

Factual Record
Oldman River II Submission
(SEM-97-006)

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



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1. Executive Summary

Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (“NAAEC”) establish a process allowing residents of Canada, Mexico and the US to file submissions alleging that a Party to the NAAEC (Canada, Mexico or the United States) is failing to effectively enforce its environmental law. Under the NAAEC, this process can lead to the publication of a factual record. The Secretariat (“Secretariat”) of the North American Commission for Environmental Cooperation (“CEC”) administers the NAAEC citizen submissions process.

On 4 October 1997, The Friends of the Oldman River filed a submission (SEM-97-006 (Oldman River II), the “submission”) with the Secretariat asserting that Canada is failing to effectively enforce the fish habitat protection provisions of the federal *Fisheries Act* and related provisions of the *Canadian Environmental Assessment Act* (“CEAA”). The submission asserts that in regard to projects that may harm fish habitat, the Department of Fisheries and Oceans (“DFO”) is issuing letters of advice to project proponents instead of issuing *Fisheries Act* authorizations and orders that trigger an environmental assessment requirement under the CEAA. The submission also alleges that Canada has abdicated its responsibilities for enforcement of the *Fisheries Act* habitat protection provisions to Canada’s inland provinces (Alberta, Saskatchewan, Manitoba, Ontario, parts of British Columbia and parts of Quebec), which are not effectively enforcing the *Fisheries Act*.

On 13 July 1998, Canada responded, asserting that compliance with the *Fisheries Act* habitat protection provisions could be achieved on a preventative basis through voluntary, routine communications between DFO and project proponents. Canada states that this approach is consistent with the *Fisheries Act*, which does not require DFO to review project information or issue *Fisheries Act* orders and authorizations. Canada asserts that DFO has designated provincial fish and wildlife employees in all provinces for enforcement purposes under the *Fisheries Act*. Canada asserts that in many cases, actions that violate the *Fisheries Act* are prosecuted under provincial laws.

On 19 July 1999, the Secretariat recommended preparation of a factual record to gather additional information on the use and success of “letters of advice” in securing compliance with the *Fisheries Act*, and regarding Canada’s claim that enforcement action is taken when the *Fisheries Act* is contravened. On 16 November 2001, in Council Resolution 01-08, the Council instructed the Secretariat to prepare a factual record on whether Canada, in the Sunpine Forest Products Access Road case—an example mentioned in the submission—is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, Section 5(1)(d) of the CEAA, and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA.

S. 35(1) of the *Fisheries Act* provides that no person shall carry on any work or undertaking that results in the harmful alteration, disruption, or destruction (“HADD”) of fish habitat. S. 35(2) states that s. 35(1) is not violated if a person causes a HADD of fish habitat by any means or under any conditions authorized by the Minister of Fisheries and Oceans (“MFO”) or under *Fisheries Act* regulations (there are no regulations at this time). S. 37(1) requires proponents of projects that are likely to result in a HADD to provide information to MFO, in the manner and circumstances prescribed by regulations made under the *Fisheries Act* (there are no regulations at this time) or on the request of MFO. Under s. 37(2), the MFO may, by order, subject to regulations made under the *Fisheries Act*, or, if there are no such regulations in force (which is the case at this time) with the approval of the Governor in Council, require changes to plans for a work or undertaking or to an existing work or undertaking, and may restrict its operation. Violation of ss. 35(1), 37(1) or 37(2) is an offense under s. 40 of the *Fisheries Act*, punishable by fines, or jail time, or both. Before MFO can issue a s. 35(2) authorization or a s. 37(2) order under the *Fisheries Act*, DFO must ensure that an environmental assessment of the project is conducted under the CEAA. A CEAA assessment determines whether a project is likely to result in significant adverse environmental effects, taking into account any mitigation measures considered appropriate, and if so, whether such effects are justifiable in the circumstances. If they are not, a federal authority such as MFO cannot take any action, such as issuing an authorization under s. 35(2), that would allow the project to be carried out in whole or in part. The CEAA requires federal authorities such as DFO to ensure that assessments are conducted as early as is practicable in the planning stages of a project, and before irrevocable decisions are made.

In July 1992, Sunpine Forest Products Ltd. (“Sunpine”) signed a forest management agreement (“FMA”) with the Alberta government

giving Sunpine long-term tenure over an area of over 2,500 square miles of forest land in the Rocky Mountain foothills of West Central Alberta. Sunpine's operations within the FMA area are governed by timber harvest planning and operating ground rules it negotiated with the Alberta government, including rules on road planning and fish habitat protection. DFO was not involved in developing these ground rules. Under its ground rules, Sunpine is required to use existing roads for its log hauls whenever possible. In 1993, Sunpine presented the provincial government with a proposal to build a new, permanent, 40 km, all-weather log haul road up the middle of its new FMA area (the "Sunpine Project" or "Mainline Road"). After provincial fisheries, wildlife, and forestry staff recommended requiring Sunpine to use an existing, public road for its log haul to avoid, among other things, creating new impacts on fish habitat, the province's forest service approved the proposed road corridor under Alberta's *Resource Road Planning Guidelines* in August 1995. With provincial approval and without DFO involvement, Sunpine built and operated a temporary road within the Mainline Road corridor in the winter of 1995-96. The provincial forest service approved the alignment for the Mainline Road in September 1996, and the Mainline Road was built in 1997. Certain provincial fisheries staff involved with the Sunpine Project had appointments as fishery guardians under the *Fisheries Act*. Under these appointments, they had the power to lay charges for violations of s. 35(1), but could not issue authorizations under s. 35(2).

MFO is accountable to Parliament for the protection of fish and fish habitat in Canada through the administration and enforcement of the *Fisheries Act*. DFO has developed the *Policy for the Management of Fish Habitat (1986)* (the "Habitat Policy") as a guide to the administration of the *Fisheries Act* habitat protection provisions. The Habitat Policy has an overall objective of achieving a net gain in fish habitat in Canada, with an emphasis on integrated planning and achieving no net loss of fish habitat productive capacity on a project-by-project basis. The Habitat Policy states that DFO does not actively apply the Habitat Policy in six provinces (or parts thereof) where federal fisheries legislation is administered by the provincial fisheries management agency, including Alberta. The Habitat Policy states that agencies in such provinces will be encouraged to apply the Habitat Policy through bi-lateral administrative agreements and protocols. During planning and construction of the Sunpine Project, DFO did not have an agreement or protocol with Alberta for the application of the Habitat Policy.

In 1994, DFO issued Habitat Conservation and Protection Guidelines under the Habitat Policy. These Guidelines contain a standard approach to the administration of the *Fisheries Act* habitat protection provisions, including a hierarchy of preferred options for assessing physical impacts of projects on fish habitat. Where project assessment indicates that current habitat productive capacity cannot be maintained, the Guidelines recommend changing project design 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. Under DFO policy, a s. 35(2) authorization is required only in those cases where compensation or artificial propagation is needed to achieve no net loss of fish habitat productive capacity. Where DFO considers that mitigation measures could avoid a HADD, DFO issues letters of advice to project proponents setting out required mitigation measures.

A concerned citizen made DFO aware of the Sunpine Project in June 1995. DFO exercised its discretion and did not participate in the selection of a road corridor or road alignment for the Sunpine Project in order to evaluate relocation or redesign options as contemplated by the Habitat Conservation and Protection Guidelines. DFO made an information request to Sunpine regarding the Sunpine Project in August 1995, listing information Sunpine was asked to provide to DFO for review. According to DFO, this information request was not made pursuant to the discretionary information-gathering powers given the MFO by s. 37(1) of the *Fisheries Act*. Following Sunpine’s reply, DFO made another detailed information request to Sunpine in February 1996, and Sunpine replied in March 1996, committing to implement mitigation measures and conduct follow-up monitoring of sediment impacts on fish habitat at seven of twenty-one stream crossings, as well as a section of the proposed Mainline Road. As regards impacts on fish habitat from five of these crossings and a section of the proposed Mainline Road, DFO reviewed mitigation measures proposed by Sunpine but did not take action to ensure their implementation or verify their success in preventing a HADD of fish habitat. In September 1996, DFO concluded that the Sunpine Project would not result in a HADD of fish habitat and therefore did not require issuance of a s. 35(2) authorization and a CEEA environmental assessment.

The Mainline Road was built in 1997. In its 13 July 1998 response to the submission, Canada stated that Alberta Fish and Wildlife officials inspected the road following construction of the bridges and culverts and concluded that fish habitat had been protected. Canada has stated that Alberta's forest service, in its role as land manager, monitored the right-of-way and directed Sunpine to submit an action plan to correct erosion problems. Neither DFO nor Alberta have conducted follow-up monitoring—or required Sunpine to submit results of follow-up monitoring—to verify that sediment run-off from the Mainline Road surface is not causing a HADD of fish habitat in Sunpine's FMA area in violation of the *Fisheries Act*.

In December 1995, Sunpine applied to the Canadian Coast Guard (“CCG”) in Vancouver for permits under the federal *Navigable Waters Protection Act* (“NWPA”) for two bridges it proposed to build over navigable rivers as part of the Sunpine Project. These applications triggered a requirement for a screening under the CEAA. Under the CEAA, CCG referred these applications to DFO for expert advice on any mitigation measures required to reduce impacts of the bridges on fish habitat. In the following months, jurisdiction over the province of Alberta was transferred from the CCG Western region to the Central and Arctic region, and CCG staff responsible for reviewing the Sunpine Project were transferred from Vancouver, British Columbia to Sarnia, Ontario. In July 1996, CCG decided to assess each bridge as a separate “project” under the CEAA, and DFO submitted required fish habitat mitigation measures to CCG for inclusion in the CEAA screening report for each of the two bridges. Under the CEAA, CCG was then responsible for ensuring the implementation of those mitigation measures. The CEAA screening reports for the two bridges concluded that the bridges, taking into account required mitigation measures, would not cause significant adverse environmental effects. In September 1996, DFO issued letters of advice to Sunpine for the bridges, containing mitigation requirements similar to those found in the CEAA screening reports. At the outcome of DFO's review of the two bridges for effects on fish habitat, Sunpine changed the design of one bridge to a clear span structure from a pier structure (“project redesign” under the Habitat Conservation and Protection Guidelines). As regards the other bridge, Sunpine decided not to build that part of the Sunpine Project, opting to use an existing, public road instead (“project relocation” under the Habitat Conservation and Protection Guidelines).

In August 1996, an environmental group applied to the Federal Court for cancellation of Sunpine's NWPA permits on the grounds that

CCG's CEAA screenings of the two bridges did not comply with the requirements of the CEAA. The group maintained that CCG should have defined the "project" as the Mainline Road and associated logging operations, that a consideration of the environmental effects of the Mainline Road and Sunpine's logging operations should have been included within the scope of the CCG screening assessments, and that cumulative environmental effects of other projects in the area should have been taken into account in considering whether the Mainline Road (including the two bridges over navigable waters) and Sunpine's logging operations were likely to result in significant, adverse environmental effects. The trial judge held that CCG had not committed a reviewable error in exercising its discretion by defining each bridge as a separate project, but he also held that CCG should have included the road and the forestry operations within the scope of the environmental assessment.

On appeal, the Federal Court of Appeal reversed the trial judge's decision on the issue of the scope of the environmental assessment, holding that CCG had discretion to limit the scope of the environmental assessment to factors related to the two bridges. The Federal Court of Appeal also ruled that CCG had erred in its interpretation of the CEAA when it decided that it could not consider cumulative environmental effects from activities outside of the scope of the project, or outside of federal jurisdiction, in its cumulative environmental effects assessment under the CEAA. Finally, the Federal Court of Appeal held that locating the public registry of documents related to the screenings in Sarnia, Ontario, and requiring the public to file requests under the *Access to Information Act* in order to obtain copies of those documents, was patently unreasonable. An application by the environmental group, for leave to appeal to the Supreme Court of Canada, was denied.

In 2001, DFO conducted a second CEAA screening of the Ram River bridge (built in 1997) and again concluded that the bridge was not likely to cause significant adverse environmental effects.

2. Summary of the Submission

The Submitters filed the submission on 4 October 1997. The submission alleges that Canada is failing to apply, comply with and enforce the habitat protection provisions of the *Fisheries Act* and the CEAA. The Submitters allege that "[i]n particular, the Government of Canada is failing to apply, comply with and enforce Sections 35, 37 and 40 of the *Fisheries Act*, Section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the

CEAA.”¹ The submission contains two main assertions. First, it alleges that under a 1995 policy directive, DFO is issuing “letters of advice” to proponents of projects that are likely to harmfully alter, disrupt or destroy fish habitat, instead of carrying out environmental assessments of such projects under the CEAA and issuing authorizations to project proponents under s. 35(2) of the *Fisheries Act* or orders under s. 37(2).² According to the Submitters, “Letters of Advise are of questionable legality and invite the non-application of Sections 35 and 37,” and “[t]he Directive invents a decision making process which frustrates the intention of Parliament and usurps the role of the CEAA as a planning and decision making tool.”³

The other main assertion of the submission is that there has been a *de facto* abdication of legal responsibilities for the enforcement of the habitat protection provisions of the *Fisheries Act* by the Government of Canada to the inland provinces, and that the provinces have not done a good job of ensuring compliance with or enforcing the *Fisheries Act*.⁴ On the basis of the number of environmental assessments conducted under the CEAA in the 1995-96 fiscal year, the Submitters estimate that DFO issued no more than 339 s. 35(2) authorizations to harmfully alter, disrupt or destroy fish habitat across the country in 1995-96, compared to over 12,000 issued in 1990-91.⁵ The Submitters also allege that there are very few prosecutions under the habitat protection provisions of the *Fisheries Act*, and that those that do occur are very unevenly distributed across the country.⁶

The submission is supported by a document entitled “ENGO Concerns and Policy Options Regarding the Administration and Delegation of Subsection 35(2) of the *Fisheries Act*, Proposed Subsection 35(3) and Consequences For Federal Environmental Assessment—A Discussion Paper for the Department of Fisheries and Oceans prepared for the *Fisheries Act* Working Group of the Canadian Environmental Network by the Quebec Environmental Law Centre, January 1996.”⁷ The submission lists actions taken by the Submitters between 3 October 1994 and 4 October 1996, to communicate these concerns to relevant authorities in the federal government of Canada.⁸

1. Submission at 1.

2. *Ibid.* at 2.

3. *Ibid.*

4. *Ibid.* at 3.

5. *Ibid.*

6. *Ibid.*

7. *Ibid.* at 2.

8. *Ibid.* at 7-9.

The Submitters cite the Sunpine Project as a specific example. The submission states “[t]his submission is related to the general failure of the Government of Canada to apply, comply with and enforce the *Fisheries Act* and the *Canadian Environmental Assessment Act* and not this particular case which is provided only as an example.”⁹ The submission describes in detail exchanges of correspondence between Martha Kostuch and DFO officials during the period 7 June 1995–2 October 1997 concerning DFO’s review of the Sunpine Project under the *Fisheries Act*.¹⁰

3. Summary of Canada’s Response

Canada responded to the submission on 13 July 1998.¹¹ In its response, Canada states

Canada supports the Article 14 process. Canada views this process as a positive and constructive tool through which the public can help the Parties to the NAAEC improve their environmental enforcement. Canada submits it is effectively enforcing its environmental laws and is therefore in full compliance with its obligations under the NAAEC. Therefore, the development of a factual record is not warranted.¹²

In response to the Submitter’s assertion that DFO’s use of letters of advice results in a failure to effectively enforce ss. 35, 37 and 40 of the *Fisheries Act* and related provisions of the CEAA, Canada stresses that the CEAA is triggered by a requirement for a s. 35(2) authorization or the requirement for a s. 37(1) information request (leading to a s. 37(2) order), neither of which occurs if DFO, working with a project proponent, can agree on mitigation measures that will avoid any harmful alteration, disruption or destruction of fish habitat.¹³ According to Canada, such mitigation measures are developed on the basis of information voluntarily supplied to DFO by project proponents, s. 37(1) requests being reserved for instances in which proponents refuse to provide such information.¹⁴ Canada states

[s]ince the Act does not require DFO to use the powers of Section 37 in any given set of circumstances, DFO’s preference is to proceed on a voluntary

9. *Ibid.* at 3.

10. *Ibid.* at 3-7.

11. “Response of the Government of Canada to Submission on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), Submission No. SEM-97-006, October 4, 1997, by Friends of the Oldman River,” dated 13 July 1998 [hereinafter “response”].

12. *Ibid.* at 1.

13. *Ibid.* at 5-6.

