1999 letter.<sup>201</sup>

DFO informed the Secretariat in June 2002 that regional staff still wanted to implement a program of monitoring forest operations on private land but have inadequate resources to do so to the extent they seek.<sup>202</sup> DFO stated that it does some informal planning regarding

---

199. Canada’s comments on draft BC Logging factual record (2 June 2003).

200. Personal communication from John Werring to Geoffrey Garver (11 June 2002).

201. DFO Response to the CEC Secretariat Follow-up Questions (30 July 2002).

202. Personal communication from DFO representatives to Geoffrey Garver (13 June 2002 site visit).

inspections, taking into account factors such as the historical performance of logging companies and particular habitat concerns. DFO informed the Secretariat that it also continues to rely on forest companies to provide information and on members of the public and non-governmental organizations to bring forward complaints regarding private land logging on Vancouver Island.

DFO staff also confirmed to the Secretariat that it remains DFO's position that the fish habitat protection measures set out for private forest land in the *Private Land Forest Practices Regulation*, and in the Best Management Practices endorsed by the Private Forest Land Owners Association (PFLA), are inadequate to protect fish habitat.

### 5.9 *Logging along the Upper Sooke River*

This section presents information regarding the logging in the Sooke River area referenced in Council Resolution 01-12.<sup>203</sup>

#### 5.9.1 *Description and Location of the Upper Sooke River Cutblock*

The Sooke River logging referenced in Council Resolution 01-12 involves a cutblock on TimberWest's private land located along the Sooke River, near Sooke, on the south west coast of Vancouver Island in British Columbia. This site is approximately 13 kilometers from the De Mamiel Creek block described in section 5.8 and is known as Block 954, Branch 10, McDonald Lake Road, Upper Sooke Watershed. The cutblock is referred to below as either cutblock 954 or the Sooke River cutblock.

Unlike the unnamed tributary to De Mamiel Creek, the Sooke River in the area of the logging referred to in Council Resolution 01-12 is a large, low-gradient (<5%), relatively straight river more than 15 meters wide, confined by sloping banks. A dam upstream of the area regulates the stream flow. Because of the occasional high flows below the dam, there are very few natural logs or other woody debris in the channel and there is a uniform coarse substrate. Several kilometers below the area of concern are falls and canyons that create natural barriers to the upstream movement of anadromous fish. Thus, salmon do not occur naturally in

---

203. Unless otherwise noted, information presented in this section is from documents from DFO's investigation file related to the logging operation that Canada provided to the Secretariat during preparation of the factual record. Appendix 13 contains a list of these documents, which Canada provided in its response to the Secretariat's first request for information.

the part of the Sooke Watershed referenced in Council Resolution 01-12 but populations of naturally-occurring small resident trout and Dolly Varden Char remain in this part of the river throughout their life cycles. Since about 1979, the Sooke River Enhancement Society has placed chinook salmon and steelhead trout fry in this part of the watershed.<sup>204</sup> These fish rear for a year or more in the river and then migrate downstream over the falls to the ocean. DFO considers the stretch of the Sooke River bordering cutblock 954 as fish habitat subject to the *Fisheries Act*.

The logging referred to in Council Resolution 01-12 occurred from January to April 1999 on private land owned by TimberWest. Block 954 was a clearcut block of approximately 11 hectares on the west bank of the Sooke River. A fringe of trees 5 to 10 meters wide along the edge of river was left for approximately 400 meters within the block. No logging occurred on the forested east bank of the river. Unlike the De Mamiel Creek cutblock, the Sooke River block is in steep forested terrain in an area primarily dedicated to industrial logging. Other cutblocks are close by. The Sooke River cutblock is accessible only by gravel industrial logging roads that are gated to restrict public access.

#### 5.9.2 DFO Involvement in Planning of the Logging

The Secretariat has no information indicating when, or if, DFO was aware of specific logging plans for Block 954. DFO told the Secretariat that DFO staff sometimes attend public meetings where logging plans are presented and was generally aware of TimberWest's operations on private land in the Sooke area.<sup>205</sup> DFO staff stated that they did not do any field assessment of Block 954 before it was logged and did not request any plans for the logging.<sup>206</sup> The Secretariat has no information indicating that DFO staff had any contact or involvement with TimberWest or any other companies or consultants about the specific logging plans for Block 954 until DFO received a public complaint regarding the logging in March of 1999 when the block was being logged.

As noted above in Section 5.8.2, this is consistent with DFO's approach on other private lands on southern Vancouver Island. DFO informed the Secretariat that it considered TimberWest to be a larger company with higher standards than other smaller operations on private land and that it believed that TimberWest had a relatively high

---

204. Fisheries Data Warehouse — FISS Report Sooke River.

205. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

206. *Ibid.*

standard of care for streams and fish habitat.<sup>207</sup> Thus, DFO informed the Secretariat that it viewed TimberWest's logging operations generally as a low priority for monitoring or enforcement action.<sup>208</sup> DFO informed the Secretariat that it did not request any information or plans, or provide any advice to TimberWest, in advance of logging.<sup>209</sup>

### 5.9.3 Canada's Investigation of the Logging

DFO's first involvement with Block 954 occurred in early March 1999, when members of the Sooke Watershed Society and Sooke First Nation informed DFO of their concerns about TimberWest's logging in the upper Sooke River watershed. On 6 March 1999, a DFO Fishery Officer met with four members of these organizations to inspect the logging in the Upper Sooke watershed at several locations, including Block 954. The Fishery Officer observed that trees had been felled almost to the stream edge, leaving a narrow fringe of trees along the bank. In addition, he noted that logs had been stored on the floodplain adjacent to the river. He recommended referring the concerns to habitat staff in DFO for a further assessment.<sup>210</sup>

The Acting DFO Supervisor in Sooke wrote to two habitat staff seeking their assistance in inspecting the area. The Acting Supervisor pointed out that the groups with whom the Fishery Officer had been on-site had been expressing broad concern about logging practices and were concerned that DFO was not doing its job. The Acting Supervisor stated that the Fishery Officer felt that the logging observed in Block 954 was not consistent with good practices but did not appear to be "any direct violation" of the *Fisheries Act*.<sup>211</sup>

On 17 March 1999, the Fishery Officer, a DFO Habitat Technologist and a TimberWest engineer inspected several sites on TimberWest's private land by helicopter, including Block 954, and took photographs. The two DFO staff were concerned about the adequacy of the narrow strip of trees left along the stream edge in cutblock 954 for fish habitat protection, the potential for blowdown of the remaining trees and damage caused by logs piled on the floodplain. The TimberWest engineer agreed to remove the piles of logs from the floodplain immediately and

207. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

208. *Ibid.*

209. *Ibid.*

210. Internal DFO e-mail Re: Improper Logging Practices on Private Lands (7 March 1999).

211. Internal DFO e-mail Re: Improper Logging Practices on Private Lands (8 March 1999).

stated that all further logging in the watershed would be done with more sensitivity.<sup>212</sup>

The DFO Habitat Technologist remained concerned about the logging along the river and two weeks later, on April 8, she visited Block 954 with three other DFO employees—a Fishery Officer and two biologists. They identified at least five concerns with regard to the protection of fish habitat in the block. They confirmed the earlier concerns about the removal of trees from the riparian area and the narrow width of the remaining trees. They observed that 11 trees had blown down and they had concerns that other trees would blow down. They observed that the logging road in the cutblock encroached into the riparian zone and was within 20 meters of the stream. In addition, they were concerned that machine use and soil disturbance at one site on the floodplain where logs had been stored had exposed soil and might create a sediment input into the stream at high flow. They also identified a blocked culvert that might contribute sediment-laden water into the Sooke River. They determined that a review by a forestry expert was warranted.<sup>213</sup>

The DFO Habitat Technologist then discussed the situation with her supervisor, the Chief of Habitat and Enhancement Branch. She called a Fishery Officer on 13 April 1999 to tell him that the Branch Chief felt that an investigation was warranted and would “seek out an expert witness to prove that the logging conducted [at the Upper Sooke site] is contrary to private land guidelines and is harmful to fish. In particular, the limited buffer zone of trees left behind is not adequate.”<sup>214</sup> That same week the Habitat Technologist notified TimberWest that DFO was investigating “possible court action” in Block 954.<sup>215</sup> TimberWest advised its legal counsel of the possibility of charges under the *Fisheries Act*.

On 17 April 1999, a DFO Fishery Officer was appointed to coordinate the investigation. On April 23, he completed a Habitat Incident Investigation Report and sent it to the Habitat and Enhancement Branch Chief. The Fishery Officer requested an expert witness and recommended that charges be laid.

In early April 1999, fisheries biologist John Werring of the Sierra Legal Defence Fund visited the site with members of the Sooke Renfrew

---

212. Internal DFO e-mail Re: Follow-up Logging Inspections in the Sooke and Leech Watersheds by Helicopter (20 March 1999).

213. DFO, Sooke River Private Land Logging Case Summary (26 June 2000).

214. Internal DFO e-mail Re: Sooke R. Logging (13 April 1999).

215. Letter from DFO Fishery Officer to TimberWest (8 June 1999).

Forest Society and took some video footage of the logging in Block 954. Werring was not aware that DFO had initiated an investigation of the block and on April 28, Werring wrote to the Regional Director of DFO's Habitat Enhancement Branch. This letter is described above in Section 5.8.3. With regard to Block 954, Werring's letter stated:

On a large cutblock immediately adjacent to the Sooke River, I witnessed (as well as videotaped and photographed) where TimberWest:

- Left a leave strip of standing trees along the Sooke River that was essentially one tree wide (the Forest Practices Code would have required a 50 meter reserve);
- In several locations, felled standing trees right on the banks of the Sooke River;
- Marked for felling, trees on a small island within the main river separated from the main cutblock by a seasonally wetted side channel;
- In at least one location, left large piles of F&B (felled and bucked) wood and woody debris within the high water mark of the Sooke River (these trees and debris will likely wash downstream during freshet flows); and
- Clear-cut, felled and yarded timber across and through a small (>1.5 m wide but <2 m. wide) shallow gradient (<5% slope), stream that is directly tributary to the Sooke River. While I did not see any fish in this small creek, there is no doubt in my mind that it is a fish stream. Under the Code this stream would have been classified as S3 and would have received a 20 m. reserve buffer.

Werring mentions in the letter that local residents have complained to DFO about this block. His letter states: "The local DFO have been made aware of all these issues and have been out to look at this operation but, as far as I know, nothing has been done to remedy these situations."

As noted above in Section 5.8.3, the Regional Director responded to Werring's letter on 19 July 1999 and told Werring that "Fisheries and Oceans is currently investigating the private land logging adjacent to the Sooke River and appreciates receiving your observations of the site. We are unable to comment further on this case due to the ongoing investigation."

Consistent with that statement from the Regional Director to John Werring, DFO continued an active investigation. In May 1999, the inves-



investigating Fishery Officer organized letters, maps and photographs of the area, searched corporate records, communicated with legal counsel and planned for fieldwork with the expert witness.

On 5 May 1999, a DFO Habitat Technologist told TimberWest that the situation was still under investigation. On June 8, the investigating Fishery Officer wrote to TimberWest to request permission for continued use of a key that opened the locks on the gates that controlled access to the private land. The Fishery Officer explained:

Your company was informed by [DFO] of the starting of possible court action regarding this site the week of April 12.

An investigation/inspection of your Branch 10 logging practices by DFO staff and associates will be conducted June 22nd/99. Information gathered may assist in, or define if habitat related charges under the *Fisheries Act* would be pursued.<sup>216</sup>

A DFO scientist with expertise in the interaction of forestry practices and fish habitat values was designated as the expert witness for the investigation. On 22 June 1999, he visited Block 954 with five other DFO employees. An April 13 internal DFO e-mail indicates that DFO anticipated that the expert opinion would be a key piece of evidence to determine whether DFO would proceed with charges.<sup>217</sup> The Secretariat has no documents related to this field trip or any subsequent meetings regarding the expert's opinion about impacts on fish habitat. It is possible that no documents or written expert opinion exists.

By late June 1999, DFO had initiated an investigation and its expert witness had visited the Sooke River cutblock with five other DFO staff on 22 June.<sup>218</sup> In addition, DFO had notified TimberWest and the Sierra Legal Defence Fund that a *Fisheries Act* investigation was underway in regard to the logging of the cutblock. A DFO fishery officer had recommended charges and DFO had appointed a case coordinator. Articles had also appeared in the *Victoria Times Colonist* and *Sooke Mirror* in late April and in early May regarding logging on private land in the Sooke watershed, including cutblock 954, and John Werring's videotape had been shown on local cable television. A 26 June 2000 DFO report states that "DFO has conducted follow-up inspections of the site." The

---

216. Letter from Fishery Officer to John Mitchell, Operations Planner, TimberWest (8 June 1999).

217. See footnote 214. A DFO internal e-mail on 27 April 1999 stated "I don't think you should spend any more time on this file until we get our expert opinion lined up."

218. The presence of five other DFO staff is described in the Sooke River Private Land Logging Case Summary (26 June 2000), and the Warning Letter of 27 June 2000.



Secretariat has no other information regarding those inspections or any other action DFO took in regard to the investigation of the Sooke River cutblock in the year from the 22 June 1999 field trip to 27 June 2000, after the filing of the BC Logging submission with the Secretariat.

Canada provided the Secretariat with an undated e-mail from DFO's expert scientist to the Chief of the Habitat and Enhancement Branch. That note provides no assessment of any alteration of fish habitat at the site or other information regarding the investigation. The expert suggests that a series of data related to stream temperature, forest canopy density over the stream, large woody debris, and fish presence be collected to assist in quantifying the impact and he suggests a second field trip. Although the e-mail is undated, it was likely written after the field trip of 22 June 1999, because it states: "if this is to proceed, I would like to see the system again. . . ." The Secretariat has no documents indicating if these recommendations were considered or if any data was collected in response to it. The Secretariat has no information indicating that there was a second field trip. The e-mail was faxed to another DFO employee on 1 June 2000.

On 13 August 1999, the Fishery Officer who was the case coordinator, recorded a note of a phone conversation with legal counsel in his Occurrence Record Continuation Report. Although part of the note is not available because it is protected by solicitor/client privilege, the note states "Expert outcome?" The Secretariat has no indication of any outcome to the expert investigation of the logging of the cutblock, and the 13 August note is the last entry in the Fishery Officer's record of the investigation. The Secretariat has no information indicating whether or when Canada made a formal decision not to proceed with charges on Block 954 and to close the investigation file. Canada confirmed that, in response to the Secretariat's request, it has no specific documentation of any activity regarding the investigation of the Sooke River cutblock between 22 June 1999 and 27 June 2000.

On 15 March 2000, the Submitters filed the BC Logging submission (summarized in Section 2), which referred to the Sooke River cutblock and that led to the preparation of this factual record. As noted above, Canada's response to the submission was due on 7 July 2000. DFO personnel informed the Secretariat that the filing of the submission prompted the federal government to review again the logging of the Sooke River cutblock.<sup>219</sup>

219. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

On 27 June 2000, DFO sent a five-page letter to TimberWest. The letter is captioned in bold letters: ‘WARNING OF POTENTIAL OFFENCE UNDER THE *FISHERIES ACT*.’ The stated purpose of the letter stated was “to serve notice” on TimberWest that DFO “is concerned about the effect of logging practices along the bank of the Sooke River, Block 954, MacDonald Lake Branch Road, Branch 10 site.” The letter continued: “More specifically, the Department is concerned that the 1999 logging at the site may lead to a harmful alteration of Fish Habitat, contrary to section 35 of the *Fisheries Act*.” The letter further states that it serves as a warning that “TimberWest activities may eventually result in violations of Section 35.” A copy of s. 35 was attached to the letter.

The warning letter described DFO’s observations during the field inspections at the Sooke River cutblock in early 1999. It summarized DFO’s conclusions from the 8 April 1999 site visit as follows:

The harvesting practices at this site were of concern for all observers. Numerous functions of the riparian zone had been potentially been [sic] impacted as a result of the narrow leave strip. The team discussed the role of the adjacent forest canopy in regulating temperature as well as controlling the inputs of solar energy and ultraviolet radiation into the stream. The loss of canopy also had the potential to reduce the sources of nutrients and food supply to fish through leaf and insect drop.

Fish habitat impacts were not observable at the time of the site visit, however, the function of the riparian zone had been compromised and there was a concern that should a windstorm event blow down the few remaining trees on the site harm to fish habitat would occur and be immediately observable.

The disturbed floodplain site posed a potential problem during high flows in the Sooke River. The potential consequences for the area would be destabilization and erosion of the banks as well as overland flow of water washing the disturbed soil into the Sooke River. Sediment entering the Sooke River may impact water quality and likely be harmful to recently emerging fry and to any adult fish that reside downstream of the site. High concentrations of sediment are harmful to fish by blocking gills, reducing prey capture success thus impeding feeding and growth; and infilling of interstitial spaces in the gravels thus reducing habitat used for spawning.

The road culvert described above was also of concern. Unless properly maintained this culvert may contribute sediment laden road run-off into the Sooke River during heavy rainfall.<sup>220</sup>

---

220. Letter from DFO to TimberWest, at 3 (27 June 2000).

The warning letter also discussed DFO's observations during the 22 June 1999 site visit, including the deactivation of the road to the cutblock, removal of logs on the floodplain and bank stabilization work that had occurred since 8 April 1999. The letter summarized DFO's conclusions following the June 22 site visit as follows:

The group agreed that the riparian zone had been compromised but that there was not enough observable evidence of harm to fish habitat to warrant proceeding directly with a charge under Section 35(1) or Section 36(3). Blowdown of the narrow fringe of trees as a result of a windstorm needed to be monitored in future years. Should trees be unable to withstand a wind event harm to fish habitat would occur and DFO may proceed with an investigation. The site was considered unstable with a high probability of harm to fish habitat occurring after a heavy windstorm event.<sup>221</sup>

DFO staff informed the Secretariat that warning letters are one means used to close files where DFO concludes that a minor violation has occurred but formal charges are not appropriate.<sup>222</sup> Consistent with this, the Compliance and Enforcement Policy, as noted above, provides that warnings are appropriate when enforcement personnel have reasonable grounds to believe that a violation of the *Fisheries Act* has occurred; where the degree of harm or potential harm to the fisheries resource, its supporting habitat and to human use of fish or both appears to be minimal; and where the alleged violator has made reasonable efforts to remedy and mitigate the negative impact of the alleged offence on the fishery resources and its habitat.

In regard to the first criteria of the Compliance and Enforcement Policy, the "Warning" section of the warning letter stated: "As noted above the department is concerned that TimberWest activities may eventually result in violations of section 35 of the *Fisheries Act* RSC as amended. The maximum fines for these offences are \$300,000." DFO personnel informed the Secretariat that this warning letter was unusual in that it did not indicate that a violation had occurred.<sup>223</sup> DFO informed the Secretariat that the warning letter was nonetheless issued because DFO wanted to close the investigation that had been underway for more than a year while at the same time serving notice to TimberWest that DFO was keeping the option open for future investigation in case signifi-

---

221. *Ibid.* at 4.

222. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

223. Personal communication from DFO representatives to Geoffrey Garver (12 and 13 June 2002).

cant blowdown occurred in the narrow leave strip and caused a harmful impact on habitat. In its June 2002 interviews with the Secretariat, DFO acknowledged that this was an unusual use of a Warning Letter.

On 30 June 2000, DFO's Regional Director Habitat and Enhancement Branch, Pacific Region, sent a memorandum to the Director of Policy and Program Development, Habitat Management and Environmental Science Branch, DFO National Headquarters. The memorandum, captioned NAAEC/CEC BC LOGGING SUBMISSION, was in response to a 15 June 2000 memorandum from the Director of Policy and Program Development.<sup>224</sup> The 30 June memorandum stated that DFO "will not be pursuing charges at this time under the *Fisheries Act* against TimberWest with respect to logging activities in the Sooke River. Thus, we have compiled the following information to be included in the overall response to the CEC being prepared by Environment Canada." A three-page report titled "Sooke River - Private Land Logging Case Summary" prepared by a DFO biologist on 26 June 2000, was attached to the memo. This report, written nearly a year after the field trip of 22 June 1999, provides the same information contained in the 27 June 2000 warning letter.

The report of 26 June 2000, stated that "DFO has conducted follow-up inspections of the site. To date, no further evidence of habitat impact has been observed." This statement indicated that DFO had inspected the Sooke River cutblock between 22 June 1999, and 26 June 2000. The Secretariat asked Canada to provide documentation regarding the dates of any follow-up inspections during that time period. Canada provided no documentation. Other than the information in the 26 June 2000 report, the Secretariat has no information regarding the assertion that there were site inspections between 22 June 1999, and 26 June 2000, that yielded no further evidence of habitat impact. In its 2 June 2003 comments on the draft factual record, Canada states that it is incorrect to suggest that no monitoring was done. Canada explains: "At the time monitoring was done, no wind throw was observed. As a result, no further investigation was necessary." No dates are provided in Canada's comment.

Canada responded to the submission from the five environmental organizations on 6 July 2000. The response described and attached a copy of the 27 June 2000 warning letter and noted that DFO had observed no blowdown from the 1999-2000 winter season and no harmful impact on fish habitat during a 4 July 2000 site visit.

---

224. The Secretariat did not obtain a copy of this 15 June memorandum.

During a field trip to the Sooke River site with the Secretariat in June 2002, some of the DFO staff involved in the June 2000 field trip with the expert witness provided additional information regarding the matters discussed in the warning letter. They told the Secretariat that they considered the trees along the Sooke River to be an important component of fish habitat. These trees stabilize the banks, and provide shade, a source of insects for food, and logs and branches for cover in the stream, all of which are important attributes of fish habitat. For these and other reasons, they considered the cutting of trees along the stream edge to be an undesirable alteration of fish habitat. However, most of the trees immediately along the stream edge in Block 954 were not removed. The remaining strip of trees was a single tree in width, rather than the several trees in width that DFO staff informed the Secretariat during the visit that they felt was normally necessary. DFO concluded that it would be difficult to prove in court that the removal was a harmful alteration, as required for conviction under s. 35(1). They added that the most important trees are the trees along the stream edge and those trees were left in Block 954. The trees that had been removed were further back from the stream and were considered to be a less important component of fish habitat.

#### *5.9.4 Current Status*

Soon after DFO's initial inspections of Block 954 in March and April of 1999 TimberWest undertook work to remove logs from the floodplain and to remedy damage to streambanks. They also deactivated the road through the cutblock. No further remedial work has been undertaken since. DFO staff told the Secretariat that the removal of trees from the riparian area in Block 954 along the Sooke River is an alteration of the habitat and they are monitoring the situation to see if further impacts arise as a result of the tree removal. DFO believes that little more can be done to remedy the impacts associated with removing trees in the riparian zone.

The current situation in Block 954 is largely unchanged from the summer of 2000. Field inspections in the summer of 2002 indicate that no further blowdown of trees in the leave strip has occurred. DFO has found no evidence of further alteration of the leave strip or fish habitat. DFO expects to continue to monitor the site for blowdown and they maintain the option of further investigation if blowdown does occur.

DFO informed the Secretariat that it generally has had a good relationship with TimberWest and considers TimberWest to be a coopera-

tive company.<sup>225</sup> After the investigation on Block 954, TimberWest sought DFO's input regarding changes to TimberWest's internal standards for riparian protection on their private land. According to DFO, the new TimberWest standards exceed the Best Management Practices of the PFLA and the requirements of the *Private Land Forest Practices Regulation*. DFO believes that the new standards are an improvement but provided no information indicating that those improvements are related in any way to the investigation of the Sooke River cutblock or the Warning Letter. DFO indicated that the improvements might be related to TimberWest's efforts to be certified under a sustainable forestry certification system.<sup>226</sup>

DFO informed the Secretariat that it considers its investigation of the Sooke River cutblock and the warning letter to be consistent with DFO policy and that DFO has not reviewed its procedures or issued guidance to staff as a result of the investigation or the decision not to pursue charges.<sup>227</sup>

## 6. Closing Note

Factual records provide information regarding asserted failures to effectively enforce environmental law in North America that may assist submitters, the NAAEC Parties and other interested members of the public in taking any action they deem appropriate in regard to the matters addressed. Pursuant to Council Resolution 01-12, which determined its scope, this factual record provides information regarding Canada's actions to enforce s. 35(1) and s. 36(3) of the *Fisheries Act* in regard to

---

225. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

226. In regard to forest certification, TimberWest's Internet site states the following: TimberWest manages our assets for long-term sustainability to assure a steady and continuing flow of high quality timber. Protection of biodiversity is a key element of sustainable forest management and TimberWest continually strives to improve our efforts to sustain key habitat for plants and wildlife. This endeavour is not only part of delivering on our social and environmental license to operate, it meets the increasing market demand for products from timberlands that have been independently certified as having high standards of environmental management. TimberWest has achieved third party certification of all operations under ISO 14001 and of our private lands under the American Forest & Paper Association's Sustainable Forestry Initiative<sup>SM</sup> program. See <<http://www.timberwest.com/sustainability.cfm>>. Additional information regarding TimberWest certification is available on TimberWest's web site, and additional information regarding forest certification in Canada generally is available from the web site of the Canadian Sustainable Forestry Certification Coalition, at <<http://www.sfms.com>>.

227. Personal communication from DFO representatives to Geoffrey Garver (12 June 2002 meeting).

TimberWest's logging in late 1998 and early 1999 of its private land in two areas in the Sooke watershed on Vancouver Island, British Columbia.

At the time of the logging, British Columbia did not regulate forest practices on private land and DFO regional staff believed that voluntary best management practices and proposed provincial forest practices regulations for private land provided inadequate protection for fish habitat. DFO was generally aware of TimberWest's plans to harvest timber in the Sooke watershed but did not review plans for TimberWest's logging of the De Mamiel Creek or Sooke River cutblock. DFO relied on TimberWest or the public to raise any concerns with respect to the logging. In both cases reviewed in this factual record, members of the public raised concerns and Canada investigated both instances for violations of s. 35(1) and 36(3) of the *Fisheries Act*.

With respect to the De Mamiel Creek cutblock, logged from December 1998 to April 1999, DFO received public complaints before and just after the logging but did not conduct a thorough investigation regarding potential impacts of the logging until after the filing in March 2000 of the submission that led to this factual record. The detailed investigation that began in July 2000 led to *Fisheries Act* charges against TimberWest. Although DFO concluded that logging of the cutblock had harmed fish habitat, federal prosecutors dropped the charges because a DFO fishery officer had incorrectly advised TimberWest that the small, unnamed stream running through the cutblock was not fish-bearing.

With respect to the Sooke River cutblock, logged in early 1999, DFO responded immediately to public concerns regarding the logging by undertaking an investigation from March to June 1999. The investigation remained open but inactive from June 1999 to June 2000. Canada provided no reports, field notes or other contemporaneous documentation of DFO's last field visit before the investigation became inactive, a 22 June 1999 field visit in which a forestry expert participated. In June 2000, before Canada responded to the BC Logging submission, DFO issued a warning letter to TimberWest, indicating that while no violation of the *Fisheries Act* was observable at the time, TimberWest activities may eventually result in violations of s. 35 of the *Fisheries Act*. DFO closed the investigation after sending the warning letter.

Indicia of effective enforcement are presented in the factual record. They are not intended to be comprehensive or to establish criteria of effective enforcement, but rather to reflect some of the considerations already in use by others. Among other things, they are based on the

extent to which enforcement personnel act to prevent harm to fish and fish habitat; encourage the public to report suspected *Fisheries Act* violations; and conduct inspections, in response to public complaints or otherwise. These indicia of effective enforcement may be taken into account in considering whether Canada failed to effectively enforce ss. 35(1) and 36(3) of the *Fisheries Act* in connection with TimberWest's logging operations in the area of De Mamiel Creek and Sooke River.



## **APPENDIX 1**

**Council Resolution 01-12, Instruction to  
the Secretariat of the Commission for  
Environmental Cooperation regarding the  
assertion that Canada is failing to effectively  
enforce sections 35(1) and 36(3) of the  
*Fisheries Act* (SEM-00-004)**



Montreal, November 16, 2001

COUNCIL RESOLUTION 01-12

**Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Canada is Failing to Effectively Enforce sections 35(1) and 36(3) of the *Fisheries Act* (SEM-00-004)**

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

CONSIDERING the submission filed on the above-mentioned matter by David Suzuki Foundation, Greenpeace Canada, Sierra Club of British Columbia, Northwest Ecosystem Alliance and Natural Resources Defense Council, and the response provided by the Government of Canada on July 4, 2001;

HAVING REVIEWED the notification by the Secretariat of July 27, 2001 that the development of a factual record is warranted in relation to the submission (SEM-00-004);

NOTING that the only specific case for which the Secretariat's notification recommends a factual record is that Canada is failing to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* with regard to the Sooke River;

FURTHER NOTING that the Secretariat's determination suggests that a factual record might be prepared for the documented assertion that Canada is failing to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* with regard to De Mamiel Creek;

RECOGNIZING that Canada in its response indicated that the submission did not include sufficient information to enable Canada to provide a meaningful response to other matters raised in the submission for which the Secretariat's notification recommends a factual record; and

HAVING BEEN INFORMED by the Government of Canada that no judicial and administrative proceedings regarding De Mamiel Creek are pending;

HEREBY UNANIMOUSLY DECIDES:

TO INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation for the assertions set forth in submission SEM-00-004 that Canada is failing to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* at the Sooke River and at the De Mamiel Creek;

TO DIRECT the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan; and

TO DIRECT the Secretariat to consider, in developing the factual record, whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on January 1, 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to January 1, 1994, may be included in the factual record.

APPROVED BY THE COUNCIL.

## **APPENDIX 2**

**Overall Plan to Develop a Factual Record  
with regard to Submission SEM-00-004**



---

## Secretariat of the Commission for Environmental Cooperation

### Overall Plan to Develop a Factual Record

**Submission I.D.:** SEM-00-004

**Submitter(s):** David Suzuki Foundation  
Greenpeace Canada  
Sierra Club of British Columbia  
Northwest Ecosystem Alliance  
Natural Resources Defense Council

**Represented by:** Sierra Legal Defence Fund  
Earthjustice Legal Defense Fund

**Party:** Canada

**Date of this plan:** 14 December 2001

---

### Background

On 15 March 2000, the Submitters identified above presented to the Secretariat of the Commission for Environmental Cooperation (CEC) a submission in accordance with Article 14 of the North American Agreement on Environmental Cooperation (NAAEC). The Submitters assert, *inter alia*, that Canada is failing systemically to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* in connection with logging operations on public and private land in British Columbia. They claim logging activities that are likely to have harmful impacts on fish and fish habitat are allowed province-wide on public and private lands in British Columbia under provincial forestry laws and regulations and that, 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*. They contend that this approach amounts to a failure to effectively enforce the *Fisheries Act*. The Submitters describe TimberWest's logging in three areas in the Sooke watershed as examples of a logging operation on private land that resulted in *Fisheries Act* violations as to which Canada's enforcement response was ineffective.

On 16 November 2001, the Council decided unanimously to instruct the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforce-*

ment Matters under Articles 14 and 15 of the NAAEC (Guidelines), “for the assertions set forth in submission SEM-00-004 that Canada is failing to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* at the Sooke River and at the De Mamiel Creek.”<sup>1</sup> The Council directed the Secretariat, in developing the factual record, to consider whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

Under Article 15(4) of the NAAEC, in developing a factual record, “the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”

### Overall Scope of the Fact Finding

The Submitters assert that neither British Columbia nor Canada effectively ensures that logging on public or private land in British Columbia complies with the *Fisheries Act*. With regard to private lands, they allege that this failure to effectively enforce occurs “particularly with respect to practices such as clearcutting to the streambanks of small streams and clearcutting landslide prone areas.”<sup>2</sup> They assert that British Columbia’s *Forest Practices Code* does not apply to private land and that British Columbia’s *Private Land Forest Practices Regulation*<sup>3</sup> is “sorely inadequate given its lack of enforceable standards” and lack of protection for small streams.<sup>4</sup> Specifically, they contend that the regulation provides no protection along streams less than 1.5 meters 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 a means for ensuring compliance with the *Fisheries Act* amounts to a failure to effectively enforce 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

---

1. Council Resolution 01-12.

2. Submission at 8.

3. This regulation came into force 1 April 2000, after the date of the submission.

4. Submission at 9.



example of private land logging. . . .”<sup>5</sup> Two of these three areas are the Sooke River and De Mamiel Creek areas referenced in Council Resolution 01-12. The Submitters claim that while Canada has been made aware of these activities, it has taken no action against TimberWest. The Submitters further contend 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*.<sup>6</sup>

In its response, Canada asserts that it carried out investigations of TimberWest’s logging operations in the Sooke River area from March to June 1999, and, as a result of the investigation, sent TimberWest a warning letter dated 27 June 2000<sup>7</sup> 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. Canada asserts that a subsequent inspection on 4 July 2000 did not reveal any harmful impact on fish habitat at the site.

Canada did not comment in its response on the Submitters’ assertions about logging in the area of De Mamiel Creek because the logging was being investigated as a potential offence under the *Fisheries Act*. Council Resolution 01-12 indicates that the Government of Canada informed the Council that no judicial or administrative proceedings regarding De Mamiel Creek are pending.