14. *Ibid.*

basis to obtain the information necessary to deal with Section 35 issues. This reflects a commitment to operational efficiency. There is no need to invoke legislative powers to obtain information that is readily available through routine relationships involving government agencies, proponents and clients.¹⁵

Canada states that required mitigation measures are set out in letters of advice issued by DFO to project proponents.¹⁶ Canada states “[i]f the applicant includes the measures necessary to avoid harmful effects, no authorization under subsection 35(2) is necessary. However, where the applicant refuses to include such measures, he or she must obtain an authorization.”¹⁷

Regarding enforcement, Canada states that DFO “has identified provincial personnel responsible for the implementation of the habitat provisions and enforcement of the *Fisheries Act* for every province in Canada,” including “an estimated 650 provincial conservation and fish and wildlife officers in Canada’s four inland provinces” who “have been designated under the *Fisheries Act* for enforcement purposes in addition to their enforcement duties under provincial legislation.”¹⁸ Canada states that cooperation with provinces increases enforcement resources and allows more effective enforcement, and that DFO “prefers to prevent damage to habitat and avoid losses to the fisheries resource in the first phase, before proponents proceed with projects.”¹⁹ In addition, Canada explains that fish habitat related matters frequently find redress through provincial court action under provincial statute.²⁰

In regard to the Sunpine Project, Canada states

[w]hile the FOR submission is clear that the focus of their allegations against Canada regarding the enforcement of the *Fisheries Act* habitat provisions is broader than the Sunpine log hauling road cited as an example in their submission, Canada would like to provide factual information pertaining to this project and how it was dealt with under federal habitat protection legislation for the public record.

[...]

Sunpine Forest Products Ltd. proposed to build a road to access forest areas on the eastern slope of the Rocky Mountains west of the town of

15. *Ibid.* at 6-7.

16. *Ibid.* at 5.

17. *Ibid.*

18. *Ibid.* at 11.

19. *Ibid.* at 9.

20. *Ibid.* at 10.

Rocky Mountain House. The company approached the provincial government for the required permits and approvals. DFO became aware that as part of Sunpine's proposed undertakings, the company's project would be crossing 21 streams. DFO concluded that 8 of the 21 had potential implications for fish habitat. For two of the stream crossings, Ram River and Prairie Creek, DFO permits for bridge construction were required under the federal *Navigable Waters Protection Act* thus triggering *CEAA* screenings for these bridges. The screenings were completed and the permits were issued. DFO concluded that 6 crossings did not have a potential to damage fish habitat if constructed as proposed by the company and that no further action by DFO was required. For the remaining 2 crossings (Ram River and Prairie Creek), DFO wrote letters of advice. Project construction, with the exception of the Prairie Creek Bridge, was completed during 1997. Alberta Fish and Wildlife officials have inspected the 40-kilometer road and have confirmed that the bridges and culverts have been constructed as proposed and that fish habitat has been protected.²¹

4. Scope of the Factual Record

On 19 July 1999, the Secretariat notified the Council under Article 15(1) of the NAAEC that the Secretariat considered that the submission, in light of Canada's response, warranted development of a factual record.²² The Secretariat stated "[...] while the response asserts that the project review and prosecution approaches the Party uses are effective in preventing and addressing violations of the *Fisheries Act* Section 35(1), the lack of information concerning the actual extent of use of different enforcement tools, and concerning the effects of these tools in achieving compliance with the *Fisheries Act*, has led the Secretariat to conclude that it is appropriate to use the factual record process to develop facts concerning these questions."²³

In Council Resolution 01-08, 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 14 and 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 on whether Canada, in the Sunpine Forest Products Access Road case, is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, Section 5(1)(d) of the Canadian

21. *Ibid.* at 11.

22. SEM-97-006 (Oldman River II) Article 15(1) Notification (19 July 1999) [hereinafter "Article 15(1) notification"].

23. *Ibid.* at 22.

Environmental Assessment Act (CEAA) and Schedule 1 Part 1 Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of CEAA.

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.²⁴

As stated in the overall work plan for the factual record (see Appendix 2), this factual record presents facts regarding:

- (i) application of section 35 of the *Fisheries Act* in connection with the Sunpine Project;
- (ii) Canada's enforcement of sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in connection with the Sunpine Project; and
- (iii) whether Canada is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in the context of the Sunpine Project.

The following matters raised in the submission and the Secretariat's Article 15(1) notification are, except as relevant to the Sunpine Project, excluded from the factual record:

- as regards letters of advice: (i) extent and history of use; (ii) compliance monitoring; (iii) enforcement actions; (iv) effectiveness in achieving compliance with s. 35(1); comparison with s. 35(2) authorizations on aspects (i)-(iv);
- use of prosecutions as a tool for enforcement of the *Fisheries Act* habitat protection provisions; and
- basis for Canada's assertion that seeking assurances of voluntary compliance in respect of s. 35(1) of the *Fisheries Act* repre-

24. It should not be assumed that the Secretariat's Article 15(1) Notification to Council recommending a factual record for SEM-97-006 was intended to include a recommendation to prepare a factual record of the scope set out in Council Resolution 01-08, or that the Secretariat would have recommended a factual record of this scope.

sents a legitimate exercise of enforcement discretion pursuant to the NAAEC and that Canada's allocation of enforcement resources in connection with the *Fisheries Act* habitat protection provisions results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.²⁵

5. Summary of Other Relevant Factual Information and Facts Presented by the Secretariat with Respect to Matters Raised in Council Resolution 01-08

5.1 Information Gathering Process

On 16 November 2001, the CEC Council instructed the Secretariat to develop a factual record in regard to submission SEM 97-006 (Oldman River II), pursuant to Council Resolution 01-08 (Appendix 1). 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 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 01-08. The plan stated the Secretariat's intention to gather and develop information relevant to facts regarding:

- (i) application of section 35 of the *Fisheries Act* in connection with the Sunpine Project;
- (ii) Canada's enforcement of sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in connection with the Sunpine Project; and
- (iii) whether Canada is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in the context of the Sunpine Project.

25. Article 15(1) notification at 16-19.

To comply with the instruction in Council Resolution 01-08 “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). In its comments on the overall work plan for this factual record, Canada asked that the Sunpine Project be referred to as the “Sunpine Forest Products Forest Access Road Case.” For ease of reference, Sunpine’s Mainline Road project, described in detail below, in s. 5.6, is referred to as the “Sunpine Project” throughout this factual record.

As noted above in Section 4 (Scope of the Factual Record), and as reflected in the overall plan to develop the factual record, the Council, in Resolution 01-08, determined the scope of 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 01-08. The Request for Information provided the following examples of relevant information falling within the scope of the factual record:

1. Technical information regarding the Sunpine Project, such as maps, technical drawings, and engineering studies, including any information regarding:
 - design options;
 - siting options; or
 - alternatives to the Project.
2. Information regarding the potential of the Sunpine Project to result in the harmful alteration, disruption or destruction of fish habitat, including:
 - environmental impact studies;
 - evaluations by government professionals;
 - concerns of the public.
3. Information about measures proposed, considered or adopted to prevent harmful alteration, disruption or destruction of fish habitat in connection with the Sunpine Project, including information about any public consultations.
4. Information about the effectiveness of measures adopted to prevent harmful alteration, disruption or destruction of fish habitat in connection with the Sunpine Project.

5. Information on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in connection with the Sunpine Project.
6. Information on federal, provincial or local enforcement- or compliance-related staff or resources available for enforcing or ensuring compliance with, sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in connection with the Sunpine Project.
7. Information on Canada's or Alberta's efforts to enforce or ensure compliance with sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in connection with the Sunpine Project, including for example:
 - efforts to prevent violations, such as by placing conditions on or requiring modification of the Sunpine Project or providing technical assistance;
 - monitoring or inspection activity;
 - warnings, orders, charges or other enforcement action issued to Sunpine;
 - actions to remedy any impacts to fish habitat caused by the Sunpine Project; or
 - coordination between different levels of government on enforcement and compliance assurance.
8. Information on the effectiveness of Canada's or Alberta's efforts to enforce or ensure compliance with sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in connection with the Sunpine Project, for example their effectiveness in:
 - preventing violations of those provisions; or
 - remedying any violations that occurred.
9. Information on barriers or obstacles to enforcing or ensuring compliance with sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations*

made pursuant to paragraphs 59(f) and (g) of the CEEA in connection with the Sunpine Project.

10. 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 7 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. 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), Sunpine, and nongovernmental organizations identified as potentially having relevant information, inviting them to respond with any relevant information by 30 June 2002.

Canada responded to the Secretariat's Request for Information on 25 March 2002. Canada sent the Secretariat copies of documents taken from a public registry set up in connection with environmental screenings carried out by the Canadian Coast Guard in connection with two bridges Sunpine proposed to build as part of the Sunpine Project. The Secretariat sent the Government of Canada an additional information request on 10 September 2002 with follow-up questions based on the Secretariat's review of information received from Canada on 25 March 2002 (Appendix 5). On 5 November 2002, Secretariat staff met with representatives of Sunpine at their offices in Sundre, Alberta and was given a tour of Sunpine's Mainline Road. Sunpine lent Secretariat staff copies of proceedings of 1982 public hearings on the Brazeau Timber Development Area. Canada responded to the Secretariat's 10 September 2002 follow-up information request on 22 January 2003. The Secretariat was asked to direct all requests for explanations or additional information regarding DFO's actions in regard to the Sunpine Project to Environment Canada in Ottawa.

The Submitters provided documents that the Secretariat requested from them. Secretariat staff met with Martha Kostuch in Rocky Mountain House on 5 November 2002, and borrowed Ms. Kostuch's file on the Sunpine Project, including information obtained pursuant to an

access-to-information request made to the Alberta government in 1995. 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 information relevant to the factual record.

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 17 April 2003 and received comments from the United States on 2 June 2003 and from Canada on 5 June 2003. Mexico did not comment on the draft factual record.

5.2 *Meaning and Scope of Fisheries Act ss. 35, 37 and 40*

5.2.1 *Introduction*

Council Resolution 01-08 instructs the Secretariat to prepare a factual record regarding an allegation that the federal government of Canada is failing to effectively enforce fish habitat protection and related environmental assessment provisions under federal law in connection with a logging haul road project, the Sunpine Project, carried out by private interests on provincial Crown land in Alberta in the 1990s. The application of federal environmental protection provisions on provincial Crown land in Canada raises constitutional issues that are relevant to a consideration of the enforcement of such provisions in connection with the Sunpine Project.

The Parliament of Canada has constitutional authority to enact laws for the protection of fish and fish habitat in Canada, and for the prior environmental assessment of projects that are likely to cause the harmful alteration, disruption or destruction (known as a "HADD") of fish habitat. This authority extends to all fish habitat in Canada, regardless of who owns the fish habitat and/or the fish.²⁶ In Alberta, subject to Aboriginal and treaty rights, the province owns the fishing rights on provincial Crown lands.²⁷ Because of the province's right of ownership in the fisheries, legislative jurisdiction for the protection of fish and fish

26. Peter W. Hogg, *Constitutional Law of Canada*, Loose-leafed (1997) at 29.5(a).

27. Gerard V. LaForest, *Water Law in Canada* (Ottawa: Information Canada, 1973) at 196 and 235-236.

habitat is concurrent between the federal and provincial governments.²⁸ However, in case of conflict between a provincial and a federal law, the rule of federal paramountcy gives the federal law priority.²⁹

In the forestry context, if Fisheries and Oceans Canada (“DFO”) becomes aware that a proposed forestry operation is likely to cause a HADD of fish habitat requiring a *Fisheries Act* authorization, it must ensure, before it issues such an authorization, that an environmental assessment of the proposed forestry operation (and/or related works, such as logging roads, bridges, and culverts) is carried out in relation to the project, to determine whether it is likely to cause unjustifiable, adverse environmental effects.³⁰ If the project is likely to cause unjustifiable, adverse environmental effects, the federal government cannot take any action under certain federal statutory and regulatory provisions, such as issuing an authorization under s. 35(2) of the *Fisheries Act*, that would permit the project to be carried out, in whole or in part. In effect, this means that the federal government has the power to stop a forestry operation from proceeding, even if the operation is located on provincial Crown land and the province has issued all necessary provincial permits. Relevant information is provided below regarding the distribution of legislative powers under the Canadian Constitution, and the history of provincial resource ownership.

Under the Constitution of Canada, law-making powers are distributed between the federal government and the provinces.³¹ Each order of government is given exclusive authority to make laws in regard to certain subjects. For example, only the federal government is allowed to legislate in relation to “sea coast and inland fisheries”³² and “criminal law,”³³ while only the provinces are allowed to make laws in relation to, for example:

- the management and sale of the public lands belonging to the province and of the timber and wood thereon;³⁴

28. Peter W. Hogg, *Constitutional Law of Canada*, Loose-leafed (1997) at 29.5(c).

29. *Ibid.*

30. See e.g. application of *Fisheries Act* and CEAA in the context of land clearing activities carried out on federal lands used for military training: *2003 Report of the Auditor General of Canada*, online: Auditor General of Canada <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/03menu_e.html> (date accessed: 14 April 2003).

31. As defined in s. 52(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Constitution”].

32. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [hereinafter “*Constitution Act, 1867*”], s. 91(12), reprinted in R.S.C. 1985, App. II, No. 5.

33. *Ibid.* at s. 91(27).

34. *Ibid.* at s. 92(5).

- local works and undertakings [...];³⁵
- property and civil rights in the province;³⁶ and
- generally all matters of a merely local or private nature in the province.³⁷

The federal government has authority to legislate on all subjects not specifically assigned to the provinces by the Constitution. The Supreme Court of Canada has held that the environment is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial, and that as a result jurisdiction is shared.³⁸

In recognition of the broad wording of the federal and provincial heads of legislative powers under the Constitution, and to respect the federal/provincial division of powers, the courts have ruled that each order of government can make laws that affect subjects not assigned to it by the Constitution, provided that in pith and substance, such laws are concerned with a subject matter assigned to that order of government by the Constitution.³⁹ A provision in a law that directly or indirectly seeks to regulate a matter within the legislative jurisdiction of the other order of government can be found to be unconstitutional or *ultra vires* and struck down by the courts.⁴⁰

The *Fisheries Act* was adopted by the federal government in 1868, a year after Confederation, pursuant to federal jurisdiction over seacoast and inland fisheries.⁴¹ “It regulates the management of marine and inland (freshwater) fisheries, including commercial, recreational, and Aboriginal fishing across Canada. The Act sets out the licensing powers of the Minister of Fisheries and Oceans, the responsibility with respect

35. *Ibid.* at s. 92(10).

36. *Ibid.* at s. 92(13).

37. *Ibid.* at s. 92(16).

38. See *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213. See also *Friends of the Oldman River Society v. Canada (Ministry of Transport)*, [1992] 1 S.C.R. 3.

39. See *Attorney-General for Canada v. Attorney-General for British Columbia et al.*, [1930] A.C. 111 (Privy Council) at 118: “[...] (3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91;” see also *Attorney-General of Ontario v. Attorney General for the Dominion*, [1894] A.C. 189 (Privy Council) and *Attorney-General of Ontario v. Attorney General for the Dominion*, [1896] A.C. 348 (Privy Council).

40. See Peter W. Hogg, *Constitutional Law of Canada*, loose-leafed, (1997) at 15.5(d).

41. 31 Vict. 1868, c. 60.

to the protection of fish habitat, including pollution prevention and enforcement and regulation making powers.”⁴²

Since the adoption of the *Fisheries Act*, there have been many court cases in which persons facing *Fisheries Act* charges and/or provinces have challenged the validity of *Fisheries Act* provisions on constitutional grounds. As a result, there is a significant body of caselaw defining the meaning and scope of federal legislative authority over seacoast and inland fisheries. Notably, in 1882, the Supreme Court of Canada held that there is a difference between legislative authority and ownership, and that federal jurisdiction to legislate on the subject of seacoast and inland fisheries does not give the federal government an ownership right in the resource.⁴³ Rather, the federal government has the power to legislate “[...] generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large.”⁴⁴ This raised a question regarding the limits of federal authority to legislate for the management, protection and preservation of the fisheries, considering that in many instances the provinces are the owners of the fisheries resource and have legislative jurisdiction over property and civil rights in the province as well as over the management and sale of public lands in the province. In 1976, Chief Justice Bora Laskin of the Supreme Court of Canada held that “[f]ederal power in relation to fisheries [...] is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner’s right of utilization.”⁴⁵

Provincial ownership of natural resources is the result of pre-Confederation negotiations between the colonies of British North America and the British Crown. The colonies of Canada [now the provinces of Ontario and Quebec], New Brunswick and Nova Scotia retained ownership of their lands and natural resources upon entering Confederation in 1867.⁴⁶ Four decades later, in 1905, the Parliament of Canada passed a statute creating the province of Alberta out of a section of the Northwest Territories, a vast tract of land Canada had purchased from the Hud-

42. See *Draft National Freshwater Fisheries Strategy* (26 September 2002) prepared by an intergovernmental task group for the Canadian Council of Fisheries and Aquaculture Ministers.