To prepare the factual record, the Secretariat will gather and develop information relevant to the facts concerning:

- (i) alleged violations of sections 35 and 36 of the *Fisheries Act* in connection with the two areas that are referenced in Council Resolution 01-12;
- (ii) Canada’s enforcement of sections 35 and 36 of the *Fisheries Act* in connection with the two areas referenced in Council Resolution 01-12; and

---

5. Submission at 8-9. See also Attachment 6 [referred to in the Submission as Attachment 5].

6. See Attachment 6 [referred to in the Submission as Attachment 5].

7. Annex 2 to the Response.

- (iii) whether Canada is failing to effectively enforce sections 35 and 36 of the *Fisheries Act* in the context of the two areas referenced in Council Resolution 01-12.

### Overall Plan

Consistent with Council Resolution 01-12, execution of the overall plan will begin no sooner than 14 January 2002. All other dates are best estimates. The overall plan is as follows:

- Through public notices or direct requests for information, the Secretariat will invite the Submitters; JPAC; community members; the regulated community; and local, provincial and federal government officials to submit information relevant to the scope of fact-finding outlined above. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested non-governmental organizations or persons or the JPAC to provide relevant information to the Secretariat (section 15.2 of the *Guidelines*). [January 2002]
- The Secretariat will request information relevant to the factual record from federal, provincial and local government authorities of Canada, as appropriate, and shall consider any information furnished by a Party (Articles 15(4) and 21(1)(a) of the NAAEC). [January 2002] Information will be requested relevant to the facts concerning:
  - (i) alleged violations of sections 35 and 36 of the *Fisheries Act* in connection with the two areas that are referenced in Council Resolution 01-12;
  - (ii) Canada's enforcement of sections 35 and 36 of the *Fisheries Act* in connection with the two areas referenced in Council Resolution 01-12; and
  - (iii) whether Canada is failing to effectively enforce sections 35 and 36 of the *Fisheries Act* in the context of the two areas referenced in Council Resolution 01-12.
- The Secretariat will gather relevant technical, scientific or other information that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. [January through April 2002]
- The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record. [January through June 2002]

- The Secretariat, as appropriate, will collect relevant technical, scientific or other information for the preparation of the factual record, from interested non-governmental organizations or persons, the JPAC or independent experts. [January through June 2002]
- In accordance with Article 15(4), the Secretariat will prepare the draft factual record based on the information gathered and developed. [June through September 2002]
- The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5). [end of September 2002]
- As provided by Article 15(6), the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. [November 2002]
- The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7).

#### **Additional information**

The submission, the Party's response, the Secretariat determinations, the Council Resolution, and a summary of these are available in the Registry on Citizen Submissions in the CEC home page [www.cec.org](http://www.cec.org) or upon request to the Secretariat at the following address:

Secretariat of the CEC  
Submissions on Enforcement  
Matters Unit (SEM Unit)  
393, St-Jacques St. West,  
Suite 200  
Montreal QC H2Y 1N9  
Canada



## **APPENDIX 3**

**Comments of Canada and the United States  
on the Overall Plan to Develop a Factual Record  
with regard to Submission SEM-00-004**



---

**Comments of Canada  
on the Overall Plan to Develop a Factual Record  
with regard to Submission SEM-00-004**

Environment Canada  
Ottawa ON K1A 0H3

January 14, 2002

Ms. Janine Ferretti  
Executive Director  
Secretariat  
Commission for Environmental Cooperation  
393 St. Jacques Street West, Suite 200  
Montreal QC H2Y 1N9

Dear Ms. Ferretti:

Canada is pleased to offer its comments on the five work plans to develop factual records which were provided to the Parties on December 14, 2001.

First, we note that – unlike the work plans the Secretariat provided for the “B.C. Hydro” and “Metales y Derivados” factual records – these five are quite general, and that the Secretariat has chosen not to include specific information on the methods that will be used to gather the facts, or any criteria to determine the relevancy of those facts. As a result, Canada is limited in its ability to provide comments that may be helpful to the Secretariat in ensuring the timely and efficient development of factual records. Should the Secretariat provide the Parties with a more detailed account of what it intends to do to develop the factual records, Canada would be pleased to offer comments which would facilitate the fact gathering process.

In regard to the scope of the fact finding defined in each of the five work plans, it is Canada’s understanding that this scope is limited to the instructions provided by Council with respect to the specific cases identified in Council Resolutions 01-08, 01-09, 01-10, 01-11, and 01-12. As it is made clear in the scope of the fact finding for the Aquanova Factual Record, Canada understands that the facts in the other four factual records will also be gathered strictly with respect to the cases identified in the council resolutions, and not in any other factual context.

With respect to the scope of the fact finding and the overall plan for the Oldman River Factual Record, Canada notices that references are made to the “Sunpine Project”. To avoid any misunderstanding, Canada recommends that all references regarding this case be made to the “Sunpine Forest Products Forest Access Road case” referred to in Council Resolution 01-08 and in the background section of the work plan for the Oldman River Factual Record.

With regard to the scope of the fact finding and the overall plan for the B.C. Logging Factual Record, Canada notices that references are made to sections “35 and 36” of the *Fisheries Act*. Canada believes that this is inaccurate and that these references should be changed to sections “35(1) and 36(3)” of the *Fisheries Act* as is identified in Council Resolution 01-12.

Canada is pleased to submit the above comments for consideration by the Secretariat and offers its full assistance in providing any other relevant information which may facilitate the fact gathering process. We note in this regard that, in order to ensure full access to the appropriate Canadian governmental authorities (federal, provincial, and local) and expedite the compilation of facts, it would be preferable that all information requests made to the Canadian Party regarding the Oldman River, B.C. Mines, and B.C. Logging factual records be addressed to the following contact:

Ms. Jenna MacKay-Alie  
Director  
Americas Branch  
Policy and Communications  
Environment Canada  
10 Wellington Street, 23rd Floor  
Hull, Québec  
K1A 0H3

We will follow-up with the Director of the Submissions on Enforcement Matters Unit to determine if this offer is helpful in expediting the process.

Yours sincerely,

Assistant Deputy Minister  
Policy and Communications

c.c.: SEMARNAT  
US EPA



**U.S. Comments on the Overall plan to develop  
a factual record on SEM-99-002 submitted by  
the CEC Secretariat on December 14, 2001**

1/23/02

**Background Section**

First paragraph, second sentence: The Secretariat's characterization of the requirements of Section 703 of the Migratory Bird Treaty Act with respect to "taking" is inaccurate. The U.S. proposes that this sentence be revised to read as follows:

". . . which prohibits the killing or 'taking' of migratory birds and their nests or eggs, against loggers, logging companies, and logging contractors."

First paragraph, third sentence: We ask that the Secretariat revise this sentence to include language directly from the Submission (as opposed to re-characterizing statements in the Submission and then citing four pages and an appendix). We propose reworking the sentence to read as follows:

"The Submitters claim that logging operations consistently result in violations of the Act which have 'significant consequences, because logging directly kills or takes migratory birds by destroying nests, crushing eggs, and killing nestlings and fledglings.'"

First paragraph, fourth sentence: Please revise this sentence as follows:

"The Submitters assert that despite being aware of these alleged violations. . . ."

**Overall Scope of the Fact Finding Section**

While the Submitters' allegations are described in some detail, almost no information is provided regarding the U.S. government response. To maintain balance, the Secretariat should provide additional information describing the main elements of the U.S. government response to the MBTA submission.

For consistency, please revise bullet (i) to read as follows: "the alleged violations of section 703 of the MBTA **in connection with the two cases** that are referenced in Council Resolution 01-10".

Bullet (iii) is unnecessary. Bullet (ii) is general in nature and effectively covers the substance addressed in bullet (iii), therefore, the third bullet should be removed.

#### **Overall Plan Section**

In order to facilitate the fact finding as well as internal U.S. coordination efforts, it is requested that all communications between the Secretariat and U.S. federal government officials, as outlined under the first and second bullets, be in writing and go through the following primary points of contact, with an electronic copy to the U.S. Environmental Protection Agency/Office of International Activities (frigerio.lorry@epa.gov):

#### U.S. Department of Interior/ Fish and Wildlife Service

Kevin Adams  
Assistant Director, Law Enforcement  
U.S. Fish & Wildlife Service  
Mail Stop 3012  
1849 C Street NW  
Washington, D.C. 20240  
ph: 202-208-3809  
fx: 202-482-3716  
\*DOI does not have email access at this time

#### U.S. Department of Agriculture

Tom Darden  
Acting Director Wildlife, Fish, Watershed, Air, and Rare Plants Staff  
USDA Forest Service  
Sidney R. Yates Federal Building  
201, 14th Street at Independence Avenue, SW  
Washington, D.C. 20250  
ph: 202-205-1167  
fx: 202-205-1599  
email address to follow

Additionally, the contacts identified above should be copied on all communications between the Secretariat and U.S. state and local officials (including an electronic copy to the U.S. Environmental Protection Agency via frigerio.lorry@epa.gov).

Second bullet:

- The following sentence should be included after the first sentence in the first paragraph: “All requests for information from government authorities will be in writing.”
- Bullet (i) under the second bullet should be revised as outlined above.
- Bullet (iii) under the second bullet should be removed for the reasons stated above.

Fourth bullet: If the Secretariat obtains independent experts to develop information, the Secretariat should ensure that such experts represent a balanced point of view.

**U.S. Comments on the Overall plan to develop a factual record on SEM-97-006, 98-004, 98-006, and 00-004 submitted by the CEC Secretariat on December 14, 2001**

Since these four documents contain much of the same “boilerplate” language, the comments outlined below apply to all four work plans.

**Overall Scope of the Fact Finding Section**

Bullet (iii) is unnecessary. Bullet (ii) is general in nature and effectively covers the substance addressed in bullet (iii), therefore, the third bullet should be removed.

**Overall Plan Section**

Second bullet:

- The following sentence should be included after the first sentence in the first paragraph: “All requests for information from government authorities will be in writing.”
- Bullet (i) under the second bullet should be revised as outlined above.
- Bullet (iii) under the second bullet should be removed for the reasons stated above.

Fourth bullet: If the Secretariat obtains independent experts to develop information, the Secretariat should ensure that such experts represent a balanced point of view.



## **APPENDIX 4**

**Request for Information describing the  
scope of the information to be included in  
the factual record and giving examples  
of relevant information**



## Secretariat of the Commission for Environmental Cooperation

### REQUEST FOR INFORMATION For Preparation of a Factual Record Submission SEM 00-004 (B.C. Logging) January 2002

#### I. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (the NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the top environmental official from each country; a Joint Public Advisory Committee (JPAC), comprised of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of the NAAEC allows persons or non-governmental organizations in North America to inform the Secretariat, in a submission, that any NAAEC country (referred to as a Party) is failing to effectively enforce its environmental law. This initiates a process of review of the submission, which can result in the Council instructing the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Articles 15(4) and 21(1)(a) of the NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available; submitted by the JPAC or by interested non-governmental organizations or persons; or developed by the Secretariat or independent experts.

On 16 November 2001, the Council issued Council Resolution 01-12, unanimously instructing the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, “for the assertions set forth in submission SEM-00-004 that Canada is failing to effectively enforce sections 35(1)

and 36(3) of the *Fisheries Act* at the Sooke River and at the De Mamiel Creek.” The Council directed the Secretariat, in developing the factual record, to consider whether the Party concerned “is failing to effectively enforce its environmental law” since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

The Secretariat is now requesting information relevant to matters to be addressed in the factual record for the B.C. Logging submission, SEM-00-004. The following sections provide background on the submission and describe the kind of information requested.

## II. The BC Logging submission

On 15 March 2000, David Suzuki Foundation and other groups (the Submitters) presented to the CEC Secretariat a submission in accordance with Article 14 of the NAAEC. The Submitters assert that Canada is failing systemically to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* in connection with logging operations on public and private land in British Columbia. They claim logging activities that are likely to have harmful impacts on fish and fish habitat are allowed province-wide on public and private lands under provincial forestry laws and regulations and that, in reliance on these provincial laws and regulations, Canada has scaled back its review of whether logging will ensure compliance with the *Fisheries Act*. The Submitters contend that this approach amounts to a failure to effectively enforce provisions of the *Fisheries Act*.

With regard to private lands, the Submitters allege that the failure to effectively enforce occurs “particularly with respect to practices such as clearcutting to the streambanks of small streams and clearcutting landslide prone areas.<sup>1</sup>” They assert that British Columbia’s *Forest Practices Code* does not apply to private land and that British Columbia’s *Private Land Forest Practices Regulation*<sup>2</sup> is “sorely inadequate given its lack of enforceable standards” and lack of protection for small streams.<sup>3</sup> Specifically, they contend that the regulation provides no protection along streams less than 1.5 meters 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 a means for ensuring compliance with the *Fisheries Act* amounts to a failure to effectively enforce the *Fisheries Act*.

---

1. Submission at 8.

2. This regulation came into force 1 April 2000, after the date of the submission.

3. Submission at 9.



The Submitters cite logging by TimberWest Cowichan Woodlands (TimberWest) of its private land in three areas in the Sooke watershed as “[o]ne particularly troubling example of private land logging. . . .”<sup>4</sup> Two of these three areas are the Sooke River and De Mamiel Creek areas referenced in Council Resolution 01-12. The Submitters claim that while Canada has been made aware of these activities, it has taken no action against TimberWest. The Submitters further contend 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 Timber West’s operations as necessary to comply with the *Fisheries Act*.<sup>5</sup>

In its 4 July 2000 response, Canada asserts that it carried out investigations of TimberWest’s logging operations from March to June 1999 in the Sooke River area, and, as a result of the investigation, sent TimberWest a warning letter dated 27 June 2000<sup>6</sup> 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. Canada asserts that a subsequent inspection on 4 July 2000 did not reveal any harmful impact on fish habitat at the site.

Canada does not comment in its response on the Submitters’ assertions about logging in the area of De Mamiel Creek because the logging was being investigated as a potential offence under the *Fisheries Act*. Council Resolution 01-12 indicates that the Government of Canada informed the Council that no judicial or administrative proceedings regarding De Mamiel Creek are now pending.

### III. Request for information

The Secretariat requests information relevant to the facts concerning:

- (i) alleged violations of sections 35(1) and 36(3) of the *Fisheries Act* in connection with the two areas that are referenced in Council Resolution 01-12;

---

4. Submission at 8-9. See also Attachment 6 [referred to in the Submission as Attachment 5].

5. See Attachment 6 [referred to in the Submission as Attachment 5].

6. Annex 2 to the Response.

- (ii) Canada's enforcement of sections 35(1) and 36(3) of the *Fisheries Act* in connection with the two areas referenced in Council Resolution 01-12; and
- (iii) whether Canada is failing to effectively enforce sections 35(1) and 36(3) of the *Fisheries Act* in the context of the two areas referenced in Council Resolution 01-12.

#### IV. Examples of relevant information

Examples of relevant information include the following:

1. Information on TimberWest's logging operations along the Sooke River or De Mamiel Creek; for example information on:
  - formal or informal plans TimberWest had for complying with the *Fisheries Act*;
  - clearcutting in riparian areas;
  - the extent to which standing trees were left in riparian areas;
  - yarding or falling of trees into or across streams; or
  - logging on steep or landslide-prone areas.
2. Information on the impact of TimberWest's logging operations along the Sooke River or De Mamiel Creek on fish and fish habitat, particularly on any harmful alteration, disruption or destruction of fish habitat within the meaning of *Fisheries Act* section 35(1) or any deposit of deleterious substances (including silt, sediment or debris) in waters frequented by fish within the meaning of *Fisheries Act* section 36(3).
3. Information on whether TimberWest's logging activity along the Sooke River or De Mamiel Creek area complied with British Columbia forest practices laws or regulations, and on whether the logging resulted in harmful alteration, disruption or destruction of fish habitat or in the deposit of deleterious substances in waters frequented by fish even though it complied with forest practices laws and regulations.
4. Information on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring com-

---

pliance with, sections 35(1) and 36(3) of the *Fisheries Act*, specifically ones that might apply to TimberWest's logging along the Sooke River and De Mamiel Creek.

5. Information on federal, provincial or local enforcement or compliance-related staff or resources available for enforcing or ensuring compliance with sections 35(1) and 36(3) of the *Fisheries Act* in connection with TimberWest's logging along the Sooke River and De Mamiel Creek.
6. Information on Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* sections 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas, including for example:
  - efforts to prevent violations, such as by placing conditions on or requiring modifications of the logging operations or providing technical assistance;
  - monitoring or inspection activity either during or after the logging operations;
  - warnings, orders, charges or other enforcement action issued to TimberWest;
  - actions to remedy impacts to fish habitat due to logging; or
  - coordination between different levels of government on enforcement and compliance assurance.
7. Information on the effectiveness of Canada's or British Columbia's efforts to enforce or ensure compliance with *Fisheries Act* section 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas, for example its effectiveness in:
  - remedying any violations of *Fisheries Act* sections 35(1) or 36(3) that occurred, or
  - preventing future violations of those provisions.
8. Information on barriers or obstacles to enforcing or ensuring compliance with *Fisheries Act* sections 35(1) and 36(3) in connection with TimberWest's logging operations in the Sooke River and De Mamiel Creek areas.

9. Any other technical, scientific or other information that could be relevant.

#### V. Additional background information

The submission, Canada's response, the determinations by the Secretariat, the Council Resolution, the overall plan to develop the factual record and other information are available in the Registry and Public Files section of Citizen Submissions on Enforcement Matters on the CEC website: <<http://www.cec.org>>. These documents may also be requested from the Secretariat.

#### VI. Where to Send Information

Relevant information for the development of the factual record may be sent to the Secretariat until 30 June 2002, to the following address:

Secretariat of the CEC  
Submissions on Enforcement  
Matters Unit (SEM Unit)  
393, St-Jacques St. West,  
Suite 200  
Montreal QC H2Y 1N9  
Canada  
Tel. (514) 350-4300

Please reference SEM-00-004 (B.C. Logging) in all correspondence.

For any questions, please send an e-mail to the attention of Geoffrey Garver, at [info@ccemtl.org](mailto:info@ccemtl.org).

## **APPENDIX 5**

**Information Request to Canadian authorities  
(1 February 2002)**



---

## Memorandum

**DATE:** 1 February 2002

**À / PARA / TO:** Environment Canada

**CC:** Semarnat  
US EPA  
CEC Executive Director

**DE / FROM:** Director, Submissions on Enforcement  
Matters Unit

**OBJET /  
ASUNTO / RE:** Request for information relevant to the factual  
record for the B.C. Logging submission,  
SEM-00-004.

---

As you know, the CEC Secretariat recently began the process of preparing a factual record for the B.C. Logging submission, SEM-00-004. Consistent with Council Resolution 01-12, the factual record will focus on the assertion that Canada is failing to effectively enforce provisions of the federal *Fisheries Act* with respect to logging on TimberWest Cowichan Woodlands land in the Sooke watershed on Vancouver Island.

Consistent with Articles 15(4) and 21(1) of the NAAEC, I am writing to request from the Government of Canada information relevant to the B.C. Logging factual record. The attached Request for Information describes the scope of the information to be included in the factual record and provides examples of relevant information. Please provide the Secretariat any information responsive to the Request for Information. Under our current schedule, we intend to accept information for consideration in connection with the factual record until June 30, 2002. To allow time for possible follow-up information requests to Canada prior to that date, we ask that you provide the information requested here by 15 April 2002.

In addition, as we discussed last week, I request your assistance in arranging meetings with relevant federal, provincial and local agencies. As I mentioned, I will be in British Columbia the week of 25 February to 1 March and would like to meet with regional officials of DFO, Environment Canada and/or other relevant federal agencies, as well as with officials from the British Columbia Ministries of Water, Land and Air

Protection; Agriculture, Food and Fisheries; Sustainable Resource Management; Forests; and/or other relevant provincial or local agencies. I would ask that you include personnel who were directly involved in any efforts to enforce or ensure compliance with section 35(1) or 36(3) of the *Fisheries Act* in connection with the two areas referenced in Council Resolution 01-12. I tentatively plan to be available for meetings in Vancouver on the evening of 25 February, all day on 26 February and in the morning of 27 February, and for meetings in Victoria on the afternoon of 27 February, all day on 28 February and the morning of 1 March. However, I am flexible as to how to divide my time between Vancouver and Victoria.

I also would like to schedule a day of meetings with officials of DFO, Environment Canada and/or other relevant federal agencies in Ottawa, preferably early in the week of February 18. Please let me know if a meeting during that time is possible, and if not, what other dates might work.

Please note that Katia Opalka is also planning fact-gathering trips in connection with the B.C. Mining and Oldman River II submissions. She is planning to be in British Columbia the first part of the week of February 25, and is also interested in meeting officials in Ottawa the week of February 18. We will try to coordinate our schedules if it makes sense for us to hold meetings with the same officials.

I appreciate your consideration of this request and your assistance in coordinating the Secretariat's contacts with government agencies. I look forward to any relevant information Canada is able to provide and to working with you on finalizing the schedule for my meetings with government officials. Please feel free to contact me at (514) 350-4332 or [ggarver@ccemtl.org](mailto:ggarver@ccemtl.org), or my assistant, Doris Millan at (514) 350-4304 or [dmillan@ccemtl.org](mailto:dmillan@ccemtl.org), to discuss this request.



## **APPENDIX 6**

**Information Requests to NGOs, JPAC  
and other Parties to the NAAEC**



---

## Form Letter to NGOs

31 January 2002

**Re: Preparation of the factual record for submission SEM-00-004**

The Secretariat of the Commission for Environmental Cooperation of North America recently began the process of preparing a “factual record” regarding an assertion that Canada is failing to effectively enforce provisions of the federal *Fisheries Act* with respect to logging on TimberWest Cowichan Woodlands land in the Sooke watershed on Vancouver Island. This assertion was made in a “submission” filed with the Secretariat in March 2000 by the David Suzuki Foundation and others.

I am writing to invite you to submit information relevant to the factual record. The attached Request for Information explains the citizen submissions process and factual records, gives background about the so-called B.C. Logging submission (SEM-00-004), describes the scope of the information to be included in the factual record for the B.C. Logging submission, and provides examples of information that might be relevant. We will accept information for possible consideration in connection with the factual record **until June 30, 2002**.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. Please feel free to contact the Secretariat if you have questions. Contact information is provided at the end of the Request for Information.

Sincerely,

Director  
Submissions on Enforcement Matters Unit

Enc.

## Memorandum

**DATE:** 1 February 2002

**À / PARA / TO:** Chair, Joint Public Advisory Committee (JPAC)

**CC:** JPAC Members, CEC Executive Director,  
JPAC Liaison Officer

**DE / FROM:** Director, Submissions on Enforcement  
Matters Unit

**OBJET /  
ASUNTO / RE:** Request for information relevant to the factual  
record for the BC Logging submission,  
SEM-00-004.

---

As you know, the CEC Secretariat recently began the process of preparing a factual record for the B.C. Logging submission, SEM-00-004. This submission was filed with the Secretariat in March 2000 by the David Suzuki Foundation and others. Consistent with Council Resolution 01-12, the factual record will focus on the assertion that Canada is failing to effectively enforce provisions of the federal *Fisheries Act* with respect to logging on TimberWest Cowichan Woodlands land in the Sooke watershed on Vancouver Island.

I am writing to invite the JPAC to submit information relevant to the factual record, consistent with Article 15(4)(c) of the NAAEC. The attached Request for Information, which will be posted on the CEC website, gives background about the B.C. Logging submission (SEM-00-004), describes the scope of the information to be included in the factual record, and provides examples of information that might be relevant. We will accept information for possible consideration in connection with the factual record until June 30, 2002.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. Please feel free to contact me if you have questions regarding this request or the factual record process.

---

**Letter to the Other Parties of the NAAEC  
(USA and Mexico)**

1 February 2002

**Re: Preparation of the factual record for submission SEM-00-004.**

Dear Administrator/Minister:

As you know, the CEC Secretariat recently began the process of preparing a factual record for the B.C. Logging submission (SEM-00-004), consistent with Council Resolution 01-12. I am writing to invite the [United States] [Mexican] Party to submit information relevant to the factual record, consistent with Article 15(4) of the NAAEC.

The attached Request for Information, which will be posted on the CEC website, gives background about the B.C. Logging submission, describes the scope of the information to be included in the factual record, and provides examples of information that might be relevant. We will accept information for consideration in connection with the factual record until June 30, 2002.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. Please feel free to contact me if you have questions regarding this request or the factual record process.

Sincerely,

Director  
Submissions on Enforcement Matters Unit

c.c.: Semarnat  
US EPA  
Environment Canada  
CEC Executive Director

Enc.



## **APPENDIX 7**

**List of Nongovernmental Organizations  
recipient of a Request for Information for  
the development of the Factual Record  
for Submission SEM-00-004**





**Nongovernmental Organizations recipient of a  
Request for Information for the development  
of the Factual Record on SEM-00-004**

Amalgamated Conservation Society	American Forest and Paper Association
B.C. Environmental Network (BCEN)	Bilston Watershed Habitat Protection Association
Canadian Institute of Forestry (CIF) – Vancouver Island	The Canadian Nature Federation (CNF)
Canadian Parks & Wilderness Society	Canadian Sustainable Forestry Certification Coalition
Canadian Wildlife Federation	CERCA (Coastal Environmental Restoration Co-operative Association)
COFI (Council of Forest Industries)	Community Fisheries Development Centre – Nanaimo
Community Fisheries Development Centre – Vancouver	Courtland Hastings Agricultural Preservation Society
Cowichan Watershed Council	Ecoforestry Institute Society of Canada
Forest Alliance of B.C.	Friends of Mount Douglas Park Society
Goldstream Volunteer Salmonid Enhancement Association	Hagan Creek KENNES Watershed Project
Haig-Brown Fly Fishing Association	Island Stream & Enhancement Society

---

Lake Cowichan Salmonid Enhancement Society	Lester B. Pearson College
Native Brotherhood of B.C.	Pacific Streamkeepers Federation
Raincoast Conservation Society	SEHAB (Salmonid Enhancement & Habitat Advisory Board)
Sidney Anglers	Society for the Protection of Ayum Creek
Somenos Marsh Wildlife Society	Sooke Salmon Enhancement Society
Sooke Watershed Society	South Islands Aquatic Stewardship Society (SIASS)
T. Buck Suzuki Foundation	T'Sou-Ke First Nation
United Fishermen & Allied Workers Union	The University of B.C.
The University of Victoria	Vancouver Island Watership Foundation
Veins of Life Society	Wilderness Committee
Woodwynn Farm	World Wildlife Fund

## **APPENDIX 8**

**Follow-up Questions to Canada  
(dated 7 June 2002) regarding the factual  
record for Submission SEM-00-004**



---

## Memorandum

**DATE:** 7 June 2002  
**À / PARA / TO:** Environment Canada  
**CC:**  
**DE / FROM:** Director, Submissions on Enforcement  
Matters Unit  
**OBJET /**  
**ASUNTO / RE:** Follow-up questions regarding the factual record  
for the BC Logging/SEM-00-004 submission

---

Pursuant to Canada's request, I am writing to provide the follow-up questions the Secretariat wishes to pursue with Canada in regard to the factual record for the B.C. Logging submission (SEM-00-004), consistent with NAAEC Article 21. While we intend to ask these questions during our meeting with Department of Fisheries and Oceans (DFO) and Environment Canada (EC) in Vancouver on 12 June 2002, we assume you will provide us with a written response following the meeting, which will greatly assist us in accurately presenting information in the draft factual record. In addition, especially since we only received yesterday the information regarding the Upper Sooke River logging activity in response to our 31 January 2002 information request, we may have additional questions at and following the 12 June meeting. I hope the 12 June meeting will provide sufficient time to discuss these questions. If not, it may be necessary to obtain Canada's responses to some questions in a follow-up meeting or Canada's written response.

We request Canada's answers, and copies of supporting information, for each of the following questions. If Canada has already provided supporting information, please identify specifically the information that is responsive to a particular question. In addition, we seek to determine how the information Canada provided in response to the Secretariat's 31 January 2002 information request responds to the questions and examples included in that information request. If requested information has not been or will not be provided (including on a confidential basis) because it is non-existent, confidential or privileged, or otherwise unavailable, please provide an explanation consistent with Article 21(3). I confirm that you have already noted, with explanation, the removal of certain information in your responses to date.

**General questions:**

1. Are the TimberWest lands at issue in the factual record in the Forest Land Reserve, or in a tree farm license or woodlot license? Is any of the land Crown Land?
2. A memorandum from John Lamb to Roy Osselton among the information provided by Canada includes a statement on page 2 that “The Department of Fisheries and Oceans’ opinion is that the minimal standards of the PFLPR does not offer adequate protection for fish habitat, particularly regarding the limited retention of riparian trees.” He also suggests, on page 5 of that memo, that the Private Forest Landowners Association standard for streamside retention of trees does not offer adequate protection for fish habitat. Is this the current opinion of DFO?
3. To what extent was or are DFO or EC’s policies, programs or overall approach to compliance assurance and enforcement of sections 35(1) and 36(3) of the *Fisheries Act* applicable to the logging activity at issue in the factual record different from the approach applicable to logging regulated under the British Columbia *Forest Practices Code*? For example, was TimberWest’s activity subject to greater scrutiny by DFO or EC because it was not regulated under the *Forest Practices Code*?
4. To what extent do the 1998 *Habitat Protection and Conservation Guidelines* apply to the area in which the logging activity at issue in the factual record took place? If the Guidelines applied, how were they applied to the logging activity at issue in the factual record?
5. To what extent did the HADD Decision Framework apply to the logging activity at issue in the factual record? If the Framework applied, how was it applied to the logging activity at issue in the factual record?
6. Are there any other DFO or EC policies related to fish habitat or the deposit of deleterious substances that apply in the areas in which the logging activity at issue in the factual record took place? If so, how were they applied to the logging activity at issue in the factual record?
7. Please explain the extent of the application, either formal or informal, and in either final or draft form, of the July 2001 Compliance

---

and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* to the logging activity at issue in the factual record. To the extent it applied, how was it applied in connection with the logging activity at issue in the factual record?

8. Please explain the extent to which the action Canada took in regard to the logging activity at issue in the factual record promotes the goal of administering and enforcing the *Fisheries Act* in a fair, predictable and consistent manner.
9. Please explain the extent to which DFO or EC considered how situations in Canada similar to the logging activity at issue in the factual record were being or have been handled in deciding what, if any, enforcement action to take in connection with the logging activity at issue in the factual record?
10. Does or did DFO or EC have a plan or program, applicable to the logging activity at issue in the factual record, for conducting inspections of logging operations for compliance with sections 35(1) and 36(3) of the *Fisheries Act* in the Sooke watershed? If so, please provide details regarding the plan or program (the frequency of inspections, prioritization of inspections, training and guidelines for inspectors, access to private land, etc.). Was such a plan or program in place at the time the logging activity at issue in the factual record took place? If so, please provide details as to how it was applied to the logging activity at issue in the factual record.
11. Does or did DFO or EC have a plan or program, applicable to the logging activity at issue in the factual record, for reviewing plans for logging on private land prior to the logging? If so, please provide details regarding the plan or program (procedure for obtaining plans, procedure for reviewing plans, etc.) and explain the extent to which DFO or EC can request or order modifications to logging plans in order to ensure compliance with sections 35(1) or 36(3).
12. Explain any connection between any inspection programs as referenced in question 10 above and any plan review programs as referenced in question 11 above.
13. What training do Fisheries Officers receive regarding how to respond to questions from an entity such as TimberWest that is

undertaking an activity that might affect fish habitat? For example, this would include questions about whether or not fish are present in a particular stream or whether the area is fish habitat.

14. Does or did DFO or EC have a system, applicable to the logging activity at issue in the factual record, for knowing when and where logging on private lands is taking place? If so, please explain the system.
15. What effort does or did (at the time the logging activity at issue in the factual record took place) DFO or EC expect a private landowner such as TimberWest to take in order to ensure compliance with the *Fisheries Act* of logging activity (e.g. to determine presence of fish, assess fish habitat concerns, prevent violations, etc.)? How are any such expectations communicated to a private landowner such as TimberWest?
16. The letter from Mike Henderson to John Werring 19 July 1999, attachment 6 to the submission, says “we are initiating a strategic forestry monitoring program for private lands on Vancouver Island in the coming weeks.” Please explain what this program is and whether it was implemented.

**DeMamiel Creek:**

1. Was DFO or EC aware of the logging activity near DeMamiel Creek at issue in the factual record prior to receiving a public complaint regarding that activity?
2. What information does DFO or EC have about fisheries values in the area near DeMamiel Creek where the logging at issue in the factual record took place? How about at the time of the logging activity at issue?
3. What, if any, information did DFO or EC provide to TimberWest regarding fishery values or compliance with the *Fisheries Act* prior to the logging activity near DeMamiel Creek at issue in the factual record? Did TimberWest request any information?
4. Did DFO or EC request and/or review any logging plans for the logging activity near DeMamiel Creek at issue in the factual record?