43. *R. v. Robertson* (1882), 6 S.C.R. 52 at 120.

44. *Ibid.* at 123.

45. *Interprovincial Co-Operatives Limited et al. v. R.*, [1976] 1 S.C.R. 477 at 495.

46. With limited exceptions. See *Constitution Act, 1867* at ss. 109 and 117, and Schedule 3 “Provincial Public Works and Property to be the Property of Canada.”

son's Bay Company in 1870.⁴⁷ In order to retain control over land distribution for settlement purposes, the federal government decided not to hand over ownership of natural resources to the new province, opting instead to pay the province an annual cash subsidy.⁴⁸ In 1930, the Constitution was amended to ratify federal/provincial resource transfer agreements that placed the Prairie Provinces (Alberta, Saskatchewan and Manitoba) on the same footing as the original four provinces, such that the Prairie Provinces had ownership, management and control of their natural resources, subject to federal jurisdiction to legislate, among other things, for the protection of the inland fisheries.⁴⁹

Since the 1930s, the federal government and several provinces, including Alberta, have had an arrangement regarding the administration of the inland fisheries and the protection of fish habitat. This arrangement involves three functions (regulation, administration, and protection) and applies to two categories of activities: fishing, and all activities other than fishing that can harm fish or fish habitat. As regards fishing, the inland provinces draft and administer regulations that are adopted by Parliament under the *Fisheries Act*. As regards protection of fish and fish habitat from potentially harmful activities such as forestry, the federal government retains responsibility for this function, although the provinces can also legislate in this area under their powers to make laws for the management of public lands in the provinces.

With the patriation of the Constitution in 1982, a new subsection was added to the list of provincial heads of legislative powers under the Constitution, affirming the provinces' exclusive right to regulate forest development, conservation and management in Canada, including the rate at which forests are harvested.⁵⁰ Pursuant to the constitutional principle of federal jurisdictional paramountcy, however, if provisions of a provincial forest development law are inconsistent with provisions of a federal law regarding the protection of fish and fish habitat, the courts

47. Admitted pursuant to section 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105, by the *Rupert's Land and North-Western Territory Order* of June 23, 1870, effective July 15, 1870. Prior to the admission of those territories the Parliament of Canada enacted *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada* (32 & 33 Vict., c. 3). See also *Constitution Act, 1871* (U.K.), 34 & 35 Vict., c. 28 and July 20, 1905, 4 & 5 Edw. VII, c. 3.

48. See ss. 20 and 21 of the *Alberta Act, 4 & 5 Edw. VII, c. 3*. See also *Report of the Royal Commission on the Natural Resources of Alberta* (Ottawa: J.O. Patenaude, 1935).

49. *Constitution Act, 1930* (U.K.), 20-21 George V, c. 26.

50. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

can declare the provincial law to be inoperative to the extent of the inconsistency.⁵¹

5.2.2 *The Habitat Protection Provisions of the Fisheries Act*

From 1868 to 1932, the *Fisheries Act* contained a section entitled *Injury to Fishing Grounds and Pollution of Rivers* that prohibited throwing certain things overboard and allowing substances deleterious to fish to enter water frequented by fish.⁵² In 1932, s. 33(3) was added, specifically prohibiting certain logging-related activities:

No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

In 1980, the Supreme Court of Canada held that s. 33(3) was unconstitutional because it imposed a blanket prohibition on activities that are under provincial legislative jurisdiction, without a requirement of proven harm to fisheries.⁵³ In 1977, while the issue of the constitutionality of s. 33(3) was still before the courts, Parliament repealed s. 33 and added a new set of provisions to the *Fisheries Act* under the caption *Fish Habitat Protection and Pollution Prevention*. S. 33(3) was replaced with s. 35. Under s. 35 of the *Fisheries Act*, which remains in force to this day,

- (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
- (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister [of Fisheries and Oceans] or under regulations made by the Governor in Council under this Act.

S. 34 of the *Fisheries Act* defines “fish habitat” as “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.” S. 2 of the *Fisheries Act* defines “fish” as including

- (a) parts of fish,

51. Peter W. Hogg, *Constitutional Law in Canada*, Loose-leaf, ed. (1997) at 16.6.

52. See 31 Vict. 1868, c. 60, s. 14; R.S.C. 1886, c. 95, s. 15; R.S.C. 1906, c. 45, s. 53; S.C. 1914, c. 8, s. 44; R.S.C. 1929, c. 73, s. 45; S.C. 1932, c. 42, s. 33; R.S.C. 1970, c. 17 (1st supp.), s. 3.

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

- (b) shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, and
- (c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

Unlike former s. 33(3), s. 35(1) provides no details regarding prohibited conduct, focusing instead on the prohibited result. Under s. 40 of the *Fisheries Act*, violation of s. 35(1) is an offense punishable on summary conviction or indictment. On summary conviction, defendants face fines of up to three hundred thousand dollars for a first offense; for any subsequent offense, a defendant faces fines of up to three hundred thousand dollars or imprisonment for up to six months, or both. On indictment, fines for a first offense can reach one million dollars, and for any subsequent offense, the defendant faces fines of up to one million dollars or imprisonment for up to three years, or both. The *Fisheries Act* specifies that every day on which an offense continues is a new offense (s. 78.1), and it makes directors, officers or agents of corporations who direct or authorize the commission of an offense personally liable to the punishment provided for the offense, whether or not the corporation is prosecuted (s. 78.2).

Under the *Fisheries Act*, courts can issue injunctions to stop actions that constitute offenses under the Act (s. 41(3)), and upon conviction, courts have wide-ranging order powers to repair damage done and prevent the recurrence of the offense (s. 79.2). In any prosecution under the *Fisheries Act*, the Crown must prove its case “beyond a reasonable doubt.” Once the Crown has made its case, a defendant will be acquitted, if the defendant can prove, on a balance of probabilities, that the defendant exercised all due diligence to prevent the commission of the offense or reasonably and honestly believed in the existence of facts that, if true, would render the defendant’s conduct innocent (s. 78.6).

As part of the 1977 *Fisheries Act* amendments, the Minister of Fisheries and Oceans was given the following broad information-gathering and order powers under the new s. 37:

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

other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine

- (a) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof; or
 - (b) [...]
- (2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph 3(b), or, if there are no such regulations in force, with the approval of the Governor in Council,
- (a) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or
 - (b) restrict the operation of the undertaking,

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

- (3) The Governor in Council may make regulations
- (a) prescribing the manner and circumstances in which any information or material shall be provided to the Minister without request under subsection (1); and
 - (b) prescribing the manner and circumstances in which the Minister or a person designated by the Minister may make orders under subsection (2) and the terms of the orders.
- (4) Where the Minister or a person designated by the Minister proposes to make an order pursuant to subsection (2), he shall offer to consult with the governments of any provinces that he considers to be interested in the proposed order and with any departments or agencies of the Government of Canada that he considers appropriate.

- (5) Nothing in subsection (4) prevents the Minister or a person designated by the Minister from making an interim order pursuant to subsection (2) without the offer of consultation pursuant to subsection (4) where he considers that immediate action is necessary.

Under s. 40(3), every person who

- (a) fails to provide the Minister with any material or information requested pursuant to subsection 37(1) within a reasonable time after the request is made,
- (b) fails to provide or submit any material, information or report that is to be provided or submitted under regulations made pursuant to subsection 37(3),
- (c) [...]
- (d) carries on any work or undertaking described in subsection 37(1)
 - (i) otherwise than in accordance with any material or information relating to the work or undertaking that he provides to the Minister under subsection 37(1),
 - (ii) otherwise than in accordance with any such material or information as required to be modified by any order of the Minister under paragraph 37(2)(a), or
 - (iii) contrary to any order made by the Minister under subsection 37(2),

[...]

is guilty of an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding two hundred thousand dollars and, for any subsequent offence, to a fine not exceeding two hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both.

[...]

Taken together, ss. 35, 37 and 40 of the *Fisheries Act* created a framework for regulating activities that impact or are likely to impact on fish habitat in Canada. The framework leaves open the possibility of three types of implementation scenarios: one based on generally-applicable regulations, the other based on orders and permits issued in relation to individual projects, or a combination of the two.

In the regulations scenario, the federal government would adopt *Fisheries Act* regulations telling proponents of projects that result in or are likely to result in the alteration, disruption or destruction of fish habitat the manner and circumstances in which they must submit information to DFO for review under s. 37(1); identifying the circumstances in which MFO may issue an order under s. 37(2); and setting out the kinds of terms such orders can contain. The regulations scenario would also include regulations describing how to carry on activities that cause a HADD of fish habitat in such a way as to comply with s. 35. The federal government did not adopt this scenario.

In the other scenario, no regulations are adopted and DFO administers the *Fisheries Act* habitat protection provisions on a project-by-project basis. In the absence of regulations requiring persons to come forward with information, MFO must rely on other means of finding out about proposed projects that are likely to affect fish habitat in order to request information from project proponents and decide whether to issue an order under s. 37. If MFO decides to issue an order, there are no regulations setting out what kinds of terms can be included in the order. For projects that do or will cause a HADD of fish habitat, in the absence of *Fisheries Act* regulations, it is not an offense for a project proponent to proceed without an authorization under s. 35(2). Under the Act, if DFO believes that an unauthorized HADD of fish habitat has occurred, DFO can recommend laying charges against the project proponent, provided that DFO becomes aware of the existence of the project. Since 1977, no federal or provincial⁵⁴ regulations have been adopted by Parliament under s. 37 or s. 35 of the *Fisheries Act*.

5.3 *Federal Policies Regarding Administration and Enforcement of Fisheries Act ss. 35, 37 and 40*

Two DFO policy documents are central to the administration and enforcement of the habitat protection provisions of the *Fisheries Act* in Canada: the *Policy for the Management of Fish Habitat in Canada (1986)* (the “Habitat Policy”), and the *Fisheries Act Pollution Prevention Provisions Compliance and Enforcement Policy (2001)* (the “Compliance and Enforcement Policy”). Information regarding the Habitat Policy and the Compliance and Enforcement Policy, as well as related documents and initiatives, is presented below.

54. As regards regulation of the fisheries (as opposed to fish habitat), the provinces—on the basis of their knowledge of the fisheries—draft regulations for adoption by Parliament. See above.

5.3.1 *The Habitat Policy*

DFO describes the Habitat Policy as follows:⁵⁵

The Policy for the Management of Fish Habitat (the Habitat Policy) established in 1986, provides the policy framework for the administration and enforcement of the broad powers mandated in the habitat provisions of the *Fisheries Act* in a manner consistent with the concepts of sustainable development and ecosystem management. The overall objective of the Habitat Policy is to “increase the natural productive capacity of habitats for the nation’s fisheries resources” (i.e., to achieve a “net gain” in fish habitat) through the conservation, restoration and development of fish habitat.

The Policy provides eight broad strategies to support achieving the objectives and goals of the Habitat Policy. These strategies are:

- Protection and Compliance;
- Integrated Resource Planning;
- Scientific Research;
- Public Consultation;
- Public Information and Education;
- Cooperative Action;
- Habitat Improvement; and
- Habitat Monitoring.

The Habitat Policy emphasises the importance of integrated planning to ensure that fish habitat plans are implemented with sufficient knowledge of current and future demands of other natural resource users. The policy recognises that other sectors of the economy make legitimate demands on water resources, and promotes integrated planning as an approach to ensuring the protection of fish habitat while providing for other uses.

As stated above, the overall objective of the Habitat Policy is to achieve a net gain in fish habitat productive capacity in Canada through eight broad implementation strategies, with an emphasis on integrated planning. On a project level, the Habitat Policy seeks to achieve “no net loss” in the productive capacity of fish habitat, meaning that unavoidable

55. DFO, *Annual Report to Parliament on the administration and enforcement of the fish habitat protection and pollution prevention provisions of the Fisheries Act for the period of 1 April 1999 to 31 March 2000* (the latest available report, as at January 2003; herein after the “1999-2000 Annual Report”).

reductions in habitat productive capacity should be compensated through an increase in habitat productive capacity elsewhere. DFO's policy is to authorize a HADD of fish habitat under s. 35(2) if the no net loss guiding principle can be respected. If it cannot, under the Habitat Policy, MFO should not, in general, issue a s. 35(2) authorization for a project.⁵⁶

5.3.1.1 Application of the Habitat Policy in Alberta

Under the caption "National Application," Section 1.1 of the Habitat Policy explains that the federal government will not actively apply the Habitat Policy in six provinces, including Alberta:

Following references to the Privy Council and several Court decisions, formal agreements were negotiated during the period 1899 and 1930 between the federal government and a number of provinces. As a result, the federal government has made special arrangements concerning day-to-day management for the inland fisheries of Ontario, Manitoba, Saskatchewan and Alberta, and for some fisheries in the provinces of Quebec (where the province manages all freshwater, anadromous and catadromous fisheries), and British Columbia (where the province manages all freshwater species, excepting anadromous salmon). In these six provinces (or parts thereof), federal fisheries legislation is administered by the provincial fisheries management agency, although provincial fisheries regulations must be promulgated by the federal government. Conservation Officers in several provinces are designated as Fishery Officers for purposes of administering the *Fisheries Act*.

The Department recognizes that experienced freshwater fisheries management agencies, with the capability to administer regulations, and to manage fish habitats on behalf of users of the fisheries resource, have evolved in the six provinces (or parts thereof) identified in the preceding paragraph. *The federal government will not actively apply this policy in those jurisdictions; rather the provincial agencies concerned are being encouraged to apply it through bilateral administrative agreements and protocols which will also clarify roles and responsibilities for the respective parties involved [emphasis added].* Also, interagency referrals and other forms of federal-provincial cooperation will continue to be used and agreements developed in those other provinces and territories where the Department of Fisheries and Oceans administers fisheries legislation directly.

In January and September 2002 (see factual record, Appendix 4 at question IV.7 and Appendix 5 at question 1), the Secretariat requested Can-

56. Habitat Policy at s. 2.2.1.

ada to provide copies of any Canada-Alberta administrative agreements or protocols of the type referred to above, but none were provided.⁵⁷

In the Habitat Policy, DFO states that it will

[p]articipate in and encourage resource planning and management to incorporate fish habitat priorities into air, land and water use plans.

Interpretation

1. Where it is responsible for managing the fisheries resource, the Department will seek opportunities to resolve multiple resource use conflicts affecting the fisheries by participating in resource planning and management with provincial, territorial and municipal governments, other federal government agencies and other resource users (where applicable), and by recognizing the mandate and objectives of all participants.
2. The Department will plan for the conservation, restoration and development of the fisheries resource and its supporting habitat, in support of its fisheries management objectives.
3. The Department is prepared to seek ways to accommodate the concerns of other resource interests, wherever feasible.
4. The Department is prepared to enter into agreements with provincial, territorial, municipal and other federal agencies to achieve mutually agreeable resource planning and management objectives and to carry out joint programs such as the development of habitat inventories.

Under the Habitat Policy,

[t]he Department recognizes that natural resource interests such as the forest, fishing, mining, energy, and agricultural sectors make legitimate demands on water resources, and that ways must be found to reconcile differences of opinion on the best use of those resources. Effective integration of resource sector objectives, including fisheries, will therefore involve cooperation and consultation with other government agencies and natural resource users. For example, fish habitat management plans on a local or regional basis should be developed in such a way as to allow discussion with other stakeholders. In particular, in those jurisdictions

57. In its 5 June 2003 comments on the accuracy of the Draft Factual Record, Canada stated: "Since the completion of the Sunpine Project in 1997, an "Interim Protocol on Delivery of an Enforcement and Compliance Program for the Habitat Protection Provisions of the *Fisheries Act* (Canada)" was signed and is attached."

where the Department of Fisheries and Oceans manages fisheries directly, the Department will seek ways to participate in the resource planning and management initiatives of provincial, territorial and municipal governments, other federal departments and other resource users where applicable. In *other jurisdictions*, integrated planning activities will be consistent with any federal-provincial administrative agreement for habitat management [emphasis added].

Under the Habitat Policy, Alberta falls under “other jurisdictions” (see above).