5. Please explain the extent to which Canada exercised its powers under section 35 and/or 37 of the *Fisheries Act* in order to prevent or mitigate harmful impacts to fish and fish habitat of the logging near DeMamiel Creek at issue in the factual record. If this power was not exercised, why not?
6. To what extent was the investigation relating to the logging near DeMamiel Creek related to section 35(1) of the *Fisheries Act*, and to what extent was it related to section 36(3)? If it was not related to section 36(3), why not?
7. Please describe any action that DFO or EC took in regard to the logging near DeMamiel Creek at issue in the factual record between 16 December 1998 and 8 April 1999.
8. The chronology of events included in Canada's response to the Secretariat's information request indicates little or no DFO activity in relation to the DeMamiel Creek investigation from April 1999 to July 2000. Please describe any investigative activity by DFO or EC that took place during that time period.
9. What was the purpose for and circumstances surrounding the 5 July 2000 DFO helicopter flight in which observations were made regarding the impacts of the logging at issue in the factual record?
10. Why was no fish trapping done during the winter in connection with the investigation relating to the logging activity near DeMamiel Creek?
11. Please explain the role, if any, of Steve Vollers in the investigation related to the logging activity near DeMamiel Creek at issue in the factual record.
12. To what extent did DFO or EC consider the draft Private Land Forest Practices Regulations and/or the PFLA Best Management practices in determining whether and how to prosecute TimberWest in regard to the logging activity near DeMamiel Creek at issue in the factual record?
13. What rehabilitation efforts has DFO asked or ordered TimberWest to undertake, or has DFO itself undertaken, to address stream impacts likely due to the logging operation near DeMamiel Creek (planting of streamside vegetation, removal of debris, removal of

barriers to fish passage, preventing blowdown of remaining trees, etc.)?)

14. Why was the prosecution of TimberWest in regard to the logging activity near DeMamiel Creek not pursued? For example, what, if any, obstacles to successful prosecution or factors relating to the public interest were considered in deciding not to pursue the case?
15. Has DFO or EC made any changes in policy or procedures as a result of the experience in connection with the logging near DeMamiel Creek?

**Sooke River:**

1. Please clarify the dates of DFO field visits; the information in Canada's 6 July 2000 response to the submission is inconsistent with the information in the 27 June 2000 Warning Letter, which itself has an internal inconsistency regarding dates. Are correct dates 6 March 1999, 17 March 1999, 8 April 1999 and 22 June 1999? What was the reason for each site visit? If the 22 June 1999 date is correct, did anything happen on this file between that visit and the 27 June 2000 Warning Letter? Note that Canada's response to the submission refers to contacts between DFO and TimberWest during that time period; what are the details regarding those contacts?
2. Why was a warning letter not sent prior to 27 June 2000?
3. Was DFO or EC aware of the logging activity near the Sooke River at issue in the factual record prior to receiving public complaints regarding that activity?
4. What information does DFO or EC have about fisheries values in the area near the Sooke River where the logging at issue in the factual record took place? How about at the time of the logging activity at issue?
5. What, if any, information did DFO or EC provide to TimberWest regarding fishery values or compliance with the *Fisheries Act* prior to the logging activity near the Sooke River at issue in the factual record? Did TimberWest request any information?
6. Did DFO or EC request and/or review any logging plans for the logging activity near the Sooke River at issue in the factual record?

7. Please explain the extent to which Canada exercised its powers under sections 35(2) and/or 37 of the *Fisheries Act* in order to prevent or mitigate harmful impacts to fish and fish habitat of the logging near the Sooke River at issue in the factual record. If this power was not exercised, why not?
8. To what extent was the investigation relating to the logging near the Sooke River related to section 35(1) of the *Fisheries Act*, and to what extent was it related to section 36(3)? If it was not related to section 36(3), why not?
9. To what extent did DFO or EC consider the draft Private Land Forest Practices Regulations and/or the PFLA Best Management practices in determining whether and how to prosecute TimberWest in regard to the logging activity near Sooke River at issue in the factual record?
10. Why was a warning letter used in this situation, as opposed to other possible enforcement approaches?
11. What was the basis for the decision that there was insufficient evidence of harm to fish habitat to proceed with a prosecution under section 35(1) or 36(3) of the *Fisheries Act* in connection with the logging near the Sooke River?
12. What rehabilitation efforts has DFO asked or ordered TimberWest to undertake, or has DFO itself undertaken, to address stream impacts likely due to the logging operation near the Sooke River (planting of streamside vegetation, removal of debris, removal of barriers to fish passage, preventing blowdown of remaining trees, etc.)? Why did the 27 June 2000 Warning Letter request or order no remedial measures?
13. Has DFO or EC made any changes in policy or procedures as a result of the experience in connection with the logging near the Sooke River?
14. Please explain any differences in the approaches taken in connection with the logging activity near DeMamiel Creek and the logging near the Sooke River.

Thank you for your consideration of these questions.



## **APPENDIX 9**

**Request for Additional Information  
(19 July 2002)  
as discussed during the 12 June 2002  
meeting with Canadian authorities**



---

## Memorandum

DATE: 19 July 2002  
À / PARA / TO: Environment Canada  
CC:  
DE / FROM: Director, Submissions on Enforcement  
Matters Unit  
OBJET /  
ASUNTO / RE: Follow-up questions regarding the factual record  
for the BC Logging/SEM-00-004 submission

---

Thank you for your assistance in setting up our meeting and field visit with Department of Fisheries and Oceans (DFO) and Environment Canada (EC) in Vancouver on 12-13 June 2002 regarding the factual record for the B.C. Logging submission (SEM-00-004). Please also extend my thanks to Peter Delaney and the other participants representing Canada at the meeting. The meeting and the field trip were very useful for clarifying many of the matters raised in my memorandum to you of 7 June 2002.

I am writing to confirm my understanding of additional information discussed during the June 12 meeting that DFO and/or Environment Canada said they should be able to provide. In addition, I said at the June 12 meeting that I would revise the follow-up information requests for which a written response or additional information would assist us in developing an accurate draft factual record. I have summarized below our understanding of certain information that Canada presented at the June 12 meeting as it relates to some of the questions in my June 7 memorandum in the hope that this will help streamline your consideration as to whether you can provide further clarification or additional information.

### Follow-up information discussed during the June 12 meeting:

1. We understood from the discussion that while the “strategic forest monitoring program” for private lands on Vancouver Island mentioned in M.A. Henderson’s 19 July 1999 letter to John Werring has not been implemented, DFO prepared a report relating to *Fisheries Act* compliance for logging on private lands on Vancouver Island

in preparation for such a program. DFO indicated it would provide this report to us.

2. DFO indicated it would check and confirm the correct dates for all DFO field visits to the Upper Sooke River logging site. Our understanding is that all field visits to the site prior to the June 27, 2000 warning letter took place in 1999.
3. DFO indicated it would check for documentation of any federal government activity in connection with the logging site near DeMamiel Creek between April 1999 and June 2000, and between June 2001 and the date of the decision to stay charges in connection with that logging. In the event that no additional documentation is available, we request either a confirmation that no federal government activity took place or a description of any activity that took place.
4. DFO indicated it would provide a memorandum provided to DFO fishery officers that, as a follow-up to the case involving logging near DeMamiel Creek, provided instructions as to how to respond to requests from the regulated community as to the existence of fish habitat.
5. DFO indicated it would provide portions of fishery officer training materials that were based on the case involving logging near DeMamiel Creek.
6. DFO indicated it would check for documentation (e.g. field or other notes, e-mails, reports, etc.) of any federal government activity in connection with the Upper Sooke River logging site between 22 June 1999 and June 2000, and then following the 27 June 2000 warning letter up to the time the file was closed (if it has been closed) or the present. The 26 June 2000 memorandum of Nicholas Winfield states that "DFO has conducted follow-up investigations of the site" but it is not clear when those investigations occurred or who conducted them. In the event that no additional documentation is available, we request either a confirmation that no federal government activity took place or a description of any activity that took place.
7. DFO indicated it would check for any documentation, such as additional field notes, field reports, expert reports, including those of Steve McDonald, regarding the 22 June 1999 field visit to the Upper Sooke River site.



**Matters for which Canada may wish to provide confirmation or clarification:**

Based on the June 12 meeting and June 13 field visit, the following reflects our understanding of certain matters raised in my June 7 memorandum:

1. DFO in British Columbia has generally given greater scrutiny to logging on private land, such as TimberWest's logging subject to the factual record, than to logging that is regulated under the British Columbia *Forest Practices Code*. Following adoption of the British Columbia *Forest Practices Code*, DFO ceased doing block-by-block review of logging on Crown land; logging on private land not regulated under the Code received greater emphasis, but block-by-block review is not generally done for private land logging and was not done in connection with the logging at issue in the factual record. DFO would still like to develop a monitoring program for logging on private lands, but lack of staff and resources has so far prevented it. It is not clear how private land logging receives greater emphasis from DFO than logging regulated under the *Forest Practices Code*.
2. Neither the 1998 *Habitat Protection and Conservation Guidelines* nor the HADD Decision Framework applied to the logging activity at issue in the factual record. The HADD Decision Framework did not apply because DFO generally does not apply it to logging activity of this nature, and DFO did not request the logging plans and was not aware of their details prior to their execution and therefore had no basis for knowing if activity triggering the HADD Decision Framework might occur in connection with the logging.
3. Although the July 2001 Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the *Fisheries Act* was not final at the time of the logging activity at issue in the factual record, the draft policy at the time was followed in general, and DFO believes that its actions in connection with the logging at issue in the factual record were consistent with the policy.
4. DFO does not have a formal plan or program, applicable to the logging activity at issue in the factual record, for conducting inspections of logging operations for compliance with sections 35(1) and 36(3) of the *Fisheries Act* in the Sooke watershed. The companies

“hold the hammer” in terms of bringing plans to DFO. DFO does not conduct regular or routine inspections, or surprise inspections, of logging operations on private land in the watershed. DFO gets “thousands, tens of thousands of complaints” every year regarding *Fisheries Act* violations in the region and follows those up; complaints are the main trigger of inspections. DFO doesn’t have time or people available to review all plans or to schedule *ad hoc* surprise inspections of blocks and there are no systematic orders to Fisheries staff to make inspections; there is only one DFO staff person in the Duncan office to review plans for the district. Whereas DFO field staff in South Vancouver Island used to spend about 70 % of their time in connection with logging activity, for the past five to seven years they have spent about 30 % of their time on logging activity. The attention DFO gives particular companies depends largely on companies’ reputation with DFO in regard to compliance; TimberWest is generally considered a responsible company with a good compliance record in the area and is therefore not given special enforcement scrutiny. Companies ask for DFO participation more often DFO goes out to look at logging at their own initiative. DFO sometimes establishes enforcement concerns on which to focus in a given year, and that information is sometimes provided to members of the regulated community in the watershed.

**Additional information requested:**

In addition to any further clarification or information regarding the matters listed above, we request the following:

1. Any documentation relating to the stay of charges regarding the site near DeMamiel Creek or of the closing of the Upper Sooke River file, including an indication of the dates on which those actions occurred.
2. An organizational chart for DFO, especially of the Pacific region, including an indication of the number of staff in the habitat section who deal with logging plans and inspect logging operations in the Sooke watershed.
3. Any additional information or explanation not already provided in response to my 7 June 2002 memorandum that Canada would like to submit.

## **APPENDIX 10**

**Excerpt from:**  
***1999-2000 Field Monitoring Report:***  
***Vancouver Island Private***  
***Managed Forest Land***  
**(October 2001)**



The following excerpt is taken from pages 3-8 of DFO's 1999-2000 *Field Monitoring Report: Vancouver Island Private Managed Forest Land* (October 2001). The excerpt contains monitoring variables that DFO used in conducting field inspections of 50 logged sites on private managed forest land on Vancouver Island from December 1999 to April 2000. These variables provide an indication of the potential harm to fish habitat that can result from logging activities, potentially leading to violations of s. 35(1) or s. 36(3) of the *Fisheries Act*.

## 2.1 Riparian Management Issues

### General

The riparian area or zone is the ecotone between the aquatic and the terrestrial ecosystems. Physical and biological processes that take place in the riparian area result from interactions and associations between the component parts of the aquatic and terrestrial ecosystems. Ecologically, the riparian zone refers to the land area adjacent to streams, rivers, lakes, wetlands, and estuaries that are characterized by moist soils often due to frequent inundation. It has developed and supports natural vegetative cover distinct from the vegetation in adjacent freely drained upland terrestrial sites. The boundary of the riparian zone extends outwards from the stream to the limits of the floodplain and vertically into the canopy of the streamside vegetation.

A healthy riparian zone is essential to allow a stream to function normally and achieve a high level of production. In addition to its biological attributes, the riparian zone serves a valuable function in providing shade, contributing particulate organic material and large organic debris, limiting the input of chemicals and sediment, ensuring streambank stability, and, serving as an important buffer from development activity that can harm the waterbody. Harm to the riparian zone is most often associated with degradation of instream habitat.

#### 2.1.1 Streambank Integrity

Vegetation plays a key role in maintaining the integrity of the streambank through the cohesive function of the live root network. The root network of harvested trees dies off slowly over a number of years and erosion and undercutting of the streambank may occur. Energy dissipation provided by vegetation during peak flows may disappear resulting in erosion of streambanks and the delivery of sediment in streams above natural input rates. Fallen mature trees ("windthrow")

may also cause disturbance of streambanks depending on the direction of fall and the exposure of mineral soil for direct transportation into streams. Destabilisation of streambanks may also occur as a result of physical activities such as crossstream yarding.

Observations of stream bank integrity were based on field evidence of actively eroding banks directly attributable to logging activities. Cross-stream yarding, trees that had blown down, or trees that had been knocked down during harvesting resulting in exposed mineral soil available to the channel were considered in this category. Root decay from harvested streamside trees could not be assessed using this rapid monitoring methodology.

#### **2.1.2 Sources of Large Woody Debris (LWD)**

LWD is typically classified by biologists as wood greater than 0.1 meter in width and greater than 1-3 meters long depending on the width of the channel. LWD has numerous biological and structural functions. Biologically it is the long-term food source within the channel as it serves as a substrate for algal, bacterial and insect growth, which ultimately feeds fish. LWD also has a structural function especially when it spans the width of the channel, by dissipating flow and trapping sediment moving downstream. Historically, removal of LWD and intensive stream cleaning practices has greatly reduced available LWD, and therefore, impacting nutrient sources and the complexity of fish habitats within stream channels. Conversely, excessive loading of wood into channels (i.e., above background recruitment rates), is considered harmful due to creation of debris dams blocking fish passage.

Observations of adequate sources of LWD are based on the availability of wood in channels where wood would normally be found and functioning in creating complex fish habitat. This is typically in lower gradient alluvial channels where LWD creates scour pools or where LWD is an important cover feature in the channel.

If there was evidence that LWD had been cut and removed from the channel during salvage operations concerns would be entered onto field forms.

Observations of excessive wood are based on human-induced deposition of wood into the channel above background recruitment levels found in undisturbed forest stands.

### 2.1.3 Riparian Vegetation

Riparian vegetation is a crucial component of fish habitat. Riparian vegetation provides shade, regulates temperature and incident solar radiation inputs, and provides direct and indirect sources of nutrients for fish through leaf litter and insect inputs. Sufficient riparian vegetation must be left on site after harvesting to provide these functions.

Observations of adequate riparian vegetation are based on whether post harvest conditions approximated unharvested conditions in terms of temperature and incident solar radiation inputs, as well as direct sources of nutrients. Channels that were completely exposed with no riparian cover would be entered as a concern.

### 2.1.4 Windthrow Management

A moderate to high probability of windthrow is often used to justify removal of riparian trees. Removal of trees, without any consideration of methods to mitigate windthrow (such as wider buffers, feathering or pruning) is not considered an acceptable practice.

Staff observed and recorded what types of windthrow management techniques were used and how successful they were to keep streamside trees functioning as during pre-harvest conditions. Concerns were noted if no windthrow management techniques were applied and trees fell into the stream resulting in destabilised streambanks.

## 2.2 Water Management Issues

### General

Streamflow is a basic habitat determinant for salmonids. Salmonid life cycles are adapted to a range of seasonal and annual flow regimes. Alterations in streamflow have the potential to effect migration and rearing behaviours. Alterations of streamflow through diversions, encroachment or blockages of streams and their tributaries are of concern to habitat managers. Reduction of minimum flow in summer can limit the carry capacity of streams on a broad scale.

### 2.2.1 Natural Drainage Patterns

Natural drainage patterns are to be maintained at the site to the extent possible. This assessment is difficult to achieve during field moni-

toring given the complex nature of forest harvesting on seasonal hydrology and drainage pathways of the basin.

A surrogate indicator used was pooling of water on areas up-slope of roads. If observed this was recorded as a concern as it may lead to road failures causing sediment to enter fish-bearing streams.