5.3.2 *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy*

DFO adopted a “*Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy*” in July 2001. Under the Compliance and Enforcement Policy, compliance with the *Fisheries Act* habitat protection provisions is mandatory; compliance will be encouraged through communication with affected parties; rules, sanctions and processes securely founded in law will be used to administer the habitat protection provisions in a fair, predictable and consistent manner; the provisions will be administered with an emphasis on preventing harm to fish and fish habitat; enforcement personnel will take action consistent with the Policy; and the public will be encouraged to report suspected violations. No drafts of this policy were in use in DFO’s Central and Arctic Region (where the Sunpine Project is located) in the period of federal involvement in the review of the Sunpine Project, from 1995-2001.⁵⁸

5.4 *Meaning and Scope of s. 5(1)(d) of the Canadian Environmental Assessment Act (CEAA) and Schedule 1 Part I Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of the CEAA*

The *Canadian Environmental Assessment Act* (“CEAA”) came into force in January 1995.⁵⁹ It is federal environmental assessment legislation that applies to federal projects and projects that have some federal connection.⁶⁰ The CEAA is based on the principle of “self-assessment,” meaning that the federal departments or agencies involved with a given

58. DFO’s 22 January 2003 Reply, *infra* at 3.

59. S.C. 1992, c. 37.

60. See s. 5 of CEAA.

project are responsible for ensuring that the requirements of the Act are met with regard to that project.⁶¹ Under the Act, these “Responsible Authorities,” or “RA”s, decide how to define or “scope” a project for the purpose of assessing its environmental impacts.⁶² They also have discretion regarding factors to be considered as part of the environmental assessment, and, in regard to those factors, the scope of information to be considered, and some discretion regarding information to be considered in evaluating cumulative effects of the project in combination with other projects or activities that have been or will be carried out.⁶³ For example, where a road project includes a bridge for which a federal permit is required, the “scope of the project” can be defined as the bridge. “Sedimentation” can be identified as a source of environmental effects from the project and included as a factor to be considered in the assessment. The RA will decide the relevant geographic range of sediment deposition, and the time period over which this will occur, for the purpose of the assessment; this determines the “scope of the factor” for the purposes of the assessment. Where an environmental assessment is required under the CEAA, RAs must ensure that the assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made.⁶⁴ Compliance with the CEAA has been enforced by the courts in judicial review proceedings brought by environmental groups.⁶⁵

The CEAA has the following purposes:

- (a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;
- (b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

61. S. 11(2) of CEAA.

62. S. 15(1) of CEAA.

63. Ss. 15(3), 16(1)(e), (3).

64. S. 11(1) of CEAA.

65. See e.g., *Environmental Resources Center et al. v. Canada (Minister of the Environment) et al.*, [2001] F.C.T. 1423, online: Federal Court of Canada <<http://decisions.fct-cf.gc.ca/fct/2001/2001fct1423.html>> (date accessed: 28 January 2003); *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 (F.C.A.), online: Federal Court of Canada <<http://reports.fja.gc.ca/fc/2000/pub/v2/2000fc25404.html>> (date accessed: 28 January 2003); *Alberta Wilderness Association et al. v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483 (F.C.A.), online: Federal Court of Canada <<http://reports.fja.gc.ca/fc/1999/pub/v1/1999fc23601.html>> (date accessed: 28 January 2003).

- (b.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;
- (c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and
- (d) to ensure that there be an opportunity for public participation in the environmental assessment process.⁶⁶

In order to be subject to assessment under the CEAA, a given project must come within the definition of “project” under the Act. The CEAA defines “projects” as follows:

- (a) in relation to a *physical work*, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or
- (b) any proposed *physical activity* not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b) [emphasis added].⁶⁷

A “project” can therefore be an undertaking in relation to a “physical work” or it can be a “physical activity” not relating to a physical work, but in order for a physical activity to be subject to federal assessment, it has to be listed in a CEAA regulation. The CEAA *Inclusion List Regulations* list physical activities with fisheries impacts that are considered to be “projects” for the purposes of the CEAA:

- 42. The destruction of fish by any means other than fishing, where the destruction requires the authorization of the Minister of Fisheries and Oceans under section 32 of the *Fisheries Act* or authorization under regulations made by the Governor in Council under that Act.
- 43. The harmful alteration, disruption or destruction of fish habitat by means of physical activities carried out in a water body, including dredge or fill operations, that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the *Fisheries Act* or authorization under regulations made by the Governor in Council under that Act.

66. S. 4 of the CEAA.

67. S. 2(1) of the CEAA.

44. The harmful alteration, disruption or destruction of fish habitat by means of draining or altering the water levels of a water body that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the *Fisheries Act* or authorization under regulations made by the Governor in Council under that Act.
45. The harmful alteration, disruption or destruction of fish habitat by means of erosion control measures adjacent to a water body that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the *Fisheries Act* or authorization under regulations made by the Governor in Council under that Act.
46. The harmful alteration, disruption or destruction of fish habitat by means of the removal of vegetation in or adjacent to a water body that requires the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the *Fisheries Act* or authorization under regulations made by the Governor in Council under that Act.
- 46.1 The harmful alteration, disruption or destruction of fish habitat by means of physical activities intended to establish or modify more than 500 m of continuous natural shoreline and that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the *Fisheries Act* or authorization under regulations made by the Governor in Council under that Act.
47. The deposit of a deleterious substance that requires authorization under regulations made by the Governor in Council pursuant to subsection 36(5) of the *Fisheries Act*.⁶⁸

If a “physical activity” not relating to a physical work requires an authorization under s. 35(2) of the *Fisheries Act* (because it will result in a HADD of fish habitat) but that activity is not listed in the regulations mentioned above, no environmental assessment is required under the CEAA.⁶⁹

If a given project qualifies as a “project” for the purposes of the CEAA, the CEAA lists situations where an environmental assessment of that project is required, including where the project has an aspect of federal involvement as set out in s. 5 of the CEAA:

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the fol-

68. *Inclusion List Regulations*, SOR/94-637, Part VII.

69. See CEAA Guide, *infra*, at Appendix 3: “If the *project* is a physical activity not related to a physical work, it must be listed in the Inclusion List Regulations for the CEAA to apply. The regulations include several physical activities that may impact fish, fish habitat and navigation.”

lowing duties or functions in respect of a project, namely, where a federal authority:

- (a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;
- (b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;
- (c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or
- (d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Under s. 5 of the CEAA (see above), different types of federal involvement with a project “trigger” the environmental assessment requirement. For example, the trigger could be that a federal authority is a project proponent, or that federal funds are being used to finance the project. S. 5(1)(d) is called the “regulatory trigger”: if a provision of a statute or a regulation is listed in the Schedule to the CEAA *Law List Regulations*, an RA cannot act under that provision in respect of a project without triggering an environmental assessment requirement under the CEAA. The issuance of an order under s. 37(2) of the *Fisheries Act* and the issuance of an authorization under s. 35(2) of the *Fisheries Act* are CEAA “triggers,”⁷⁰ but only where a “project”—as defined in the CEAA—is involved (see above).

Under CEAA, projects are either automatically excluded from environmental assessment, or they are automatically subject to a comprehensive study, a mediation, a panel review or a screening to determine whether they are likely to cause significant adverse environmental effects. A screening can lead to a finding of no significant adverse envi-

70. *Law List Regulations*, SOR/94-636, Schedule I, Part I, Item 6.

ronmental effects, in which case the RA can proceed to issue the authorization or otherwise act to allow the project to go forward. A screening can also require reference of a project to a mediator or review panel, in the following cases: public concern about possible project impacts; the existence of significant adverse environmental effects that are justifiable in the circumstances; or uncertainty regarding whether the project is likely to cause significant adverse environmental effects.

CEAA regulations list projects for which an assessment is automatically required⁷¹ and projects for which no assessment is required.⁷² Logging roads are not listed in these regulations.⁷³ If a project triggers the CEAA (for example, the project requires a s. 35(2) authorization under the *Fisheries Act*) but the project is not automatically excluded from the application of the CEAA nor within the classes of projects in respect of which a comprehensive study, mediation or panel review is automatically required, the RA must conduct a “screening” of the project. The CEAA allows for “class screening reports” to be used as models for screening similar projects.⁷⁴ Since 2002, the Canadian Environmental Assessment Agency has a Model Class Screening Report for Prairie Grain Roads.⁷⁵ There is no model class screening report for logging roads such as the Sunpine Project.

At the outcome of a screening, issuance of an approval will depend on whether the project is expected to result in significant adverse “environmental effects,” taking into account any mitigation measures considered appropriate, and if so, whether such effects can be justified in the circumstances.⁷⁶

The CEAA defines “environmental effects” as follows:

“environmental effect” means, in respect of a project,

- (a) any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands

71. *Comprehensive Study List Regulations*, SOR/94-638.

72. *Exclusion List Regulations*, SOR/94-639.

73. *Ibid.*

74. S. 19 of the CEAA.

75. *Model Class Screening Report for Prairie Grain Road Projects in Manitoba, Saskatchewan and Alberta* (Prairie Farm Rehabilitation Administration, December 2002), online: Canadian Environmental Assessment Agency <http://www.cea-acee.gc.ca/0009/0004/0004/report_e.htm> (last modified: 10 October 2002).

76. S. 20(1)(a), (b) of the CEAA.

and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and

- (b) any change to the project that may be caused by the environment,

whether any such change occurs within or outside Canada.⁷⁷

Where the RA is uncertain about whether the project will cause significant adverse environmental effects, or where in the opinion of the RA public concerns warrant a reference to a mediator or review panel, the RA must refer the project to the Minister of the Environment of Canada for a referral to a mediator or a review panel.⁷⁸ RAs also have discretion to refer a project to the Minister of the Environment for referral to a mediator or review panel in the following cases: (i) the project is on the Comprehensive Study List,⁷⁹ or (ii) the project may cause significant adverse environmental effects, or public concerns warrant such a reference.⁸⁰ In addition, the CEEA gives the Minister of the Environment of Canada discretion to refer a project to a mediator or review panel on his or her own initiative, in the following cases:

- (a) a project for which an environmental assessment may be required under section 5 [see above], taking into account the implementation of any appropriate mitigation measures, may cause significant adverse environmental effects, or
- (b) public concerns warrant a reference to a mediator or a review panel.⁸¹

Before proceeding with such a referral, the Minister must offer to consult with the jurisdiction where the project is located and the appropriate federal authority. The “jurisdiction” can be a provincial or aboriginal government or a provincial or aboriginal environmental assessment agency.

Where a project is subject to a comprehensive study or has been referred to a mediator or a review panel, no federal authority can exercise any power, duty or function under federal legislation that would permit the project to be carried out in whole or in part unless an environmental assessment has been completed, the RA has considered the envi-

77. S. 2(1) of the CEEA.

78. S. 20(1)(c) of the CEEA.

79. S. 21(b) of the CEEA.

80. S. 25 of the CEEA.

81. S. 28(1) of the CEEA.

ronmental assessment report, and the project is not likely to cause significant adverse environmental effects or if it is, they can be justified in the circumstances, taking into account any mitigation measures considered appropriate by the RA.⁸²

The CEAA lists factors that must be considered in all environmental assessments, as well as factors that do not need to be considered in screenings:

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

- (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public that are received in accordance with this Act and the regulations;
- (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
- (e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

The following additional factors must be considered in comprehensive studies, and by mediators and review panels:

- (a) the purpose of the project;
- (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
- (c) the need for, and the requirements of, any follow-up program in respect of the project; and

82. S. 13 of CEAA.

- (d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.⁸³

The definition of a “project” for the purpose of environmental assessment under the CEAA influences the scope of an assessment pursuant to s. 16 of the CEAA (see factors listed above). For example, if the CEAA is triggered by s. 5 of the federal *Navigable Waters Protection Act*, the project (for the purposes of the CEAA) is generally described as being the physical work that poses a potential obstacle to navigation, usually a bridge. When a project is described as a “bridge,” then any study of “alternatives to the project” is limited to alternatives to the bridge. On the other hand, if a project is described more broadly as a “road,” then alternatives to the project include alternatives to the road. When a CEAA assessment is triggered by the “regulatory trigger” (i.e., the need for a federal authorization or approval), the scope of the project is defined by the limits of federal jurisdiction over the regulated matter.⁸⁴

Under the CEAA, different types of assessment have different requirements for public involvement. Public participation is not required in screening-level environmental assessments, the type of assessment most frequently carried out under the CEAA,⁸⁵ although an RA can involve the public if it feels this would be appropriate in the circumstances.⁸⁶ On the other hand, a review panel must hold public hearings, and must do so in a manner that offers the public an opportunity to participate in the assessment.⁸⁷ In screenings, the RA has discretion regarding whether or not to give the public notice and an opportunity to comment on a screening report,⁸⁸ while the public has a statutory right to comment on environmental assessment reports issued pursuant to comprehensive studies or panel reviews.⁸⁹ The CEAA states that for

83. S. 16(2) of CEAA.

84. See DFO’s CEAA Guide, *infra*, at Appendix 13 “Considerations for determining the scope of the assessment”: “For projects subject to CEAA s. 5(1)(d) regulatory triggers (most of HMP’s EAs), the project’s scope must be limited to those elements over which the federal government can validly assert authority either directly or indirectly. Thus the project addressed in the EA should correspond to the federally-regulated undertaking involved in the application.”

85. See Canadian Environmental Assessment Agency, *2001-2002 Departmental Performance Report*, Table 13: Statistical Summary of Environmental Assessments 2001-2002, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/rma/dpr/01-02/CEAA/ceaa01dpr04_e.asp#table13> (last modified: 7 November 2002).

86. S. 18(3) of the CEAA.

87. S. 34(b) of the CEAA.

88. S. 18(3) of the CEAA.

89. Ss. 22(1)(c), 34(c)(ii) of the CEAA.

every project subject to assessment under the Act, the RA must establish and operate a public registry containing, subject to certain exceptions, all records produced, collected, or submitted with respect to the environmental assessment of the project in a manner to ensure convenient public access to the registry.⁹⁰

Regardless of whether a project is subject to a screening, a comprehensive study, a mediation or a review panel, the RA must ensure that any mitigation measures considered appropriate to prevent a project from causing significant adverse environmental effects are implemented.⁹¹ The CEAA defines mitigation as

in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means.⁹²

The CEAA provides for the adoption of regulations on follow-up programs and public notice requirements.⁹³ It defines “follow-up program” as “a program for verifying the accuracy of environmental assessment of a project, and determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project.”⁹⁴ Public notice requirements could include the following:

- the RA’s course of action in relation to a project;
- any mitigation measures to be implemented with respect to the adverse environmental effects of the project;
- the extent to which the recommendations set out in any report submitted by a mediator or a review panel have been adopted and the reasons for not having adopted any of those recommendations;
- any follow-up program designed for the project [...]; and
- any results of any follow-up program.⁹⁵

No such regulations exist.

90. S. 55 of the CEAA.

91. Ss. 20(2), 37(1)(a), (2) of the CEAA.

92. S. 2(1) of the CEAA.

93. S. 38(1) of the CEAA.

94. S. 2(1) of the CEAA.

95. S. 38(1) of the CEAA.

5.5 *The CEAA and the Protection of Fish Habitat under the Fisheries Act*

The current *Fisheries Act* fish habitat protection provisions were adopted in 1977. The federal *Access to Information Act* was adopted in 1983,⁹⁶ followed in 1984 by the adoption of a federal policy on environmental assessment and review, and approval of an *Environmental Assessment and Review Process ("EARP") Guidelines Order* (the "EARP Order").⁹⁷ Under the EARP Order, the federal environmental assessment and review process was described as follows:

The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal for public review by a panel.⁹⁸

Under the EARP Order, federal departments had to ensure, "before any mitigation or compensation measures are implemented pursuant to s. 13 [*sic* – s. 14],⁹⁹ that the public have access to the information on and the opportunity to respond to the proposal in accordance with the spirit and principles of the *Access to Information Act*."¹⁰⁰

DFO adopted its Habitat Policy two years later, in 1986. The Habitat Policy does not mention the EARP Order. The Habitat Policy defines "major" and "minor" projects, and sets out the respective roles of DFO and project proponents depending on the size of the project:

Minor Projects

Those works, undertakings and activities which would not normally have, or be perceived to have, serious irreversible biological effects that could not be mitigated on the habitats supporting Canada's fisheries resources. Examples include: *most stream crossings, culvert installations, and other stream alterations; most wharf and breakwater construction and repairs; most individual forest harvesting operations; small dredging projects; small foreshore modifications; and other similar projects* [emphasis added].

96. R.S.C. 1985, c. A-1.

97. SOR/84-467, online: Canadian Environmental Assessment Agency <http://www.ceaa.gc.ca/0011/0002/earp_go_e.htm> (last modified: 10 October 2002).