### **2.2.2 Culverts**

Culverts here are generally defined as any structures less than 5 meters in width across the channel. Culverts could be corrugated metal pipes (CMPs) or open bottom structures such as log culverts or pipe arch culverts. Stream crossings should not disturb instream fish habitat, encroach upon the bankfull width, or result in excessive loss of riparian vegetation.

Staff considered the installation and maintenance of culverts in terms of fish passage, blocking of debris, bedload and water, as well as whether the culvert and/or associated riprap encroached on the natural channel.

### **2.2.3 Ditches**

Road ditches intercept flow from the road and have the potential to carry sediment laden and heated water into streams.

Staff observed whether sediment control structures had been used. Road ditches that flowed directly into fish-bearing streams without any form of sediment control were recorded as a problem under water management. Should this water be sediment-laden this would also be recorded under the sediment management section.

### **2.2.4 Bridges**

Bridges are to be installed on fish streams to permit fish passage and maintain habitat at the site.

Staff considered the installation and maintenance of bridges in terms of blocking sediment, debris and water, as well as the placement of the abutments and/or riprap in the natural channel, and the placement of rip-rap outside the channel.



## 2.3 Sediment Management Issues

### General

Elevated levels of sediment and turbidity of water can reduce the productivity of aquatic systems. This has the potential to decrease primary productivity that may have consequences to secondary productivity and the flow of food and nutrients to fish. Sediment can have lethal and sub-lethal effects on fish and their habitat. Factors such as temperature, particle size and angularity, and duration of exposure, combined with the life history stage of the fish species occupying the system all influence these effects.

Levels of suspended sediment that have been determined to be acutely lethal to fish typically range from the hundreds to hundreds of thousands of  $\text{mg}\cdot\text{L}^{-1}$  sediment, while sub-lethal effects range in the tens to hundreds of  $\text{mg}\cdot\text{L}^{-1}$  sediment. Elevated levels of sediment may be harmful to fish, and in addition, negatively impact on their habitat.

#### 2.3.1 Point Source Management

Point source discharges are those occurring at a fixed site or location, such as a culvert or road ditch, feeding into a fish-bearing stream. Point source impacts were only identified if there were active sediment discharges observed at the time of inspection. As this is weather dependent this is conservative in assessing impacts.

If there was evidence of sediment discharging directly to the stream channel, without any mitigation techniques applied, this was recorded as a concern.

#### 2.3.2 Non-point Source Management

Non-point source discharges are those that occur at multiple sites or locations that typically enter the channel as surface flow during storm events. This includes machine disturbance of soils adjacent to channels, and sidecasting of road materials that may move across the land to enter watercourses.

#### 2.3.3 Slope Stability

Activities such as road building or forest harvesting on unstable terrain may result in mass wasting events such as landslides that could move sediment into watercourses. Evidence of slope stability concerns

included tension cracks in roads and ravelling exposing sediment on side slopes.

## **2.4 Water Quality Management Issues**

### **2.4.1 Contaminants Near Streams**

Contaminants such as gasoline, diesel fuels and hydraulic oils are lethal to fish. If there was any evidence of contaminants stored or spilled near or adjacent streams this was recorded as a concern.

## **APPENDIX 11**

### **Recent Cases Pursued Under the *Fisheries Act***



The following summaries of recent (1995 or later) *Fisheries Act* charges<sup>1</sup> and convictions<sup>2</sup> provide a factual basis for considering the consistency with other similar cases of the approach that Canada took in regard to the cases referenced in Council Resolution 01-12. These case summaries were all presented on the DFO-Pacific Region's Habitat Enforcement Bulletin. This list is not intended to be a comprehensive list of DFO-Pacific Region's enforcement actions. The Secretariat did not gather information regarding enforcement responses other than the laying of charges and convictions, and therefore information regarding enforcement action not leading to charges or conviction (for example site inspections; investigations; issuance of warnings, directions by fishery inspectors, authorizations, and Ministerial orders) in similar cases is not presented.

- **June 1997** – “CP Rail and AM-PM Land Clearing and Logging Ltd. of Surrey have been charged with damaging fish habitat during construction work for West Coast Express commuter trains in 1995. While building train tracks in Port Coquitlam, streamside vegetation was removed from Fox Creek, and stands of cottonwood trees were removed from Maple Creek. Streamside vegetation provides shade to cool stream water, hiding places for small fish, and insects as food for fish. The City of Port Coquitlam stopped the work and DFO was called in to investigate. Restoration work, including construction of a rearing pond on Maple Creek, was carried out immediately. However, DFO felt the nature of the offence nevertheless dictated charges. CP Rail and AM-PM have each been charged with two counts under section 35(1) of the *Fisheries Act*.”<sup>3</sup>
- **January 1998** – “Dale Tortorelli of Coast Timber has been charged under the *Fisheries Act* with two counts of harmful alteration to fish habitat. Charges related to logging activities in the summer of 1995 on private land near Sayward, Vancouver Island. Logging activities are alleged to have damaged coho and trout habitat of the Salmon River.”<sup>4</sup>
- **May 1999** – “Joseph Swampy of Merville, Vancouver Island, was fined \$3,000 for harmfully altering a small stream on his property. Swampy had cleared vegetation and modified the stream bed with heavy equipment. An investigation revealed a number of fish were trapped without cover and exposed to predation. Swampy alleged that the

1. DFO has defined a charge as “an accusation (‘Information’) laid before a judge or justice of the peace alleging an instance, or count, of violating a specified section of the *Fisheries Act* or other legislation.” Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 12 (September 2002).

2. DFO has defined a conviction as “a finding by a court that an accused is guilty of a charge, after either a plea of guilty, or a trial.” Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 12 (September 2002)

3. Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 1 (September 1997).

4. Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 2 (January 1998).

waterway was a drainage ditch dug by a previous owner. However, *Fisheries Act* protection of fish habitat applies to man-made habitat on private property as well as to natural streams. Of the fine, \$2,000 will be paid to the Tsolum River Restoration Society to rebuild salmon stocks. In addition to the fine, Swampy was directed to re-seed the banks, plant streamside vegetation, install fish-friendly culverts, and construct live-stock fencing.”<sup>5</sup>

- **April 2000** – “Canadian Forest Products Limited (Canfor) faces charges for alleged damage to fish habitat. Canfor was charged under the *Fisheries Act* after harvesting operations in the spring of 1999 at the Torpy River, east of Prince George. To access a logging site, Canfor had constructed a road network with three bridges across two unnamed tributaries of the Torpy River. Fishery Officers patrolled the area to monitor timber harvesting practices near water systems. The officers discovered damage to stream bank, and unauthorized removal of vegetation around the bridges. The river supports populations of Chinook salmon and rainbow trout.”<sup>6</sup>
- **February 2001** – “Canadian Forest Products Ltd. (Canfor) pleaded guilty to a charge of harming fish habitat. Canfor was charged under the *Fisheries Act* after building a road network east of Prince George, BC, to access a logging site. One road crossed a tributary of the Torpy River. The company removed streamside vegetation and damaged the banks. . . . Canfor was ordered by the court to pay a \$1,000 fine, and \$14,000 to improve habitat in rivers near the city of Prince George.”<sup>7</sup>
- **May 2000** – “A Prince George logging company has pleaded guilty to damaging fish habitat on the Salmon River. The offence involved logging on private land in 1998. Trees were harvested from the river bank in an active floodplain. Floodplain habitat is a critical refuge for young salmon during seasonal flooding. Riverbank vegetation provides shade and moderates water temperatures, prevents erosion, and contributes to the aquatic food chain. The Salmon River has been designated as a sensitive stream under the provincial *Fish Protection Act* because of concerns about its low flows and high summer water temperatures. The BC Provincial Court ordered CF and S Logging Ltd. To pay a \$5,000 court fine, and \$20,000 to local fish habitat conservation and protection projects.”<sup>8</sup>
- **April 2001** – The government of BC has been convicted in Provincial Court for harmfully altering fish habitat near Smithers. The provincial Ministry of Transportation and Highways was found guilty under the *Fisheries Act*. The case began in 1998 when federal fishery officers

5. Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 7 (December 1999).

6. Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 8 (June 2000).

7. Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 10 (June 2001).

8. Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 8 (June 2000).

received a complaint from the public. Ministry staff were using heavy machinery to install a fence, removing vegetation and damaging the stream. Small streams provide spawning habitat and rearing habitat for salmon and trout. The damaged stream is a tributary to the Bulkley and Skeena Rivers. The decline of coho salmon in this area has resulted in significant fishery restrictions. The Ministry was sentenced to pay \$35,000 for fish habitat improvement in the Smithers area. This is the fourth time since 1991 the Ministry has been convicted for polluting or damaging fish habitat. BC is appealing the conviction.<sup>9</sup>

In addition to those cases, in its Habitat Enforcement Bulletin No. 10 (June 2001), DFO provided a summary of selected *Fisheries Act* cases that involved removing or damaging waterside vegetation. The summary of the post-1995 cases selected for inclusion was as follows (*verbatim*):<sup>10</sup>

*R. v. Dual Enterprises Ltd. and Keico Holdings Inc.*, BC Provincial Court (1995). The accused logging companies harvested timber from 700 meters along the west bank of the Nechako River without a leave strip. They were charged with harmfully altering fish habitat. The Crown submitted that removing the riverbank trees harmed fish habitat by removing a source of large organic debris (LOD) from trees falling into the river. The defence argued there was insufficient evidence of harm: there was no proof the trees would have provided any LOD, and the opinion of the Crown witness was conjecture because the witness had no personal knowledge of the site before logging. Dual Enterprises was convicted and fined \$5,000. The court noted that prospective harm to fish habitat by removing trees which can become LOD can found a conviction for this *Fisheries Act* offence. That is so even though prospective harm cannot found a *Criminal Code* conviction. Further, the Crown opinion, partly based on photographs, was real evidence and not conjecture.

*R. v. West Pines Developments Ltd.*, BC Provincial Court (1996). A caterpillar tractor was used to remove deadfall and flood debris from a 950 meters strip parallel to the North Thompson River. Many small trees were permanently bent or broken. The affected strip was partly separated from the river by a vegetated berm, and the area is under water four to six weeks a year. The accused was charged with harmfully altering fish habitat. The court held that the flood plain was fish habitat only during the time it was flooded. Works can be done on the property when it is not flooded, provided that they do not harmfully alter fish habitat values when the land is flooded. However, the Crown need not show that an alteration actually reduced the overall capacity of the river to support fish. The Crown failed to prove harmful alteration beyond a reasonable doubt, and the charge was dismissed.

9. Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 10 (June 2001).

10. Fisheries and Oceans Canada, Habitat Enforcement Bulletin No. 10 (June 2001).

*R. v. IPSCO Inc., BC Provincial Court (1998)*. Preparing for a residential development, trees and vegetation were removed from land surrounding Pigeon Creek, Port Moody. The creek originated as a drainage ditch of the city storm sewer system. The accused was charged with harmfully altering fish habitat. IPSCO was convicted. The court found that the creek did originate from storm sewers, but was nevertheless productive fish habitat for trout and salmon. That habitat was harmfully altered by the removal of several large trees and streamside shrubs. **BC Supreme Court (1998)**. IPSCO appealed its conviction. IPSCO claimed it had reasonably and honestly held the mistaken belief that the creek was a storm sewer ditch and not fish habitat; and should be acquitted under s. 78.6 of the *Fisheries Act*. The appeal court held that the trial judge found IPSCO honestly believed the ditch was not fish habitat. However, the trial judge did not say whether that belief was reasonable. The appeal court quashed the conviction.

*R. v. Denney and Denney, BC Provincial Court (1998)*. The accused removed vegetation from 40 meters of their property along Shuswap Lake to build a residence. The property was subject to a 7.5 meters restrictive covenant setback from the lake. The accused were charged with harmfully altering fish habitat. The accused were acquitted. The court heard conflicting opinion evidence on whether removing the vegetation materially affected the lake's fish habitat. The Crown did not prove beyond a reasonable doubt that the alteration was harmful.

*R. v. Barret Denault and Chase Riverside Estates Ltd., BC Provincial Court (1998)*. The accused individual and his company were building a trailer park on the Neskainlith Indian Reserve near Chase. Landfill was placed over 7,000 square meters of a flood plain off the South Thompson River. The accused were charged for harmfully altering fish habitat. Mr. Denault, on his own behalf, argued that he had Aboriginal title to site, the laws of Canada did not apply, and the flood plain was not fish habitat. The accused were convicted. Citing *Delgamuukw v. BC (1997)*, the court noted that lands subject to Aboriginal title cannot be used in ways that would destroy the relationships giving rise to that title in the first place. Historic Aboriginal use of the land would be impossible once it was developed as a trailer park. Further, the court found that the flood plain is rare and valuable fish habitat. The court imposed \$30,000 in fines and ordered the accused to restore the damaged habitat.

*R. v. Niho Land and Cattle Co. Ltd., BC Provincial Court (2000)*. The accused owned forty acres of land bordering the North Thompson River near Avola. To prepare it for sale, the company removed trees, shrubs and grass from 400 meters along the west bank, and 600 meters along the east. The accused pleaded guilty under the *Fisheries Act* to harmful alteration of fish habitat. Niho was fined \$1,000 and ordered to pay \$14,000 for local fish habitat conservation work.



## **APPENDIX 12**

### **BC Forest Practices Board – Criteria of Appropriate Enforcement**





## BC Forest Practices Board – Criteria of Appropriate Enforcement

The BC Forest Practices Board developed the following criteria of appropriate enforcement for use in connection with enforcement audits that the Board conducts pursuant to the 1995 *Forest Practices Code of British Columbia Act*. Information regarding the Board and its mandate are available on the internet at <http://www.fpb.gov.bc.ca>.

The criteria of appropriate enforcement are set out in section 2110 of the Board's Enforcement Audit Reference Manual, available on the internet at [http://www.fpb.gov.bc.ca/AUDITS/manuals/earm1\\_0.pdf](http://www.fpb.gov.bc.ca/AUDITS/manuals/earm1_0.pdf). The Manual states that “[e]nforcement audits primarily involve auditing compliance and enforcement systems and processes against commonly-accepted management principles” as represented by the criteria of appropriate enforcement. Section 4000 of the Manual also sets out the criteria, along with detailed sub-criteria for each main criterion.

The criteria are as follows:

- Government agencies establish, through operational plan approval and related processes, expectations for forest practices that are enforceable and in accordance with the Code.
- Government agencies obtain, use and maintain adequate information on the forest activities subject to enforcement.
- Government agencies have an effective way of identifying risks associated with forest activities and utilizing risk in inspection planning.
- Government agencies conduct a sufficient number of inspections in a fair, objective and effective way, and accurately record and report results.
- Investigations are conducted in all applicable situations and only when warranted. They are performed in a fair, objective and consistent way, and are accurately recorded and reported.
- Determinations are made in all applicable situations and only when required. They are performed in a fair, objective and consistent way, and are accurately recorded and reported.

- Government agencies' organizational structures, policies and processes contribute to and support appropriate enforcement of the Code.
- The decisions and actions of different parts of government responsible for enforcement of the Code are appropriate and co-ordinated.
- Reporting systems provide adequate information on agency performance in relation to enforcement objectives.

## **APPENDIX 13**

**Documents received from Canadian authorities  
for the preparation of the factual record  
on Submission SEM-00-004**



- I. Documents from Department of Fisheries and Oceans (DFO) investigation file for the DeMamiel Creek cutblock (*not all provided*)

R. v. TIMBERWEST FOREST CORP.

TABLE OF CONTENTS

1. SUMMARY OF INVESTIGATION
2. DFO OCCURRENCE REPORT / CHRONOLOGY OF EVENTS
3. HABITAT INVESTIGATION REPORT
4. COPY OF INFORMATION
5. ACCUSED / CORPORATE DESCRIPTION / ENVIRONMENTAL PRACTICES
6. ACCUSED RECORD OF COMPLIANCE/CONVICTION
7. LIST OF WITNESSES
8. WITNESS STATEMENTS AND REPORTS
9. INVESTIGATORS NOTES AND REPORTS
10. EXPERT STATEMENT, REPORT AND CV'S
  - (A) Tom G. Brown, Habitat Biologist (MSc)
  - (B) John Lamb, Habitat & Enhancement Branch, Field Supervisor (ASct)
11. PHOTOGRAPHS AND VIDEO TAPE
12. APRIL 20th 1998 AERIAL PHOTOGRAPH OF THE "SITE"
13. DIAGRAMS
14. SEARCH WARRANTS
  - (A) TIMBERWEST FOREST CORP.
  - (B) RICHMOND PLYWOOD CORPORATION LIMITED
  - (C) PACIFIC FOREST PRODUCTS LIMITED

15. DOCUMENTS SEIZED THROUGH WARRANTS & VOLUNTARILY PRODUCED

- (A) Setting File A071 from TIMBERWEST FOREST CORP.
- (B) Bid Proposal extracts from TIMBERWEST FOREST CORP.
- (C) John Mitchell, TIMBERWEST FOREST CORP. Daily Planner / Diary, extracts
- (D) Bid Proposal extracts from RICHMOND PLYWOOD CORPORATION LIMITED
- (E) Agreement between RICHMOND PLYWOOD CORPORATION LIMITED & P.V. SERVICES LTD. from RICHMOND PLYWOOD CORPORATION LIMITED
- (F) TW Letter Re: PURCHASE OF STANDING TIMBER, SOOKE, REVISED (signed original by TW B. Bustard, Senior Log Trader) from RICHMOND PLYWOOD CORPORATION
- (G) TW Letter Re: SOOKE STANDING TIMBER (signed original by A. Allison RICHMOND PLYWOOD CORPORATION LIMITED) from RICHMOND PLYWOOD CORPORATION LIMITED
- (H) Title Search Print of the "site" from PACIFIC FOREST PRODUCTS LIMITED
- (I) ASSIGNMENT OF BENEFICIAL INTEREST extracts from PACIFIC FOREST PRODUCTS LIMITED
- (J) DECLARATION OF TRUST extracts from PACIFIC FOREST PRODUCTS LIMITED
- (K) BUSINESS CARD: Beverlee F. Park, Vice President Finance, CFO, and Secretary, TIMBERWEST FOREST CORP.