98. S. 3 of the EARP Order.

99. S. 14 of the EARP Order: "Where, in any case, the initiating department determines that mitigation or compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant, the initiating department shall ensure that such measures are implemented."

100. S. 15(b) of the EARP Order.

For *minor projects* involving physical activities (e.g., salmon stream crossings), which disrupt important fish habitat, Fishery Officers and fish habitat management staff will assist operators to the extent feasible in identifying the biological impacts of the work or undertaking and will make a biological assessment of the requirements necessary to meet fisheries operational objectives [emphasis in original].

Major Projects

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 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 [emphasis added].

For *major projects*, obtaining and presenting relevant information on the project or the chemical compounds involved, and on the fish habitat that is likely to be affected, is the responsibility of the proponent under *Section 37(1)* of the Act. This step will take varying amounts of time to complete, depending on the size of the project, and it will be in the interest of proponents to provide assessments on a timely basis. Staff of the Department will assess the information obtained and if necessary visit the site and undertake studies to complete their assessments. As part of the examination step, the hierarchy of preferences (outlined in Section 5.1 of this chapter) will be used to guide both the Department and proponents; the amount of detail and time required will depend again on the size of the work or undertaking, and its potential impact on *fish habitats* [emphasis in original].

For major projects, the Habitat Policy states that project proponents are responsible for submitting information to DFO under s. 37(1). Under s. 37(1), the extent of this responsibility can either be stated in a regulation (which to date does not exist) or it can take the form of an information request from MFO. "Habitat Conservation and Protection Guidelines" published by DFO in 1994 state that it is the responsibility of project proponents, in forwarding project proposals to DFO for examination, to include all appropriate plans and studies. The Guidelines state "[i]f these plans and specifications are not forthcoming, the Regional Director General may issue a legally binding request under the authority of s. 37(1) of the *Fisheries Act* to obtain them."¹⁰¹

101. DFO, "Habitat Conservation and Protection Guidelines" (First Edition 1994) at s. 2.8.

The courts have been asked to consider whether the public can force MFO to issue s. 37(2) orders or s. 35(2) authorizations, thereby triggering a requirement for an environmental assessment. In 1989, the Submitter launched an action in Federal Court to require MFO and the Minister of Transport (Canada) to carry out an environmental assessment under the EARP Order in connection with a provincial government project involving construction of a dam on the Oldman River in Alberta. The case made its way to the Supreme Court of Canada and in 1992, the Supreme Court ruled that the EARP Order was mandatory in nature and therefore had to be complied with by federal departments prior to issuing permits and authorizations under federal legislation.¹⁰² In the *Friends of the Oldman River* case, Alberta argued that the Minister of the Environment of Canada did not have jurisdiction to conduct environmental assessments of projects that affected federal jurisdiction over fisheries, because the federal *Department of the Environment Act* limited the jurisdiction of the Minister of the Environment to “[...] all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to a) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality; [...]”¹⁰³ The Supreme Court held:

Because the *Fisheries Act* regulates the management of Canada’s fisheries resource, it is argued, the Minister of the Environment’s jurisdiction has been ousted in respect of all matters affecting fish habitat. This argument can be dealt with shortly. Its premise entirely misapprehends the “matters” covered by the respective pieces of legislation. The *Guidelines Order* [EARP Order] establishes an environmental assessment process for use by all federal departments in the exercise of their powers and the performance of their duties and functions, whereas the *Fisheries Act* embraces the substantive matter of protecting fish and fish habitat. There is, of course, a connection between the two, but the crucial difference is that one is fundamentally procedural while the other is substantive in nature.¹⁰⁴

In the *Friends of the Oldman River* case, the Supreme Court of Canada considered whether ss. 35 and 37 of the *Fisheries Act* imposed an

102. *Friends of the Oldman River v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [hereinafter “*Friends of the Oldman River*,” online: LexUM <http://www.lexum.umontreal.ca/csc-scc/en/pub/1992/vol1/html/1992scr1_0003.html> (date accessed: 28 January 2003).

103. R.S.C. 1985, c. E-10, as amended, s. 4(1). S. 4(2) now reads: “The powers, duties and functions of the Minister also extend to and include such other matters, relating to the environment and over which Parliament has jurisdiction, as are by law assigned to the Minister.”

104. *Friends of the Oldman River* under “Obligation of the Ministers to Comply with the Guidelines Order.”

affirmative regulatory duty upon MFO that had the effect of triggering an obligation for the Minister to conduct an environmental assessment under the EARP Order. If so, this obligation could be enforced by the Submitter in judicial review proceedings before the courts. The Court held that unlike s. 5 of the federal *Navigable Waters Protection Act* (“NWPA”), which states

no work shall be built or placed in, on, over, under, through or across any navigable water unless the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction,¹⁰⁵

“[t]here is [...] no equivalent regulatory scheme under the *Fisheries Act* which is applicable to the project.”¹⁰⁶ The Supreme Court of Canada characterized the *Fisheries Act* s. 37(2) order power as an “*ad hoc* delegated legislative power to allow an exemption from the general prohibition” and not “an affirmative regulatory duty.” While the Court did not mention *Fisheries Act* s. 35(2), it follows that s. 35(2) was also considered to give the Minister the power to allow an exemption to the s. 35(1) prohibition, without imposing on the Minister an affirmative regulatory duty to act. The difference between the NWPA and the *Fisheries Act* is that the NWPA specifically says that a permit is required for certain types of projects, whereas the *Fisheries Act* does not actually say that MFO must issue an authorization under s. 35(2) for projects that will cause a HADD of fish habitat. As explained by DFO, “you are within your legal rights to go ahead with your project without getting this Authorization. But if you do, and if you harm fish habitat you are liable to prosecution under the *Fisheries Act*.”¹⁰⁷ Because the *Fisheries Act* does not require the Minister of Fisheries and Oceans to issue s. 35(2) authorizations or s. 37(2) orders where projects cause a HADD of fish habitat, in *Friends of the Oldman River*, the Submitter was denied its application to compel MFO to require an environmental assessment of the Oldman Dam under the EARP Order pursuant to the *Fisheries Act* trigger.

Regulations adopted under the *Fisheries Act* in 1993 provide that

[a]ny person who proposes to carry on any work or undertaking that is likely to result in the harmful alteration, disruption or destruction of fish

105. R.S.C. (1985), c. N-22, s. 5(a).

106. *Friends of the Oldman River* under “Obligation of the Ministers to Comply with the Guidelines Order.”

107. Online: Fisheries and Oceans Canada <http://www.dfo-mpo.gc.ca/canwaters-eauxcan/infocentre/guidelines-conseils/guides/law-lois/more_e.asp> (last modified: 1 January 2003).

habitat and who wishes to have the means or conditions of that work or undertaking authorized by the Minister under subsection 35(2) of the Act shall apply to the Minister in the form set out in Schedule VI.

An authorization given under subsection 35(2) of the Act shall be in the form set out in Schedule VII.¹⁰⁸

The application form for s. 35(2) authorizations states: “All applications pursuant to s. 35 of the *Fisheries Act* will be assessed in accordance with applicable federal environmental assessment requirements.”¹⁰⁹

In 1995, when the CEAA came into force, DFO released a draft *Directive on the Issuance of Section 35(2) Authorizations* (the “Directive”), the contents of which are now part of a DFO publication entitled “What the Law Requires.”¹¹⁰ Under the Directive, DFO states that s. 35(2) authorizations will only be issued if a project will result in a HADD of fish habitat. Such an authorization will require compensation measures, consistent with the “no net loss” guiding principle of the Habitat Policy. If impacts of a project on fish habitat can be mitigated so as to avoid a HADD, no s. 35(2) authorization will be issued by DFO. Instead, DFO issues a letter of advice. The Directive states

[a]uthorizations to harmfully alter, disrupt or destroy fish habitat are, in a sense, the instrument of last resort. They are issued only when there is no other way to go.

What this means is that if you are planning a project that might affect fish habitat, applying for an Authorization should not be your first step in fact it should be your last.

Your first step should be to get in touch with the government agency responsible for fish habitat protection. In some provinces this will be the Department of Fisheries and Oceans (DFO) in others it will be the provincial government department responsible for fisheries and fish habitat management.

In some cases, the agency responsible for fish habitat protection may already be aware of your project. If you have had to apply for permits to conduct your work, a description of your project may have been referred to the agency responsible for fish habitat, for review.

108. *Fishery (General) Regulations*, SOR/93-53, s. 58.

109. *Ibid.* Schedule VI at 3, under “Environmental Assessment and Review Process Considerations.”

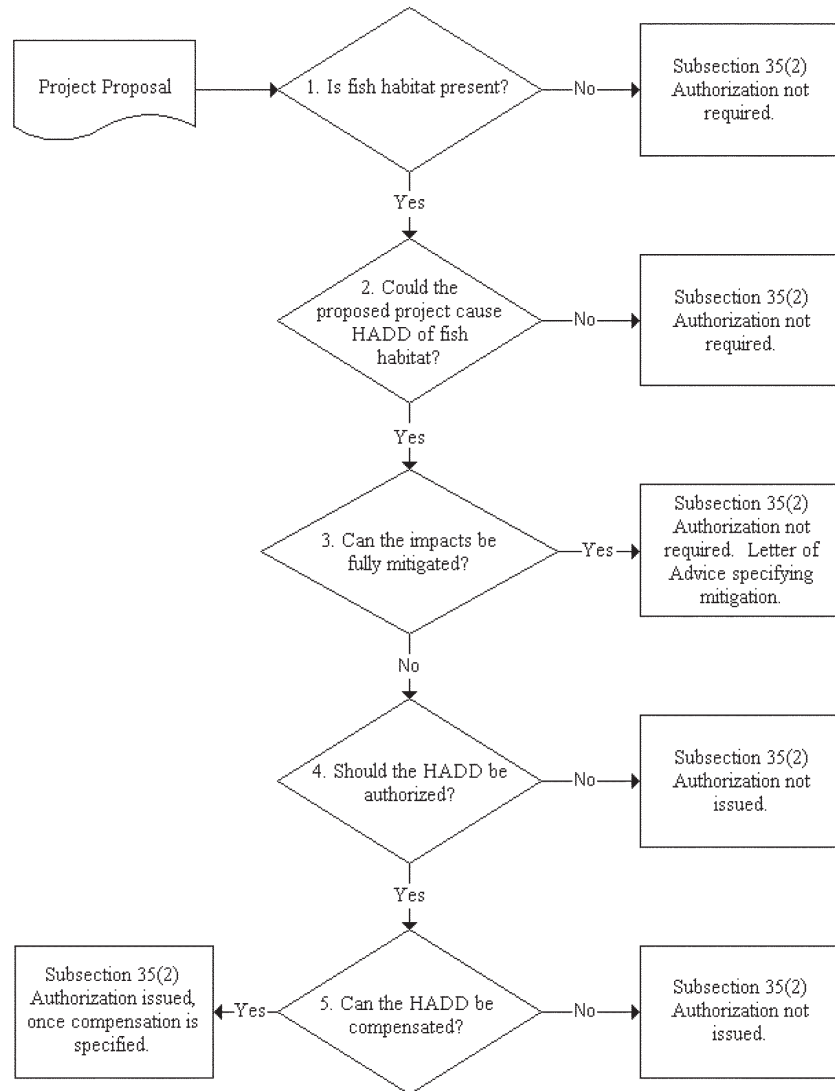
110. Online: Fisheries and Oceans Canada <http://www.dfo-mpo.gc.ca/canwaters-eauxcan/infocentre/guidelines-conseils/guides/law-lois/index_e.asp> (last modified: 1 January 2003).

Your purpose in contacting this agency is to find out whether your project is likely to harm fish habitat. If there is indeed such a danger, the agency will be able to tell you whether the damage to the habitat could be avoided or lessened by changes in project design or implementation.¹¹¹

According to DFO, “an environmental assessment should be initiated concurrently with the determination, in either step 2 or 3 of the decision making process (Figure 1, see below), that a project is likely to result in a HADD, and an authorization is therefore likely to be required.”¹¹²

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111. DFO, *What the Law Requires—Directive on the Issuance of Section 35(2) Authorizations*, online: Fisheries and Oceans Canada <http://www.dfo-mpo.gc.ca/canwaters-eauxcan/infocentre/guidelines-conseils/guides/law-lois/steps_e.asp> (last updated 1 January 2003).
 112. DFO, *Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat* (1998) at 4.0, online: DFO <http://www.dfo-mpo.gc.ca/canwaters-eauxcan/infocentre/guidelines-conseils/guides/hadd/hadd_2_e.asp#fig1> (last modified: 25 November 2002).

Figure 1. A decision framework for the determination and authorization of harmful alteration, disruption or destruction of fish habitat



This entails a detailed review of potential project impacts on fish habitat and development of fish habitat mitigation measures prior to a decision being made on whether a screening is required under the CEAA.¹¹³

5.6 *Planning of the Sunpine Project and Alberta's Approval of the Sunpine Project*

Information is provided below regarding the origin of the Sunpine Project and the process that resulted in provincial approval of the Sunpine Project. This information is relevant to a consideration of whether Canada is failing to effectively enforce the *Fisheries Act* habitat protection provisions and the CEAA in regard to the Sunpine Project. No evaluation of Alberta's enforcement of provincial laws is intended or implied.

In July 1992, Sunpine Forest Products Ltd. ("Sunpine") signed a forest management agreement ("FMA") with the Alberta government giving Sunpine long-term tenure over more than 2500 square miles of forest land in the Rocky Mountain foothills of West Central Alberta (the "FMA area").¹¹⁴ The FMA came with timber harvest planning and operating ground rules negotiated by Sunpine and the Alberta government ("Ground Rules") containing objectives, standards, and guidelines for such things as road planning and fish habitat protection within the FMA area.¹¹⁵ Under the Ground Rules, Sunpine is required to use existing roads for its log hauls whenever possible.¹¹⁶ In 1993, as part of its General Development Plan for 1994, Sunpine presented the Land and Forest Service ("LFS") of Alberta Environmental Protection ("AEP") with a proposal to build a permanent, 40 km, all-weather mainline road ("Mainline Road" or "MLR") up the middle of its new FMA area (the "Sunpine Project") to deliver logs to its new laminated veneer lumber plant in Strachan, Alberta.

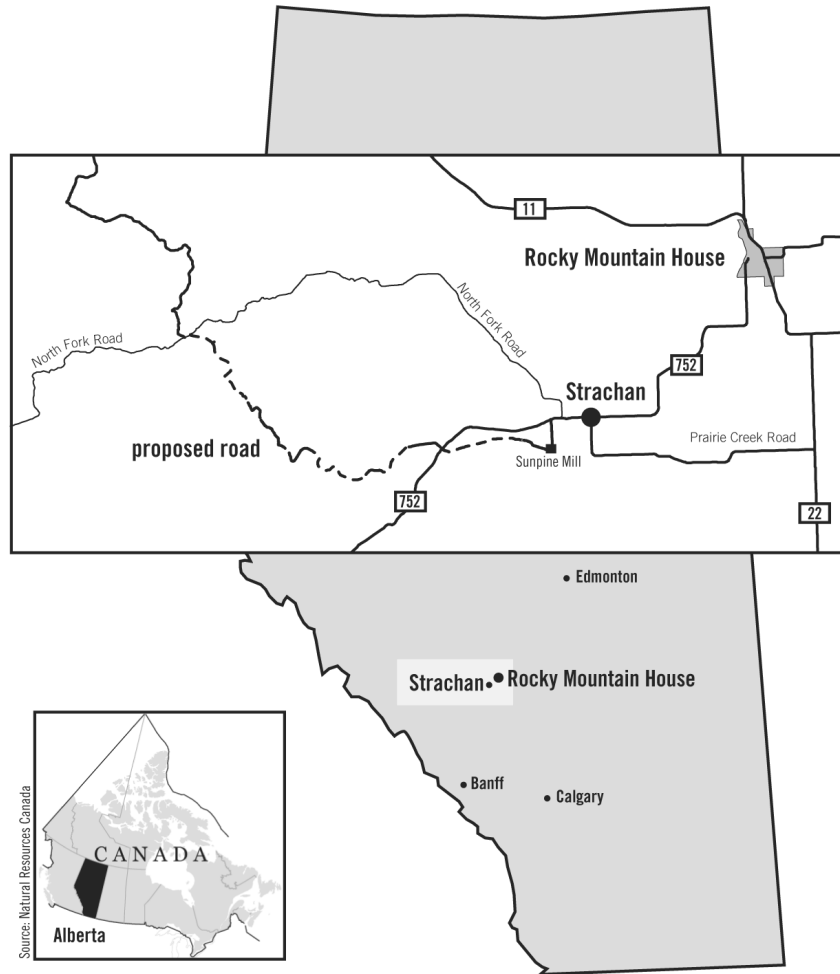
113. Ss. 20(2), 37(1)(a), (2) of CEAA.