16. DOCUMENTS OBTAINED OR GIVEN TO INVESTIGATORS / DEPARTMENT

17. ENVIRONMENTAL HISTORY

18. RECOMMENDATION FOR SENTENCE



**APPENDICES**

(A) Report: An Overview Assessment of the Sooke River Watershed, Vancouver Island, BC.

(B) Video tape containing:

- “De Mamiel Cr. Jan 10/01 TIMBERWEST” video-tape. Footage, with audio comments taken by John Lamb, Habitat & Enhancement Branch, Field Supervisor (ASct)
- Excerpt of “Martin’s Gulch, Upper Sooke River, Otter Pt. Rd.?” Copy created by J. Werring, Dec. 28, 2000, Spring 1999”

**II. Documents provided to the Secretariat regarding the Sooke River cutblock**

**LIST OF DOCUMENTS PROVIDED  
to the  
CEC SECRETARIAT  
Re:  
B.C. LOGGING SUBMISSION FACTUAL  
RECORD PROCESS (SEM-00-004)  
Sooke River Site**

1. Memo to: Patrice LeBlanc, Director, Policy and Program Development, Habitat Management and Environmental Science, NHQ, from Mike Henderson, Regional Director, Habitat and Enhancement Branch, Pacific Region, DFO, **June 30, 2000**, includes a Summary of the Sooke River Private Logging Case, photographs of the logged site and map highlighting the Sooke Watershed logging site (**June 26, 2000**).
2. Warning Letter to Mr. John Mitchell, Operations Manager, TimberWest Cowichan Woodlands, Mesachie Lake, B.C., dated **June 27, 2000**.
3. Occurrence Continuation Report, Fishery Officer Osselton, **April 8, 1999 to August 13, 1999**.
4. Letter to John Werring, Staff Sierra Legal Defence Fund, Vancouver from M.A. Henderson, Regional Director Habitat and Enhancement Branch, Pacific Region, **July 19, 1999** re: Private Land Logging on Vancouver Island.
5. Fishery Officer Roy Osselton notes, **June 10 and 15, 1999**.
6. Letter to John Mitchell, TimberWest from Fishery Officer Osselton, re: access to logging road (for site inspection **June 22, 1999**) and fax granting permission from John Mitchell, **June 8, 1999**.
7. E-mail message from Habitat Chief Bruce MacDonald to Fishery Officer Osselton re: need for expert opinion, **April 27, 1999**.
8. Letter to M.A. Henderson, Regional Director, Habitat Management and Enhancement, DFO, Pacific Region from John Werring, Staff Scientist, Sierra Legal Defence Fund, Vancouver, **April 22, 1999**.

- 
9. E-mail messages among Habitat Biologists and Fishery Officers, **April 19, 17, 13, 1999** concerning Sooke logging investigation.
  10. Occurrence Report, Fishery Officer Osselton, **April 8, 1999**.
  11. E-mail message to Fishery Officer Paike from Fishery Officer Carvalho re: helicopter inspection of Sooke and Lech watersheds, **March 20, 1999**.
  12. E-mail message from Fishery Officer Paike to Habitat Biologist Cindy Harlow and Habitat Chief, John Lamb re: inspection of observations, **March 8, 1999**.



# **ATTACHMENT 1**

**Council Resolution 03-12**





7 August 2003

COUNCIL RESOLUTION 03-12

**Instruction to the Secretariat of the Commission for Environmental Cooperation to make public the Factual Record for Submission SEM-00-004 (BC Logging)**

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

HAVING RECEIVED the final factual record for Submission SEM-00-004;

NOTING that pursuant to Article 15(7) of the NAAEC, the Council is called upon to decide whether to make the factual record publicly available; and

AFFIRMING its commitment to a timely and transparent process;

HEREBY DECIDES:

TO MAKE PUBLIC and post on the registry the final factual record for Submission SEM-00-004; and

TO ATTACH to the final factual record comments provided by the Parties to the Secretariat on the draft factual record.

APPROVED BY THE COUNCIL:

---

Judith E. Ayres  
Government of the United States of America

---

Olga Ojeda Cárdenas  
Government of the United Mexican States

---

Norine Smith  
Government of Canada





# **ATTACHMENT 2**

**Comments of Canada**





Ottawa ON K1A 0H3

2 June 2003

Mr. Victor Shantora  
Acting Executive Director  
Secretariat  
Commission for Environmental Cooperation  
393 St. Jacques Street West, Suite 200  
Montréal QC H2Y 1N9

Dear Mr. Shantora:

Further to Article 15(5) of the *North American Agreement on Environmental Cooperation* (NAAEC), the Canadian government has reviewed the draft Factual Record in relation to Submission on Enforcement Matters 00-004 (the “BC Logging” submission) with interest.

In order to assist the Secretariat in developing the final Factual Record for this submission, I would like to provide Canada’s comments, which you will find attached.

Canada appreciates the Secretariat’s thoroughness in preparing the draft Factual Record for this submission. As you know, Canada is of the view that the purpose of a Factual Record is for the Secretariat to prepare an objective, independent presentation of the facts to allow readers to draw their own conclusions with respect to the alleged failure to effectively enforce environmental law.

In addition to the attached comments, I would like to note the following concerns which may affect the objectivity of the document by influencing the views of the public in an inappropriate way:

- In many Sections, the Secretariat appears to use language that draws conclusions and provides commentary. In Canada’s view, this is beyond the mandate of the Secretariat which is to set out facts in an objective and impartial manner. Examples of this include Section 1 paragraph 20; Section 5.8.1 paragraph 1; and Section 5.8.3. The attached specific comments note each time this type of language is used. We ask the Secretariat to ensure that language used in the setting out of facts is as impartial as possible.
- Section 5.4 “Indicia of Effective Enforcement” is problematic. This section raises concerns about the scope of the Factual Record. Canada does not believe the Secretariat should attempt to establish a set of “criteria” to determine what could be considered “effective enforce-

ment”. This section goes beyond the Council Resolution, which authorizes the Secretariat to examine whether or not Canada is “in fact” failing to effectively enforce its environmental laws. Therefore, we request that this section be removed

- Regarding Canada’s co-operation in the development of this Factual Record, the Secretariat appears to suggest in Section 5.8.3, paragraph 9; Section 5.8.5, paragraph 3; Section 5.9.2, paragraph 1; Section 5.9.3, paragraph 12; Section 5.9.3, paragraph 15, for example, that Canada has not been forthcoming, open or fully co-operative in providing information to the Secretariat. As also noted in our comments on the “BC Mining” draft Factual Record sent to the Secretariat on May 14, 2003, this is of concern to Canada since we have fully disclosed all requested and available information in as timely a manner as possible. We request that the Secretariat review the above-noted Sections, and any other appropriate places in the document, to remove any unintentional negativity with respect to how Canada conducted itself in providing information for this Factual Record. Canada looks forward to a meeting with the Secretariat to discuss how Canada might better help the Secretariat in obtaining information for the preparation of Factual Records.

As a general practice, Canada requests that in this, and future factual records, where an individual is referred to, reference should be to the title or position of the individual rather than the name. Canada would be pleased to provide additional titles, if required.

In order to facilitate our review of the final Factual Record and increase the timeliness of making a decision on publication, it would be appreciated if the Secretariat could provide Canada with an electronic version of the final Factual Record in “revision mode”.

Canada notes that, as a matter of procedure, comments of a Party are not to be made public unless and until Council votes to make the final Factual Record publicly available pursuant to Article 15(7) of the NAAEC.

Yours sincerely,

Norine Smith  
Assistant Deputy Minister  
Policy and Communications

c.c.: Ms. Judith E. Ayres  
Ms. Olga Ojeda  
Mr. Geoffrey Garver

## General Comments

With respect to Section 1, the Executive Summary of the draft Factual Record, Canada recognizes that it is not the Secretariat's practice to cite references in the Executive Summary. However, in order to ensure that the Executive Summary is as precise, complete and well documented as possible, we suggest that the Secretariat include references where appropriate. This will help the reader cross reference statements made in the Executive Summary with the relevant references in the rest of the document.

With regards to Section 4 entitled "Scope of the Factual Record", Canada considers the discussions surrounding the Secretariat's view of the Council's instruction regarding the scope of the Factual Record to be superfluous. This information is already known by the public given the fact that the Secretariat's determination and the Council Resolution are posted on the CEC website. Therefore, as we have suggested in the "BC Mining" draft Factual Record, we suggest that the Secretariat limit this discussion to the information that will be the subject of the Factual Record. However, to provide the public with a complete account of the facts surrounding the reasoning of Council's decision regarding the scope of the Factual Record, we request that the Secretariat include the Council Resolution textually, in addition to appending it to the document.

Also in Section 4, the Secretariat includes a summary of the comments provided by the submitters, which were in reaction to Council's instruction to the Secretariat. The NAAEC is very clear that the Council is the ultimate authority for determining the scope of a Factual Record, and the treaty does not, either explicitly or implicitly, contemplate providing submitters with an opportunity for a rebuttal on this issue. Therefore Canada requests that this information be removed.

In several sections of the draft Factual Record (e.g. Section 1, paragraph 17; Section 5.8.4, paragraph 1; Section 5.9.3, paragraph 16 and Section 6, paragraph 3) the Secretariat erroneously states that DFO's investigations began after the "BC Logging" submission was filed. We ask that the Secretariat correct this error throughout the document and specify that the investigation undertaken by DFO began following the reception of the Werring letter on April 29, 1999.

Concerning the *Forest Practice Code*, the Secretariat uses this document to attempt to establish a set of criteria for "effective enforcement". This is a provincial document. It is referred to, for example, on pages 2,

37 and in Section 5.4. The Secretariat itself acknowledges that the *Forest Practices Code* is not directly applicable to private land logging nor to enforcement of ss. 35(1) and 36 (3) of the *Fisheries Act*. Canada therefore requests that this document not be referred to as an indication of what Canada considers to be “effective enforcement”.

It is Canada’s view that the Secretariat cannot arbitrarily select legal cases to assess and examine the approach taken by DFO. This amounts to a subjective evaluation of what constitutes “effective enforcement”, and exceeds the authority of the Secretariat under the NAAEC. Therefore, we request that the list of cases selected by the Secretariat and referred to in Section 5.3.2.2 and included in Appendix 11 be removed from the draft Factual Record, in addition to paragraph 9 of Section 5.3.2.2.

### Specific Comments

#### Section 1 Executive Summary

**Paragraph 3, sentence 2:** The Secretariat uses language that states that ss. 35(1) and 36(3) of the *Fisheries Act* has been violated. In our view, such a conclusion is inappropriate as there is only an alleged violation of ss. 35(1) and 36(3) of the *Fisheries Act*. Violations can only be established by a court following a successful prosecution. As such, we request that the Secretariat use the word “potentially” prior to the word “violates”.

**Paragraph 6:** In order to ensure that the reader understands that the *Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* was not finalized at the time the relevant logging activities took place, we ask the Secretariat to include the following information as is done in Section 5.3.2.2:

“The July 2001 *Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy*, which was not yet finalized at the time when the relevant logging activities took place, reflects the policy that Canada followed informally.”

**Paragraph 10:** Because the language is suggestive, we request that the language indicated below be removed from these two sentences:

“Although DFO-Pacific Region has no formal inspection plan or program for the Sooke watershed, it conducts ~~some~~ monitoring and inspections [...]”

~~“[...] Companies often ask for DFO’s participation at the planning stage, but DFO personnel in the area are not able to participate as often as they would like.”~~

**Paragraph 14:** With respect to the number of residents who expressed to TimberWest their concerns regarding the planned logging, it would be helpful if the Secretariat could indicate the exact number, rather than using the word “several”.

**Paragraph 20, sentence 2:** Because of the leading nature of the language, we request that the Secretariat remove the language indicated below:

~~“Limited remedial measures that TimberWest has taken, [...]”~~

**Paragraph 24, sentence 4:** The Secretariat seems to overemphasize the importance of the DFO forestry expert’s opinion, as there are a number of factors which must be considered prior to laying charges. The Secretariat should delete the following passage:

~~[...] whose opinion was important for determining whether to lay charges.~~

**Paragraph 26, sentence 1:** In Canada’s view, the Secretariat should not include language which either implicitly or explicitly calls into question the actions or motivations of a Party. As such, the following text should be removed:

~~“On 27 June, 2000, approximately ten days prior to responding to the submission that led to this factual record DFO sent a warning letter to TimberWest regarding the logging of the Sooke River cutblock. [...]”~~

**Paragraph 30, sentence 2:** There are many different sources that can inform DFO of the existence of potential violations. Consequently, the Secretariat’s use of the word “primarily” does not accurately reflect the importance of the other means available to DFO to use under the Monitoring Program. As such, the sentence should read as follows.

~~“[...] DFO continues to rely primarily on forest companies to provide information and on the public to bring forward complaints regarding private land logging on Vancouver Island”~~

## **Section 5.2 Meaning and Scope of Fisheries Act Sections 35(1) and 36(3)**

**Paragraph 3:** At this time, there is competing jurisprudence with regards to the definition of “fisheries”. For greater accuracy, the Secreta-

riat should acknowledge the existence of competing case law and make reference, for example, to *R. v. BHP Diamonds Inc.*, (2002), NWTSC 74 (this case is previously cited in Section 5.2.4), particularly with respect to the following passage:

“[...] I am in disagreement with the narrow approach taken by the Majority in *Macmillan Bloedel* (1984). In my view the fish and fish habitat of the three lakes in question are afforded the protection of the federal Fisheries Act for the reason that they are part of the fisheries resource, a natural resource and a public resource of this country. To protect fish and fish habitat is to protect the resource “fishery.”

Moreover, the Secretariat should also include the definition of “fishery” as defined in the *Fisheries Act*:

“[...] “fishery” includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract, or stretch of water in or from which fish may be taken by the said pound, seine, net, weir, or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith;”

### Section 5.2.2 Section 36(3)

The Secretariat should acknowledge the existence of competing case law and make reference to *Fletcher v. Kingston (City)* [2002] O.J. No. 2324, where the definition of what constitutes a “deleterious substance” was considered. This case is of particular interest, as it appears to modify the meaning of “deleterious substance” as defined in previous case law (*R. v. MacMillan Bloedel (Alberni) Limited* (1979)).

Moreover, the Secretariat should also include the definition of “deleterious substance” as defined in the *Fisheries Act*:

“[...] “deleterious substance”

- (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
- (b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water,



degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

- (c) any substance or class of substances prescribed pursuant to paragraph (2)(a),
- (d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and
- (e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);”

### Section 5.3.1 Principle of Net Loss

**Paragraph 13, sentence 1:** There is a discrepancy in the first sentence.

The Secretariat states that:

”Canada informed the Secretariat that the HADD Decision Framework is almost never applied in connection with logging operations and [...]” [emphasis added]

however, the citation in the text states that :

“The Conservation and Protection Guidelines and the HADD Decision Framework documents provide a consistent policy framework for DFO staff to review proposals that have the potential to harm fish [...] [emphasis added].

Therefore, we request that the text be changed to read:

“Canada informed the Secretariat that the HADD Decision Framework is almost never applied in connection with logging operations and provides a consistent policy framework for DFO staff to review proposals that have the potential to harm fish but that neither it nor the project review provisions of the 1998 Guidelines was applied [...]”

**Paragraph 14, sentence 2:** This sentence suggests that Canada had an obligation to use its authority under s. 37 of the *Fisheries Act*. This is inac-

curate. Section 37 of the *Fisheries Act* confers a discretionary power to the Minister. Therefore, we request that the sentence include the underlined text:

“Canada decided ~~did~~ not to use its authority under s. 37 of the Fisheries Act [...]

### Section 5.3.2 Compliance and Enforcement Policy

**Paragraph 2:** In order for the public to accurately understand the areas of responsibility between Environment Canada and DFO with respect to s.36 of the *Fisheries Act*, the Secretariat should include the following information:

“Environment Canada has primary responsibility for pollution prevention and control matters related to section 36 and is supported in this role by DFO, which has responsibility for management and protection of the fish resource and its habitat. DFO is also responsible for those matters under s. 36 involving the release of sediments from land clearing, road building and other land use activities that do not involve effluent treatment facilities structures (May DFO/DOE Regional working Agreement.)”

### Section 5.3.3 DFO-Pacific Region Policy

**Paragraph 1:** We advise the Secretariat that the responsibility allocated to the officials was not limited to the logging plans in the Sooke Watershed. The officials also dealt with all fish habitat issues in the lower Vancouver Island area (South of Parkville). The Secretariat should include this information to provide an accurate explanation of the officials’ responsibilities.

**Paragraph 2:** The Secretariat mentions the involvement of the Department of Indian Affairs and Northern Development. The Secretariat should specify that the Department’s role is only applicable to the Yukon Region.

### Section 5.5.3 Enforcement of the Fisheries Act in Connection with Private Land Logging Operations

The title used for this section indicates that logging activities on “private” land will be discussed. The majority of this section, however, deals with logging activities on “Crown” land. This may potentially confuse the reader. We suggest that the title be revised.

## Section 5.7 Information Regarding TimberWest

**Paragraph 4, last sentence:** The last sentence is suggestive and directly draws a conclusion, which is outside the scope of the factual record. We therefore request that it be removed

~~“[...] While not comprehensive, information regarding the impacts or potential impacts to fish habitat observed during the field inspections on TimberWest cutblocks provides some indication of TimberWest’s history of *Fisheries Act* compliance, a factor relevant under the DFO policy for determining appropriate enforcement action.”~~

### Section 5.8.1 Description and Location of the De Mamiel Creek Tributary and Cutblock

**Paragraph 1, sentence 2:** Because the language is suggestive, we request that the Secretariat remove the adjective indicated below:

~~“The stream flows into De Mamiel Creek, an important fish-bearing tributary of the Sooke River.”~~

**Paragraph 2:** Canada recognizes the Secretariat’s authority to retain independent experts in the preparation of a Factual Record, as needed. However, the Secretariat should not include any conclusions or judgment made by the independent expert. As such, we request that this paragraph be removed, except for the first and third sentences.

### Section 5.8.2 Planning and Logging of the De Mamiel Creek Cutblock

**Paragraph 2, sentence 5:** The discrepancy mentioned in this sentence and in footnote 171 is attributed to a typographical error. The officer neglected to type “1” before “4”. Therefore we request that sentence five of this paragraph and sentences three and four of the footnote be removed.

**Paragraph 6, last sentence:** This sentence suggests that Canada had an obligation to use its authority under s. 37 (2) of the *Fisheries Act* to request plans. This is inaccurate. Section 37 (1) of the *Fisheries Act* confers a discretionary power on the Minister to request such information. Section 37(2) of the *Fisheries Act* confers a discretionary power on the Minister to require modifications or to restrict work, for example. Therefore, we request that this sentence refer to section 37(1) and not to section 37(2) and that it read as follows:

~~“[...] They decided ~~did not to~~ request plans either informally or under the authority of s. 37(1) (2) of the Fisheries Act.”~~

**Paragraph 7, sentence 1:** Because the Secretariat appears to be drawing a subjective conclusion, this sentence should be removed from the paragraph.

~~“This is consistent with DFO’s approach on other private lands on southern Vancouver Island.”~~

**Paragraph 8, last sentence:** To ensure that the reader does not confuse DFO with TimberWest, the Secretariat should specify that the resident of the area expressed his concerns to TimberWest.

**Paragraph 9, last sentence:** The Secretariat suggests that the Fishery Officer had an obligation to further investigate the site even though no logging activity had occurred at that time. Because the language is suggestive, we request that this sentence be removed from the paragraph.

~~“[...] He did not note any concerns and the Secretariat has no information indicating that he looked closely at the stream or attempted to determine if fish were present or if the stream should be considered a fish stream.”~~

**Paragraph 12, sentence 1:** The Secretariat should specify which Agencies it is referring to in this sentence.

### **Section 5.8.3 DFO Inspection and Monitoring Before, During and After Logging**

**Paragraph 1, sentence 2:** In order to ensure that the reader does not confuse DFO with TimberWest, we request that the Secretariat replace “They” with “TimberWest”.

**Paragraph 1, sentence 6:** In order to be objective, we request that the sentence be modified as follows:

~~“The Fishery Officer Øsselton did visit the site in response to the phone call and ~~but he~~ noted ~~only~~ that logging had not begun and that [...]”~~

**Paragraph 1, sentence 6:** In order to ensure a complete account of the facts, the Secretariat should also inform the public that DFO advised the resident to contact the Department again if siltation was observed. There was no further communication from the resident.

**Paragraph 1, last sentence:** This statement is inaccurate. The officer was on site prior to the logging activities, and at that time, there were no violations to investigate. Therefore, we request that the sentence reflect this, and not lead the reader to believe that there was an obligation for the Fishery officer to investigate.

**Paragraph 2, sentence 2:** Again, this sentence leads the reader to believe that there was an obligation on the officer to investigate. As explained above, this was not the case. During the officer's monitoring of the site on December 16<sup>th</sup>, 1998 no logging activity had taken place and there was no indication that further monitoring was required. As such, we request the following text be removed:

~~"[...]Fishery Officer Osselton did not follow up his December visit. Fishery Officer Altino Carvalho drove past the site on 7 March 1999, while logging was underway, on his way to investigate a logging site in the Upper Sooke Watershed (the other area referenced in Council Resolution 01-12). Even though the logging was taking place along the road and was in a flat area with ponded water along a small stream 150 meters from De Mamiel Creek, an important coho stream, the Secretariat has no information indicating that he considered the possibility that fish were present or that the logging operation could impact fish habitat."~~

**Paragraph 4, sentence 2:** In order to minimize unnecessary commentary, and to remain impartial, the sentence should be modified as follows:

~~"[...] Werring, who had extensive experience in assessing fish habitat in small streams within cutblocks [...]"~~

**Paragraph 4:** In order to ensure a complete account of the facts, the Secretariat should specify that DFO was only provided a copy of the video after several requests had been made.

**Paragraph 7, last sentence:** Because this sentence implies that DFO's actions were questionable, we request that it be removed.

~~"[...]In June of 1999, several DFO employees drove past the site on their way to the investigation site in the Upper Sooke River but made no notice of the logging of the De Mamiel Creek cutblock that was already completed at the time."~~

**Paragraph 8, sentence 2 (including footnote 184):** This sentence and footnote are inaccurate and contradictory. The Fishery Officer did visit

the site as indicated by the Secretariat in footnote 184. There was no obligation on the Fishery Officer to inspect the site since no logging activity had occurred at that time. Therefore, we request that the Secretariat make the appropriate corrections so that the sentence and footnote are coherent. Further, in footnote 184, the final sentence should be removed as it implies an onus on the Fishery Officer that did not exist.

~~“He did not inspect the site, or request any other DFO to inspect the site to assess the presence of fish and the potential impacts of logging on fish habitat.”~~

**Paragraph 8, last sentence:** This sentence is misleading. The Secretariat should explain that the site was already under investigation, and that the purpose of the monitoring program was to survey other areas.

**Paragraph 9, sentence 6:** This is inaccurate. It was not a manager from Richmond Plywood Corporation who told DFO that prior to logging there was fish in the stream. It was the owner of P.V. Services Ltd.

**Paragraph 9, last sentence:** The sentence leads the reader to believe that there was an onus on DFO officials, prior to any potential violations being identified, to contact individuals in order to determine if the stream was fish bearing. This is inaccurate. Once DFO officials were informed that the stream was fish bearing, as part of their investigation, locals were interviewed and statements were taken from contractors. We request the Secretariat modify the text to indicate that interviews do not occur prior to an investigation taking place. Furthermore, it is the proponent's responsibility – not DFO's — to determine if there are fish present and to apply the appropriate measures of protection. This should also be reflected in this paragraph. Sources should be identified for this paragraph.

**Last paragraph:** In the context of this section, this paragraph appears to suggest that because of its proximity to the town of Sooke, Fisheries Officer should have been monitoring the stream even though there were no reported violations. Therefore, we request that this paragraph be removed:

~~“Unlike streams in remote forest areas, the unnamed tributary to De Mamiel Creed is approximately ten 10 minutes by car from down town Sooke, and accessible by paved public road. It is observable and accessible at the point in which it passes through the culvert under Young Lake Road and, as shown”~~

#### Section 5.8.4 Canada's Investigation of the Logging Beginning in July 2000

**Paragraph 2, sentence 1:** In order to remain neutral the following adjective should be stricken:

“On 4 July 2000, two ~~experienced~~ DFO Habitat Management staff, [...]”

**Paragraph 9, sentence 1:** (Please note that the following modification must also be made in **Paragraph 11, sentence 1**). This sentence is inaccurate. The two persons who conducted detailed investigations are DFO officials. They are not expert witnesses. As such, the Secretariat should correct the sentence to read as follows:

“DFO's two officials ~~expert witnesses~~ conducted detailed investigations.”

#### Section 5.8.5 Current Status

**Paragraph 2, sentence 1:** Because the language is suggestive, we request that the following adjective be removed:

“TimberWest took some ~~partial~~ measures during and after the logging [...]”

**Paragraph 2, sentence 5:** The Secretariat should include sources to substantiate this sentence.

**Paragraph 3, sentence 2:** The sentence leads the reader to believe that DFO was under an obligation to inform Mr. Werring. This is inaccurate. DFO was under no obligation to inform Mr. Werring of the status of the investigation since Mr. Werring did not contact DFO to request such information. Therefore, we request that this sentence be removed.

“~~The Secretariat has no information that DFO informed John Werring or other members of the public of the outcome of the investigation at the time the decision was made to drop charges.~~”

Note that this correction should also be made to **Paragraph 5** of this section.

“~~By June 2002, DFO had not had any discussions with John Werring or the [...]~~”

**Paragraph 4:** In order to give a complete account of the facts, we ask that the Secretariat include the additional measures taken by DFO to improve its operations. We suggest the following language:

“Shortly after charges were stayed, an e-mail was sent to all coast field staff advising them to exercise caution before declaring a stream non-fish bearing. The Department of Justice later expanded on the e-mail and prepared a region-wide communiqué from the Department of Justice, also advising field staff to exercise caution before declaring a stream non-fish bearing. Further, the Habitat enforcement course was expanded to include a mock field investigation. The De Mamiel Creek was selected as the first field site. TimberWest attended the mock field investigation and demonstrated techniques to rehabilitate riparian vegetation.”

**Paragraph 6, last sentence:** This sentence implies that there are no other sources or means available to DFO to become aware of potential violations. This is inaccurate. We request that the sentence be substantiated and read as follows:

“DFO informed the Secretariat that it continues also to rely on forest companies to provide information and on members of the public [...]

### **Section 5.9.2 DFO Involvement in Planning of the Logging**

**Paragraph 2, last two sentences:** The Secretariat cannot speak on behalf of DFO. Therefore, we request that the Secretariat include the appropriate sources or remove the sentences.

### **Section 5.9.3 Canada’s Investigation of the Logging**

**Paragraph 5, sentence 1:** This sentence is inaccurate. Although DFO did seek expert advice, the purpose was not solely to prove that the buffer strip was inadequate. The objective was to review logging activity. The sentence should be changed as follows:

“[...] the Supervisor ~~MacDonald~~ felt that an investigation was warranted and would find an expert witness to review the logging activity ~~to prove that the narrow buffer zone was not adequate and that it was harmful to fish.~~”

**Paragraph 5, sentence 2:** This sentence should include a footnote to document the source of the information.



**Paragraph 12, last sentence:** Because of speculative language this sentence should be deleted:

~~“[...] It is possible that no documents or written expert opinion exists.~~

**Paragraph 20, sentence 1:** In order for the public to understand that warning letters are not the only means available to DFO to close files where DFO concludes that a minor violation does not warrant laying formal charges, we request that the Secretariat revise the sentence to read:

“DFO staff informed the Secretariat that warning letters, among other means, are normally used [...]”

**Paragraph 21, sentence 1:** As it is inappropriate and beyond the scope of the NAAEC for the Secretariat to draw any conclusions in a Factual Record, we request that the Secretariat remove this sentence.

~~“In this case, it is not clear that the first criteria for the Compliance and Enforcement Policy was met. The “Warning” section of the warning letter stated: “As noted above the department is concerned that TimberWest activities may eventually result in violations of section 35 of the Fisheries Act RSC as amended.”~~

**Paragraph 21, last sentence:** This sentence requires a footnote to substantiate the source of the information.

**Paragraph 22, last sentence:** Because the language is suggestive, we request that the Secretariat remove the following text:

~~“This report, written nearly a year after the field trip of 22 June 1999, provides essentially the same information contained in the 27 June 2000 warning letter.”~~

**Paragraph 23, last two sentences:** These sentences lead the reader to believe that no monitoring was done at the site. This is incorrect. At the time monitoring was done, no wind throw was observed. As a result, no further investigation was necessary. As such we request that the Secretariat reflect this information in this paragraph

**Paragraph 25, sentence 6:** Because the language is suggestive, we request that this sentence be removed from this paragraph.

~~“Although the remaining strip of trees was essentially only a single tree in width, rather than the several trees in width that DFO staff felt was necessary.”~~

## Section 6 Closing Note

**Paragraph 2, sentence 1:** This sentence requires a footnote to substantiate the source of the information.

**Paragraph 3, sentence 3:** Considering that DFO did not draw any conclusions about the “level of significance” of any harm, the sentence should read:

“Although DFO concluded that logging of the cutblock had significantly harmed fish habitat, [...]”

**Paragraph 5:** This paragraph raises concerns about the scope of the Factual Record. The Secretariat should not attempt to establish a set of “criteria” to determine what could be considered “effective enforcement”. Therefore, we request that this paragraph be removed.

# **ATTACHMENT 3**

**Comments of the United States of America**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON , D.C. 20460

May 29 2003

Geoffrey Garver  
Secretariat of the Commission for Environmental Cooperation  
Submissions on Enforcement Matters Unit (SEM Unit)  
393, rue St-Jacques west, bureau 200,  
Montreal QC H27 1N9

Dear Mr. Garver:

Thank you for providing the United States with a copy of the draft factual records for Submission SEM-00-004 (BC Logging) and Submission SEM-97-006 (Oldman River II). We appreciate the Secretariat's assiduous efforts in preparing these documents.

The accuracy of developed factual records is vital to fulfilling their intended purpose of providing the public with objective assessments of environmental law enforcement. The United States strongly supports the submissions process and seeks to ensure that factual records are accurate in their scope and purpose. We provide the following comments to assist the Secretariat in the development of these factual records.

Although the term "factual record" is not defined in the North American Agreement on Environmental Cooperation (NAAEC), Article 15 of the NAAEC and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation both provide guidance regarding the type of information a factual record should contain. Specifically, a factual record should enable readers to draw their own conclusions as to whether a Party is effectively enforcing its environmental laws. Second, a factual record should be limited to factual information relevant to the matter(s) at issue.

Regarding the first point, the United States believes that overall, the BC Logging and Oldman River II Factual Records provide the information necessary to enable readers to draw their own conclusions as to whether Canada is failing to effectively enforcing its environmental law.

Regarding the second point, the United States asserts as we have previously in our comments to the draft MBTA and BC Mining Factual

Records, that the discussion of the scope should be limited to information relevant to the Council's actual instruction to the Secretariat. The discussion should not include for example, a detailed explanation of what is not addressed in the factual record. For this reason, we propose removal of text in Section 4 of both the BC Logging and Oldman River II Factual Records which is not relevant to Council's actual instruction.

Thank you again for the opportunity to review these draft factual records. The success of the CEC is dependent upon the close cooperation of the Council, Secretariat, and Joint Public Advisory Committee, and upon the strong interest and participation of the citizens of the member nations. The submission process remains an important mechanism by which the public is able to participate through the CEC in the protection of our shared North American environment.

Should you have any questions, please contact Jose Aguto (202-564-0289) or David Redlin (202-564-6437).

Sincerely,

Judith Ayers  
Assistant Administrator