114. ForestVIEWS Alberta, 23 July 1992 Forest Management Agreement (O.C. 408/92) including amendments authorized by O.C. 131/96 between the Crown in Right of Alberta and Sunpine; and Sunpine FMA Timber Harvest Planning and Operating Ground Rules approved by K. Higginbotham, Assistant Deputy Minister, LFS, 3 September 1993 [hereinafter "Ground Rules"] (Unofficial Office Consolidation).

115. Ground Rules at 5.4.1 and 6.3.3.1.

116. Ground Rules at 5.4.1, Standard #3.

Figure 2. Map



Until then, LFS, the Municipal District of Clearwater (the “MD”), municipal residents and Sunpine had worked on the assumption that Sunpine would use existing public roads—in particular, the North Fork Road (“NFR”)—to deliver lumber from its FMA area to its new plant.¹¹⁷

A document distributed to the public in the area explained:

Historically, the public road authorities have been responsible for the development, upgrading and maintenance of the roadway network in order to accommodate industrial development. Revenues collected from general and property taxes, fuel taxes and road user charges have been used to finance these public sector expenditures. More recently, public/private partnerships have seen private funds used to provide limited roadway improvements.¹¹⁸

Sunpine refused to pay for upgrades to the existing road network.¹¹⁹ According to Sunpine, one advantage of the proposed new, private road would be to enable all-season delivery of logs to the new plant (as opposed to winter-only log hauls), thereby ensuring continuous employment in the area.¹²⁰ Another would be that the new road would

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117. *Friends of the West Country v. Canada (Minister of Fisheries and Oceans)* (Federal Court of Canada, T-2457-96) (Affidavit of Martha Kostuch, dated 4 November 1996) at paras. 9-10: “At the Municipal Development Appeal Board Hearing regarding Sunpine’s rezoning application held on February 10, 1993, Ray Ferris, speaking for Sunpine, indicated the existing roads are adequate to handle the increased traffic which would result from Sunpine’s operation and that Alberta Department of Transportation believes the existing roads are underutilized. Copies of maps of existing roads in the area and 1993 traffic counts and the 1998 projected traffic patterns are attached as Exhibit 1 to this Affidavit [not reproduced]. In the reasons accompanying the Development Appeal Board’s Decision to approve Sunpine’s application, dated 26 February 1993, the following was stated: ‘Evidence was presented that the road system has ample capacity to accommodate additional traffic.’” See also Karl Rodtka, “Letter to the Editor” (23 March 1994): “[...] For the past four years, many people, time and time again, have expressed their concern over the safety and cost to the M.D. ratepayers of providing Sunpine with a good road system for their clear-cutting operations. Don’t be foolish, we were told, there is an excellent infrastructure in place for Sunpine and with all the extra tax money rolling in from Sunpine we’ll be able to rebuild all our roads so everyone will have better and safer roads to travel. [...]”
118. Stanley Associates Engineering Ltd., Strachan Area Transportation Network Public Workshop Information Package (March 1995).
119. Monica Ahlstrom, *The Mountaineer*, “Logging Road Concept draws mixed reactions” (2 March 1994).
120. Martha Kostuch, “Road Workshop, March 30, 1995” (handwritten notes) at 2 (opening plenary, presentation by Ray Ferris of Sunpine); 7 (comments of Ray Ferris in small group discussion); 9 (remarks by Peter Denney of Sunpine during closing plenary).

be paid for entirely by Sunpine¹²¹ (and any other commercial interests wishing to use the road in the future).¹²²

Under Sunpine's Ground Rules, a new, permanent road such as the Sunpine Project had to be approved pursuant to the process set out in Alberta's 1985 *Resource Road Planning Guidelines*. Under these Guidelines, Sunpine required a license of occupation ("LOC") to proceed with the Sunpine Project. LOCs are issued by LFS pursuant to a three-phase provincial process. The first phase consists of evaluating potential road corridors. The second phase involves selecting a road centreline within the corridor approved pursuant to Phase I. Once LFS approves a detailed route plan at the outcome of Phase II, the proponent can apply for an LOC and begin with road construction (Phase III). Phase I and Phase II approvals are issued based on consideration of engineering; socioeconomic; and biophysical factors. The *Resource Road Planning Guidelines* rely on inter-agency referrals to ensure that these three factors are properly considered. In December 1993, LFS referred Sunpine's proposal to the AEP Fish and Wildlife Service ("FWS") in Rocky Mountain House ("RMH"), near Strachan.

In December 1993, a fisheries biologist working at the RMH FWS office provided comments on the Sunpine Project to the Head of Timber Management at LFS in RMH. These comments are reproduced below:

As per our discussions of December 6, 1993, regarding the proposed haul road for Sunpine, I have the following comments:

1. The proposed road would cut through an area, which up to now is relatively inaccessible. Improved access would result in increased use of the area. This would negatively impact the fisheries by increasing harvest.
2. The building of a new road would increase the amount of silt entering the creeks crossed by the road. Silt loads would continue to enter until the ditches were re-vegetated and stabilized (minimum of two years).
3. A new road would increase the amount of run-off resulting in increased discharge. During storm events the amount of water entering the creeks would increase resulting in increased natural erosion. Spring runoff would also be larger than currently experienced.

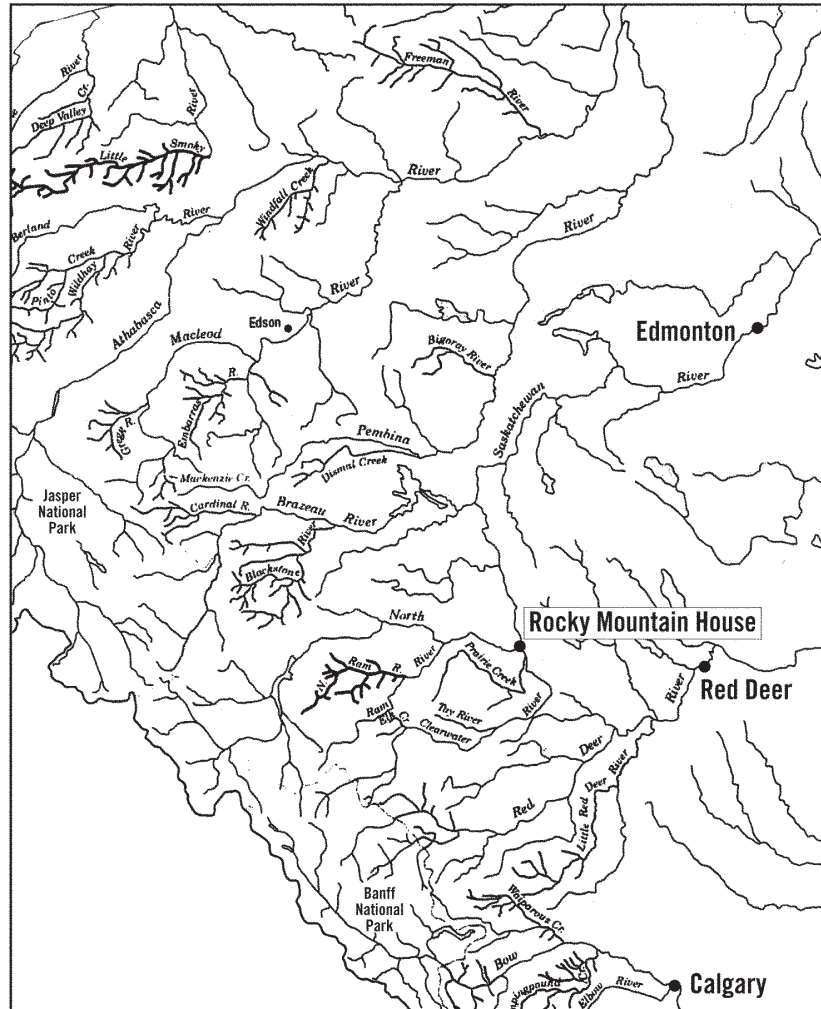
121. *Ibid.*

122. 7 July 1995 Memorandum from R.D. Konynenbelt, Fisheries Technician, Rocky Mountain House, to George Robertson, Forester i/c Forest Mgmt. Section, Southern East Slopes Region, Rocky re: Sunpine Mainline Road Proposal—Revised Phase I Submission, dated 28 June 1995 at 3.

4. Considerable instream work would be required at all river crossings (i.e., installation of bridges and culverts).
5. Instead of building a new haul road, I would recommend that Sunpine use the North Fork Road. The North Fork Road will probably have to be upgraded resulting in silt entering the creeks during the construction phase and up until the new ditches are revegetated. This will occur at either site. On the plus side, there would be less environmental impact by using the North Fork Road: a) no new country would be opened up, b) runoff would not be significantly increased over current levels. The North Fork Road crosses fewer streams and lower down in their watersheds than the proposed haul road resulting in less impact.¹²³

123. 9 December 1993 memorandum from L.A. Rhude, Fisheries Biologist (FWS-RMH) to G. Robertson, Head, Timber Management, RMH re: Proposed Haul Road—Sunpine Forests Ltd.

Figure 3. Local Watersheds



Also in December 1993, a wildlife technician working for the RMH FWS office made the following comments on the proposed haul road:

I see no reason to duplicate existing road access as proposed. The North Fork Road has already been partially upgraded and starts at the same

location as the proposed haul road. No extra travel distance would be involved and the only significant necessary alignment change would be at the Ram River crossing.

The proposed access road will negatively impact wildlife populations and watercourses throughout its entire length. Secluded headwaters access on numerous streams will be subjected to heavy long term environmental damage as well as non-sustainable pressure on fisheries and wildlife resources by various user groups. I strongly recommend that the section proposed from 3-38-9-W5 to 2-39-12-W5 be deleted and existing access be utilized.¹²⁴

Alberta's *Resource Road Planning Guidelines* do not require public input or consensus as part of the process for issuing an LOC. In regard to Sunpine's MLR proposal, a successful multi-stakeholder site selection process for Sunpine's laminated veneer plant resulted in a public expectation that there would be a similar process for identifying an optimal log haul route for Sunpine.¹²⁵ In 1994, Sunpine hired a consultant to gauge public opinion on the issue. At the outcome of public consultations, the consultant recommended forming a multi-stakeholder committee to gather public input and make a consensus recommendation on a road corridor to Sunpine, one that Sunpine would be expected to implement.¹²⁶ The consultant also stated that detailed information about available wood supply and Sunpine's long-term harvesting plans—which was not available at the time—would be required in order to make an informed decision regarding an optimal log haul route.¹²⁷ Sunpine did not act as recommended in the consultant's report.¹²⁸

124. 14 December 1993 memorandum from Brian R. Burrington, Wildlife Technician (FWS-RMH) to George Robertson, Head, Timber Management, Rocky Clearwater Forest, Land and Forest Services.

125. Western Environmental and Social Trends, Inc., "Sunpine Forest Products Ltd.—Issue Scoping Report" (2 August 1994) under "Public Consultation": "There is almost universal agreement among respondents that there is a need to create a multi-stakeholder road committee with clear goals and objectives and agreed-upon ground rules for decision-making. The need for a neutral chairperson who is skilled at consensus building has been identified by most respondents. Further, while it is recognized that the Minister of Environmental Protection has final authority, a multi-stakeholder committee is seen as having the authority to help Sunpine find the optimal main hauling road from the north end of the FMA to its plant site. This option is supported by the successful plant siting process."

126. *Ibid.*

127. *Ibid.* at 2.

128. 2 October 1994 Memorandum from Wendy Francis, Western Environmental and Social Trends, to Martha Kostuch: "[...] Attached is a copy of our last memo to Bruce Buchanan. You will see that we have tried hard to impress upon him the risks of not dealing with the road issue. Please treat the attached as confidential. Susie says that Forestry always has been supportive of a multistakeholder process and in fact,

Thereafter, Sunpine, LFS and the MD together commissioned a study of the area's transportation needs for the purpose of assessing potential log haul routes and establishing criteria for ranking alternatives. After a review of several alternatives, the transportation consultant identified an upgraded NFR and the MLR as the most promising routes, concluding that neither was clearly preferable to the other. The media subsequently reported that Sunpine "threatened to ignore their own road study report" because the study did not conclude in favor of the MLR.¹²⁹

In March 1995, the MD, LFS and Sunpine jointly funded a public workshop at which Sunpine and the MD made presentations endorsing the MLR, and the public was invited to participate in small group discussions to evaluate alternative routes based on criteria found in the transportation study. Several issues emerged at the workshop: concerns over safety of the NFR (a public road) as a log haul route; absence of information regarding environmental impacts associated with different routes; and foreseeable access management problems associated with the MLR option.

being against one would be contrary to their policies. We thought that Sunpine had been convinced of the merits of proceeding in the way we recommended. Unfortunately, it seems they have not yet learned a lesson."

129. Monica Ahlstrom, *The Mountaineer*, "Sunpine may disregard own road study report" (29 March 1995, Fourth Section): "Sunpine Forest Products Ltd. has threatened to ignore their own road study report because the final outcome of the report did not clearly support Sunpine's preferred option. Sunpine agreed to commission the report a number of months ago as part of a public input process recommended by the MD of Clearwater and Alberta Land and Forest Services. This after Sunpine had refused to form a multi-stakeholders' committee as recommended by a consultant the company had hired. A draft of the report, compiled by Carl Clayton of Stanley Associates Engineering Ltd., was presented to MD Council, Bruce Buchanan of Sunpine and Lorne Goff of Alberta Forest Services, during the regular Council meeting on March 21. A public workshop on the report, organized by the Forest Advisory Committee, is scheduled for March 30 at the Centre. Buchanan said he is upset that Sunpine now has to defend itself against a report it paid for. He said the report was initially agreed to because the company felt the Main Line route option would prove to be the better option, environmentally and economically, over the others. As it turns out that is not the case. Buchanan added he was 'concerned with the perception people will get from the report.' Shaking his head councilor Richard Gabler told Buchanan 'it's a little too late to change the game now,' adding 'unless you want to jump the whole process.' Buchanan answered, 'that's what I'm considering at this point.' [...] Brian Irmen stated that the reason for the workshop was to get public comment on the report, and that the process was not to vote on one option or another. As well, the public should be well aware of the fact that Sunpine was still free to proceed with any option they choose. [...] As the discussion continued to get heated Clearwater Forest Superintendent Lorne Goff interrupted saying it was important to remember the issue did concern a public resource on public lands. A consensus was reached that the public workshop would proceed and that Sunpine should clearly present its position at the workshop."

Sunpine's Forest Advisory Committee ("FAC") members participated in the small group discussions at the public workshop. Sunpine asked the FAC to review the results of the transportation study and the proceedings of the public workshop and come up with a recommendation for a log haul route. Sunpine is required to have a FAC under its FMA. Sunpine is not bound by recommendations of the FAC, but at the time, LFS participated in FAC meetings to monitor Sunpine's responses to public concerns. FAC members represent local political, industrial, commercial and social interests, and Sunpine. In 1995, an environmental group was represented on the FAC.

In late May 1995, Sunpine asked for and received a FAC recommendation in favor of the MLR, subject to a commitment from Sunpine to control access to the MLR and mitigate impacts on fish and wildlife.¹³⁰ All FAC members voted in favor of the MLR except the environmental group, who refused to endorse the MLR proposal in the absence of a long term road development plan and detailed environmental information on, and an environmental assessment of, the two alternatives (MLR, NFR), including baseline data on fisheries resources in the area.¹³¹

On 7 July 1995, a fisheries technician working for FWS submitted comments to LFS on Sunpine's Revised Phase I Submission for the Mainline Road. He stated

[t]he fisheries concerns remain the same as indicated by L.A. Rhude, Fisheries Biologist—Rocky, in his 9 December 1993 memo to yourself (copy attached). I would stress that the proposed new road would increase stream siltation to the detriment of the stream and fisheries resources, and would expose currently remote fisheries (and other resources) to increased pressure. These are the same two issues that stood out during the public review mentioned in the Introduction section of the proposal.

I have several other general comments/ questions/concerns:

- 1) The majority of the proposal is based on a comparison of impacts between the North Fork Road (NFR) and the Mainline Route (MLR).

130. Martha Kostuch, "Sunpine P.A.C. [Public Advisory Committee] Meeting, May 29, 1995" (handwritten notes) at 15: " Peter [Denney] solicited the following recommendation from the committee with one dissent: support Sunpine applying for Mainline Road if access control and if environmental questions including ESA's are addressed."

131. *Ibid.* See also Sunpine Forest Advisory Committee, Monday, May 15, 1995, Minutes, Item #4 - "Review negative aspects of Mainline Road as identified; Friends of the West Country - See attached list of additional information requested."

This is comparing apples and oranges, as one road exists, and one is proposed. The impacts of the NFR (including fish habitat and angling impacts) have already been realized, and are not likely to change significantly over the long term, even with road upgrading and increased traffic as a result of Sunpine's use. Impacts by the MLR would be new and additional to that of the NFR; not a matter of one or the other as the proposal attempts to impress.

- 2) Is public access control possible given the nature of the road and its intended level of use? Perhaps the road could be gated during no-hauling periods, but it is unreasonable to assume that through signage, the public will refrain from using it when the gate is open. Another concern is that a high grade road such as this has a tendency to become traditional access over time, thereby undermining any initial intention of public access control.
- 3) Part of the new road agenda appears to be based in economic interest outside of logging operations ("...opportunity to generate road usage income [by commercial users] to offset capital and maintenance costs."). This part of the agenda may be much larger than we realize.
- 4) Related to #3) is the issue of the potential increase in other commercial use of the area once a permanent road is established. These other uses could have significant overall impacts on the streams and other natural resources in the area, on top of the impacts of logging, if the area were opened up by a permanent road.

In summary, I believe that the MLR proposed would cause significant environmental disturbance to the area over the long term; disturbance that could best be avoided by rejecting the MLR proposed. I recommend that the NFR be promoted, even considering the necessary upgrading, as I believe it would be far less impact to fisheries resources than the proposed MLR.

In order to reduce some of the public concerns regarding log hauling on the NFR, I would support the construction of a short stretch of road to bypass the residential area. This road could cross North Prairie Creek at some point north of all or most of the residential area, then head generally south toward the Sunpine Mill. I realize this would result in several new stream crossings also, but this option remains preferable to the new MLR. This bypass road would likely reduce the haul distance on the NFR by several kilometers as well.¹³²

132. Memorandum, dated 7 July 1995, from R.D. Konynebelt, Fisheries Technician, Rocky Mountain House, to George Robertson, Forester i/c Forest Mgmt. Section, Southern East Slopes Region, Rocky re: Sunpine Mainline Road Proposal—Revised Phase I Submission, dated June 28, 1995.

On 1 August 1995, AEP advised Sunpine of “deficiencies” in Sunpine’s Revised Phase I Mainline Road Proposal.¹³³ Under “Fisheries,” the letter stated: “It is unlikely that an upgrade of the NFR will increase angling significantly when compared to development of new access. A NFR upgrade would cross fewer streams and lower down in their watersheds than the proposed MLR resulting in a lower risk to fishery habitat. Further details are required as to how sedimentation would be controlled.”

In response to these comments, Sunpine issued a “Phase I Revision Supplement” [the Secretariat did not obtain a copy of this document]. On 22 August 1995, an FWS employee commented:

There doesn’t appear to be any new information or answers concerning the question about wildlife or fisheries in the supplement. There are no suggested mitigative measures included for either resource. Some important points have been deleted as follows:

[...]

The FAC supported the Mainline route only with the understanding that the North Fork Road would be closed and reclaimed west of the Ram River.

[...]

Contrary to Sunpine’s statement, there is no way to construct a road across a watercourse without habitat loss and some long-term impact to the stream and/or fishery.

[...] ¹³⁴

Surveys of fish and fish habitat carried out in 1994 and 1995 by Pisces Environmental Consulting Services Ltd. (“Pisces”) for Sunpine at eight of the twenty-one stream crossings included in the Sunpine Project concluded that quality of fish habitat was high in at least five of the streams, and that the Sunpine Project would subject all these watercourses to increased sediment loads from road cuts, fills and ditches in the medium term and from the road surface over the life of the road (Townsend: 6/1/94; Allan: 11/1/95).¹³⁵

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133. Letter, dated 1 August 1995, from George Robertson, Forester i/c Forest Management Section to Peter Denney, Sunpine, Re: Phase 1—Sunpine Mainline Road Proposal.
134. Memorandum from Brian Burrington, FWS-AEP to George Robertson, Lands and Forest Services, Rocky Mountain House, 22 August 1995.
135. See Appendix 6.

On 25 August 1995, LFS approved the MLR corridor “as proposed in Sunpine’s Revised Phase I submission and Supplementary Information, and as conditionally endorsed by the Forest Advisory Committee.”¹³⁶ Sunpine built and used a temporary road within the proposed Mainline corridor in the winter of 1995-96. LFS issued Phase II approval to Sunpine in September 1996, and Sunpine then built the permanent road in 1997. Photos of the Mainline Road are attached, in Appendix 7.

5.7 Canada’s Actions in Regard to Alleged Violations of the Fisheries Act and the CEAA in Connection with the Sunpine Project

Many of the documents cited in this section of the factual record are listed in Appendix 6, in chronological order. In the text, the author and date of each document is provided for ease of reference to Appendix 6.

Friends of the West Country wrote to the federal Minister of Fisheries and Oceans (“MFO”) in Ottawa on 7 June 1995, stating “Sunpine Forest Products is proposing to build a new permanent, all weather road up the middle of their Forest Management Agreement area” (Kostuch: 6/7/95). The letter reproduced the conclusions of a June 1994 Pisces report (see above, s. 5.6) on fish habitat quality in four creeks (high) and impacts the proposed haul road crossings would have on fish habitat in those creeks (Townsend: 6/1/94). The Friends of the West Country letter also quoted an FWS fish and wildlife biologist regarding negative projected impacts of the road on fish and fish habitat. The letter stated

[b]ased on your authority under Section 37 of the *Fisheries Act*, I ask that you request such plans, specifications, studies, procedures, schedules or other information to enable you to determine whether the proposed mainline road is likely to result in any alteration, disruption or destruction of fish habitat.

After reviewing the materials and information requested, I ask you to determine whether an offence under subsection 40(1) or (2) is likely to be committed (Kostuch: 6/7/95).

The MFO replied on 26 July 1995, stating

[y]our letter is the first notification that the Department of Fisheries and Oceans has received with respect to the proposed road construction

136. Letter from L.D. Goff, Regional Director, AEP Southern East Slopes Region, to Sunpine re: Mainline Road Proposal—Phase I, 25 August 1995.

project. My department is currently preparing a request for relevant information regarding the proposal [...] from Sunpine Forest Products. This information will allow DFO staff to determine the potential impacts of the proposal on fisheries resources” (Tobin: 7/26/95).

The response also stated

[m]y department is prepared to work with provincial colleagues to ensure the protection of fish and fish habitat in the Forest Management Area. DFO Central and Arctic Regional staff will be contacting Alberta Fisheries Management officials on this subject to determine what action the province is taking with regard to the stream crossings (Tobin: 7/26/95).

Martha Kostuch hand-delivered the MFO’s response to FWS on 28 July 1995, and an FWS employee then recommended that LFS put “any action relative to approvals on hold, until the province has determined how it will respond to this development.”¹³⁷ He repeated this recommendation on 7 September 1995 and 26 September 1995.¹³⁸

On 1 August 1995, the DFO Habitat Management Division (“HMD”) in Winnipeg, the agency responsible for issuing HADD authorizations for activities in Alberta, wrote to Sunpine, stating

Subject: Sunpine Forest Products—Proposed Mainline Haul Road

The Department of Fisheries and Oceans (DFO) has received a public inquiry concerning the above captioned subject. From the information provided it appears the proposed works or undertakings have the potential to affect fish and fish habitat.

In order for DFO to determine if the works or undertakings are likely to harm fish habitat, would you please provide the following information:

- 1) All plans, specifications, studies, procedures, samples and other information required to permit an assessment of the potential impact of the proposal on fish and fish habitat; and,

137. Inter-Office Memorandum from D.G. Christiansen, AEP-FWS to F. Cardinal, re: DFO Involvement in Sunpine Haul Road Review, 28 July 1995.

138. Memorandum from D.G. Christiansen, Head, Fisheries Management, Eastern Slopes Region, AEP-FWS to F. Cardinal, Regional Director, AEP-FWS, Re: Sunpine Mainline Haul Road, 7 September 1995; and Memorandum from D.G. Christiansen, Head, Fisheries Management, Northern and Southern East Slopes Region, AEP-FWS to R.E. Kerber, Water Resources Engineer, Water Resources Admin. Division and R. Thompson, District Superintendent, Clearwater District, Land & Forest Service, Re: Sunpine Mainline Haul Road, 26 September 1995.

- 2) Mitigation and/or compensation measures proposed to alleviate potential impacts and/or compensate for any loss in the capacity of habitat to produce fish. You must also provide evidence that the measures will be effective, that their effectiveness will be monitored and that any deficiencies will be corrected.

DFO's review of your proposal will be undertaken within the framework established by our *Policy for the Management of Fish Habitat* (copy attached) which also states that DFO's goal of fish habitat conservation is guided by the principle of No Net Loss of productive capacity of fish habitat. Additional information and direction concerning the framework of our review and your obligations under the *Fisheries Act* is provided in the two attached pamphlets, 'Guidelines for Attaining No Net Loss', and 'What the Law Requires: The Directive on the Issuance of Section 35(2) Authorizations' (Hopky: 8/1/95).

This letter was copied to FWS staff. DFO later stated

[...] In regard to Subsection 37(1), I advised you [Friends of the West Country] [on 18 October 1995] that in my letter of information request to Sunpine Forest Products there was no reference to Subsection 37(1), and that I did not believe our review is being undertaken pursuant to Subsection 37(2). For your information, there has been no decision that a Subsection 37(2) order is needed or will be used (Hopky: 12/15/95).

On 3 August 1995, DFO-HMD in Winnipeg wrote to FWS stating

Re: Sunpine Forest Products—Proposed Permanent Haul Road

As you are already aware following our telephone conversation of June 21st, the Department of Fisheries and Oceans (DFO) received an inquiry concerning the above referenced project proposal. At this time, I am writing to apprise you of our intention to review this proposal pursuant to DFO's responsibilities under the *Fisheries Act*.

To this end, DFO has requested, from Sunpine Forest Products, any information that they are able to provide which will allow us to assess the potential impacts of the proposed project on fish and fish habitat. In addition, we have requested descriptions of any proposed mitigation and/or compensation measures as well as proposed monitoring programs and anticipated remedial measures.

You indicated to me that Larry Rhude is reviewing this project proposal on behalf of your department. In light of our shared responsibilities for administration of the *Fisheries Act*, I propose that we work cooperatively to ensure adequate protection of fish and fish habitat in relation to this pro-

ject proposal. I would welcome any comments or discussion with Larry or yourself regarding this review (Linsey: 8/3/95).

On 14 August 1995, the Assistant Director of AEP Fisheries Management Division wrote to the Regional Head of AEP Fisheries Management in RMH regarding the 3 August 1995 letter from DFO, stating:

I would advise that we should not be working with DFO in this regard. This is part of a much larger picture related to the administration of the *Fisheries Act*. They refuse to entertain any manner of formal working relationship with the Prairie Provinces fisheries agencies even on an interim basis. On many fronts (e.g., habitat and aquaculture) we have assumed we have an agreement only to find there is none, because of lack of agreement between their regional office in Winnipeg and Ottawa. Our concerns seem to have no place on their agenda (it recently took three months for the Deputy minister of DFO to reply to our Deputy Minister on the simplest of questions).

[...]

I would urge you make Linsey aware that without any agreement we cannot provide any information or advise him on this item. Furthermore, he should be advised that we will be supplying our conditions for the protection of fish and fish habitat through the provincial permitting system, as we have done for more than 2 decades.¹³⁹

In its 5 June 2003 comments on the accuracy of the Draft Factual Record, Canada stated: “It is important to recognise that the absence of a formal agreement did not affect the ability of DFO officials to evaluate/prevent any potential and actual project impacts pursuant to the application of the *Fisheries Act*. In fact, DFO and Alberta enjoyed a positive and productive working relationship in the review of the Sunpine Project.”

On 21 August 1995, FWS advised DFO in Winnipeg that

[...] due to the unfortunate absence of an agreement between our two agencies on the administration of the *Fisheries Act*, provincial Fisheries staff are unable to provide the requested input and comments to the proposal review that the Department of Fisheries and Oceans has chosen to initiate. Our responsibility to provide advice on fisheries matters to provincial permitting authorities, dictates that we cannot also provide recommenda-

139. Memorandum from C.W.B. Stubbs, Assistant Director, Fisheries Management Division, AEP to D. Christiansen, Regional Head, Fisheries Management, RMH, re: DFO Memo to You—3 August 1995 Re: Sunpine Haul Road, dated 14 August 1995.

tions to another authority who may choose to issue an approval with conflicting conditions. Such an occurrence would not be in the best interest of the resource or of the proponent (Christiansen: 8/21/95).

On 25 August 1995, LFS approved the corridor for the Sunpine Project under Alberta's legislation and Alberta's *Resource Road Planning Guidelines* (see above, s. 5.6).

In a 6 September 1995 Note to File regarding the Sunpine Haul Road, the Regional Head, Fisheries Management, AEP, RMH wrote:

G. Robertson of LAFS [AEP Land & Forest Service] called to ask me to meet with himself and [name deleted under access to information legislation] regarding some correspondence [name deleted] had received from Brian Tobin on the matter of the Sunpine Haul Road.

[...]

[Name deleted] asked what my response had been to the Federal request for cooperation. I advised [name deleted] that I had been directed to respond to DFO and advise them that our primary responsibility was to the provincial agencies, hence we could not be also providing recommendations to DFO on the same matter. I advised that I expected if DFO requested to review our data on the streams in question that they would be given the same access as any consultant, etc.

[...]

[Name deleted] questioned our obligations under the *Fisheries Act* as a consequence of our appointments [...]. [Name deleted] suggested that even though we were not delegated authority to issue authorizations we still had the obligation to enforce the Act. I advised [name deleted] that if we received a complaint of a violation that we would investigate it. [Name deleted] indicated that if Sunpine started work in fish bearing waters without proper approval under the *Fisheries Act* that [name deleted] group would file a complaint of a violation. [Name deleted] indicated they didn't want to see any field staff caught in the middle of this, but [name deleted] group does not agree that it's clear that our staff are in the clear on these matters if we are only providing recommendations on fisheries matters to provincial permits [*sic*].

[...]140

140. Note to file from D. Christiansen, AEP, re: Sunpine Haul Road, cc. F. Cardinal, M. Barrett, B. Stubbs, 6 September 1995.

A 28 September 1995, note to file by a fisheries technician working for AEP FWS states:

Sunpine MLR

28 Sep/95 Gary Lindsay DFO

- was out to visit site last week with Reg Watkins and Sunpine reps (Neil Reynolds, Keith Branter, Jim Allan, Peter Denney).
- NWPA permits required for Ram R. and Prairie Cr., and those applications will trigger an environmental review (CEAA).
- from what he saw (up to the Ram R.) it seems like they're acting responsibly and trying to do their best.
- doesn't think they need an authorization under the *Fisheries Act* (regardless Feds or Province who is in charge).
- he feels we're running the show locally—so don't feel restricted in input to our provincial regulatory agencies.
- if we felt there was a clear destroying of fish habitat, unmitigable, then he can see the need for DFO involvement and a final say in the project.¹⁴¹

On 15 October 1995, the Regional Head, Fisheries Management, of AEP wrote to the Assistant Director, Fisheries Management Division, AEP, stating:

As you are aware the Sunpine Mainline Haul Road proposal is under review by DFO with regard to the stream crossings that will be required. We have been advised by Sunpine's engineering consultant that the review by both DFO and the Canadian Coast Guard is proceeding very slowly, consequently the Federal approvals for stream crossings will not be received in time to meet the company's needs for logging access for that area this winter. Sunpine and LAFS [Land & Forest Service] has requested ourselves and Water Resources to meet with them on 18 October 1995, to consider the company's request for temporary crossings on the Mainline Haul Road Right of Way for this winter to allow log haul.

This becomes somewhat confusing, since although permanent crossing proposals at the same sites are under review by the Federal Government we are now being asked to comment on different types of crossing structures at the same locations. I have two chief concerns in this matter. Firstly, that recommendations we provide at this stage may conflict with require-

141. Note to file by Rocklyn Konyonenbelt, Fisheries Technician, AEP-FWS RMH, 28 September 1995.

ments forthcoming from DFO. Secondly, that the public who requested the Federal review will not see any difference between the permanent and temporary crossings, and the result will be a major blowup over the jurisdictional question.

Given this situation, I am requesting some written direction from the Division on how regional Fisheries staff should participate in this meeting and the subsequent referrals.¹⁴²

On 17 October 1995, the Head, Fisheries Habitat Protection Branch and Assistant Director, Fisheries Management Division of AEP responded, stating:

1. Notwithstanding the potential for conflict between our conditions on temporary access and DFO requirements, it is our responsibility to advise the [provincial] licensing authority of our conditions. As our first call to order we must advise on the issue of fish and fish habitat to the best of our ability.

Whether the licensing authority chooses to use or not our conditions, or, whether they wish to delay issuance of their permit in respect of DFO response is not for us to debate or concern ourselves with.

2. I agree that the public perception will be awkward for all concerned. However, I view that to be secondary to our responsibility as we see it: advising on fish and fish habitat. It appears, however, that the current dispute between Alberta Fisheries and DFO re: a protocol or MOU for the administration of Section 35 is already very public. It also appears to me, that DFO has more concern with their hands on administrative presence, than advancing the agenda for the protection and enhancement of fish habitat in Alberta.

In summary, our position at the meeting will be as it has always been, i.e., advising the licensing authority and, in this case, the applicant, on our expectations for conditions to be placed on provincial permits for the protection of fish habitat. It is our view that if our conditions are met then the spirit and intent of the *Fisheries Act* is satisfied.¹⁴³

142. Memorandum from D.G. Christiansen to C.W.B. Stubbs re: Sunpine Mainline Haul Road—Temporary Access, 13 October 1995.

143. Memorandum from C.W.B. Stubbs, Head, Fisheries Habitat Protection Branch & Assistant Director, Fisheries Management Division, AEP Natural Resources Service Fisheries Management Division to Dave Christiansen, Regional Head, Fisheries Management re: Sunpine Mainline Haul Road—Temporary Access, 17 October 1995.

On 23 November 1995, MFO wrote to Friends of the West Country, stating:

Thank you for your letter regarding Sunpine Forest Products' proposal to construct a permanent road through its Forest Management Area.

Officials of my department are currently reviewing the potential effects of the proposal on fish and fish habitat in accordance with the requirements of the *Fisheries Act* and on navigation under the *Navigable Waters Protection Act* (NWPA).

The review under the *Fisheries Act* will determine whether potential fisheries impacts can be mitigated, whether compensation is required and whether an environmental assessment pursuant to the *Canadian Environmental Assessment Act* (CEAA) is required. The review has the purpose of protecting the fisheries resources in the watercourses that would be traversed by the proposed road. With regard to your questions on Alberta's views on the project, I suggest you contact them directly.

The proponent, Sunpine Forest Products, has provided DFO with general information on fish and fish habitat concerns as well as site-specific plans for the first four proposed crossings. These are currently under review and we expect to receive similar plans for the remaining stream crossings in the near future.

With respect to NWPA involvement, we anticipate an application in the near future for approval of possibly two bridges, one crossing the Ram River and the other at Prairie Creek. Once a formal NWPA application is received, a determination will be made on the scope of the environmental assessment which would be required under the CEAA (Tobin: 11/23/95).

A 20 March 1996 newspaper article states:

[...]

Alberta Environmental Protection Land and Forest Service issued phase I approval of the road allowing the company to proceed with the design work within a half-mile corridor, with the detailed planning subject to approval before the road can be completed. There were a series of conditions attached to the Phase I approval which required the company to control access to the road.

Meanwhile, the company has built approximately 14 km of road along the corridor northwest of Prairie Creek Campground under a class 4 temporary road approval. It has been used this winter for logging in about 30 cutblocks in the area.¹⁴⁴

144. Brian Mazza, *The Mountaineer*, "Sunpine Road comes under federal scrutiny" (20 March 1996).

As noted below (s. 5.8), DFO staff observed the temporary road during a helicopter tour in April 1996. The Secretariat has received no information regarding whether DFO requested any information from Sunpine in connection with the temporary road or undertook any review of its potential impacts on fish habitat.

On 13 July 1996, Martha Kostuch wrote to MFO as follows:

On May 20, 1996, I wrote Glen Hopky, Fisheries and Oceans Habitat Coordinator, and asked him several questions regarding their review of Sunpine Forest Products' proposal to construct the mainline road. In my letter to Glen Hopky, I referred to the former Minister Brian Tobin's letter to me, dated November 23, 1995.

Glen Hopky responded on June 21, 1996, but unfortunately he did not answer my questions so now I am writing to you as the responsible minister.

What is the status of the review of the potential effects of the proposed road on fish and fish habitat in accordance with the requirements of the *Fisheries Act*?

If the *Fisheries Act* review has been completed, please send me a copy of the results and conclusions of the review. If the review has not been completed, when will it be completed?

Did the *Fisheries Act* review determine that an environmental assessment pursuant to the *Canadian Environmental Assessment Act* is required? If not, what are the reasons it was determined that no assessment was required? If so, what is the status of the assessment? (Kostuch: 7/13/96).

On 9 August 1996, Martha Kostuch wrote to MFO as follows:

Please refer Sunpine Forest Products' proposed mainline road including the Ram River and Prairie Creek bridges and the other 19 stream crossings to [federal] Minister [of Environment] Marchi for an environmental assessment panel review (Kostuch: 8/9/96).

On 19 August 1996, Friends of the West Country brought an action in Federal Court to obtain the cancellation of permits issued to Sunpine by the Canadian Coast Guard on 16 August 1996, under the federal *Navigable Waters Protection Act* for two bridges included in the Sunpine Project. Friends of the West Country alleged that there were irregularities in screenings conducted by the Canadian Coast Guard under the CEAA prior to issuing the permits (see below, s. 5.8).¹⁴⁵

145. *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans) (T.D.)*, [1998] 4 F.C. 340.

MFO wrote to Martha Kostuch on 24 September 1996, stating:

I am responding to your letters of July 13, and August 9, 1996, regarding Sunpine Forest Products' proposal to construct a permanent haul road through its forest management area.

It was determined by my department that there were no significant concerns related to this project and a *Navigable Water Protection Act* approval was issued to Sunpine Forest Products on August 16, 1996.

Since the matter is now before the Federal Court of Canada, it would be inappropriate for me to comment any further.

Thank you for bringing your concerns to my attention (Mifflin: 9/24/96).

The Secretariat asked Canada to indicate at what point in time DFO determined that it did not have a CEEA trigger (no HADD would occur and therefore no s. 35(2) authorization would be required) in connection with Sunpine's Mainline Road.¹⁴⁶ Canada replied "September 1996" and referred the Secretariat to letters of advice issued by DFO to Sunpine in September 1996 regarding fisheries impacts mitigation requirements for two watercourse crossings on the Mainline Road¹⁴⁷ (see below, s. 5.8).

5.8 Facts Regarding Whether Canada is Failing to Effectively Enforce the Fisheries Act and the CEEA in Connection with the Sunpine Project

Many of the documents cited in this section of the factual record are listed in Appendix 6, in chronological order. In the text, the author and date of each document is provided for ease of reference to Appendix 6. In addition to providing information regarding enforcement of the *Fisheries Act* in regard to the Sunpine Project (i.e. the Mainline Road), this section contains related information concerning DFO's enforcement of the *Navigable Waters Protection Act* in connection with two bridge projects included in the Sunpine Project. References to "projects" are to the bridge projects; the Mainline Road is always referred to as the "Sunpine Project."

In 1994, shortly after Sunpine submitted its proposal for the Sunpine Project to LFS for review (see above, s. 5.6), DFO published

146. See Appendix 5 at 11(i).

147. DFO 22 January 2003 Reply, *infra*.

“Habitat Conservation and Protection Guidelines” (the “Habitat Conservation and Protection Guidelines”) intended to guide DFO habitat management staff in administering the habitat provisions of the *Fisheries Act*.¹⁴⁸ The Habitat Conservation and Protection Guidelines outline a standard approach to habitat conservation and protection in Canada, through the application of the no net loss guiding principle contained in the Habitat Policy (see above, s. 5.3.1). The Foreword to the Habitat Conservation and Protection Guidelines states

[t]his Guide is intended to ensure that projects that could affect fish and fish habitat are treated fairly, and predictably across Canada. Where provinces [such as Alberta] are involved in fisheries management, DFO will work in partnership with the appropriate provincial agencies. [...]

The guiding principles and procedures relating to site selection, mitigation and compensation which are described in this Guide are to be applied when assessing physical impacts of projects on fish habitat. [...]

The Habitat Conservation and Protection Guidelines contain a hierarchy of preferred options for habitat conservation and protection. Under this hierarchy, if current habitat productive capacity cannot be maintained if the project is implemented as designed, the preferred option is to change project design 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 should be considered. The Habitat Conservation and Protection Guidelines allow for habitat compensation and artificial propagation, but these are the least preferred options.

An appendix to the Habitat Conservation and Protection Guidelines contains a list of regional guidelines, including Alberta’s *Resource Road Planning Guidelines*,

used in DFO regional offices to facilitate and provide direction in the development of measures to mitigate impacts on fish and fish habitat. [...] Many of the Guidelines are, in fact, provincial guidelines that have been adopted by DFO Regions in order to facilitate the review process for proponents. These provincial guidelines are also consistent with the Policy for the Management of Fish Habitat. [...]¹⁴⁹

148. DFO, “Habitat Conservation and Protection Guidelines Developed from the Policy for the Management of Fish Habitat (1986)” (First Edition, 1994).

149. *Ibid.* Appendix III at 21—Central & Arctic Region—Road Construction.

In the course of inter-agency referral on the Sunpine Project between LFS and FWS staff pursuant to Alberta's *Resource Road Planning Guidelines*, in December 1993, FWS staff recommended against the Sunpine Project on the grounds that using an existing road would avoid causing new impacts on fish and fish habitat (see above, s. 5.6). FWS staff maintained this position from 1993 through 1995, until LFS issued Phase I approval to Sunpine for the Sunpine Project under the *Resource Road Planning Guidelines*. Under the Habitat Conservation and Protection Guidelines hierarchy of preferred options for fish habitat conservation and protection, FWS staff recommended relocation.¹⁵⁰ The Sunpine Project was not relocated. After LFS issued Phase I approval to Sunpine for the Sunpine Project in August 1995, FWS staff provided advice on mitigation measures to provincial permitting agencies. Under the Habitat Conservation and Protection Guidelines, in general, mitigation should only be considered if project relocation and redesign are not feasible.

Certain FWS staff working on the Sunpine Project had appointments as fishery guardians under the *Fisheries Act*.¹⁵¹ Under these appointments, they had the power to take enforcement action for violations of s. 35(1), but they did not have the power to issue authorizations under s. 35(2).¹⁵²

In June 1995, Friends of the West Country informed DFO that under Alberta's *Resource Road Planning Guidelines* inter-agency referral process, provincial fisheries staff recommended against the Sunpine Project in favor of using an existing road, on the basis of anticipated impacts to fish and fish habitat associated with the Sunpine Project as compared to the existing road (Kostuch: 6/7/95). DFO was also provided with a consulting report concluding that fish habitat quality at four stream crossings included in the Sunpine Project was high, and that the Mainline Road would result in long term sediment impacts to fish habitat that could not be fully mitigated (Kostuch: 6/7/95; Townsend: 6/1/94). At its discretion, DFO staff did not participate in the process for selecting the MLR corridor or alignment.

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150. In its 5 June 2003 comments on the accuracy of the Draft Factual Record, Canada stated: "FWS was not the only staff to recommend relocation. In fact, Fisheries, Wildlife, and LFS staff recommended relocation."
151. 6 September 1995 Note to file from D. Christiansen, AEP, re: Sunpine Haul Road, cc. F. Cardinal, M. Barrett, B. Stubbs.
152. *Ibid.* See also s. 5 and ss. 49-56 of the *Fisheries Act*.

In November 1995, a habitat biologist with DFO's Habitat Management Division ("HMD") sent the Canadian Coast Guard ("CCG") a memo entitled "Sunpine Forest Products" stating

[a]ttached is a package of information that was included in one of the letters to the Minister on Sunpine's permanent road proposal. It consists of a petition with approximately 240 signatures and a number of letters expressing opposition to the proposed road. In the event that Sunpine does apply for an NWPA permit, and the CEAA is triggered, this package will be useful to CCG in gauging public concern about the project (McClelland: 11/22/95).

When DFO sent CCG the petition and related information referred to above, DFO had already determined that the Mainline Road proposal had the potential to affect fish and fish habitat (Hopky: 8/1/95), but it was only in September 1996, according to DFO, that DFO concluded that the Mainline Road would not cause a HADD and therefore did not require a s. 35(2) authorization under the *Fisheries Act* and an environmental assessment under the CEAA.¹⁵³ The CEAA contains a provision allowing an RA to request the federal Minister of the Environment to refer a project directly to a mediator or review panel for assessment, if public concerns warrant such a reference.¹⁵⁴ If the RA subsequently decides that it will not exercise a power referred to in s. 5 of the CEAA, the CEAA provides:

Where at any time a responsible authority decides not to exercise any power or perform any duty or function referred to in s. 5 in relation to a project that has been referred to a mediator or review panel, the Minister may terminate the environmental assessment of the project.¹⁵⁵

In the case of the Sunpine Project, when DFO received the petition mentioned above, it had not decided whether the Sunpine Project was likely to require a s. 35(2) authorization. Consequently, DFO was not an "RA" and could not refer the Sunpine Project to the Minister under this provision of the CEAA.

In the winter of 1995-96, Sunpine built and operated a temporary logging road within the Mainline Road corridor, while DFO was still considering whether Sunpine's proposal for a permanent road in that corridor required a s. 35(2) authorization.¹⁵⁶ DFO staff observed the tem-

153. DFO 22 January 2003 Reply.

154. S. 25(b) of the CEAA.

155. S. 27 of the CEAA.

156. Memorandum from D.G. Christiansen, AEP to C.W.B. Stubbs re: Sunpine Mainline Haul Road—Temporary Access, 13 October 1995.

porary road during a helicopter inspection intended to determine whether the Mainline Road would cross any navigable rivers (Brant: 4/13/96). Under the *Fisheries Act* and DFO's *Directive on the issuance of s. 35(2) authorizations*, it is not an offense for a proponent to carry on a project without an authorization under s. 35(2) of the *Fisheries Act*, provided the project does not harmfully alter, disrupt or destroy fish habitat. The Secretariat did not receive any information regarding what, if any, actions were taken by Sunpine to ensure compliance with s. 35(1) of the *Fisheries Act* in regard to the temporary road. The Secretariat did not receive any information regarding any actions taken by DFO to request information from Sunpine regarding the temporary road, review potential impacts of the road on fish habitat, or enforce s. 35(1) in connection with the temporary road.

In December 1995, Sunpine filed applications with CCG for permits under the federal *Navigable Waters Protection Act* ("NWPA") for bridges it proposed to build over two navigable watercourses, the Ram River and Prairie Creek, as part of the Sunpine Project.

On 15 February 1996, following up on information regarding the Sunpine Project received from Sunpine in September 1995 and a review of Sunpine's NWPA permit applications for the Ram River and Prairie Creek bridges (received from CCG), DFO made a detailed (14 point) information request to Sunpine about the Sunpine Project (Linsey: 2/15/96). At the time, DFO had not yet determined whether the Sunpine Project required a s. 35(2) authorization and therefore triggered the CEAA pursuant to the *Fisheries Act*. Referring to Sunpine's NWPA permit applications, DFO commented:

NWPA Application, section 1, page 4, under 1.2 *Cumulative Effects*—This section states that "Assuming that the design process is effective and allowing passage of flood waters and debris, erosion control methods are successful, and that access control is maintained, there is not likely to be any change in the channels, water quality or migratory movement of fish and wildlife." With respect to water quality and effects on fish, how does Sunpine propose to test these assumptions given the lack of baseline data regarding sediment transport in the watercourses as well as the absence of any proposed monitoring programs for water quality and fish, both during and post-construction? To address these issues, adequate monitoring programs for sediment discharge and fish utilization of the habitat will have to be designed and implemented by Sunpine (Linsey: 2/15/96).

Sunpine responded to DFO's 15 February 1996 information request on 18 March 1996, providing detailed information on planned

mitigation measures and proposing sediment monitoring programs for seven of twenty-one stream crossings and a section of the Mainline Road (Denney: 3/18/96). In regard to the Ram River and Prairie Creek bridges, DFO subsequently required Sunpine to honor its 18 March 1996 commitments in advice DFO provided to CCG under s. 12(3) of the CEAA and in letters of advice DFO issued to Sunpine (see below). Sunpine's 18 March 1996 letter contained several other commitments by Sunpine, in regard to other parts of the Mainline Road. Those commitments, which were not formalized in letters of advice from DFO, included, among other things, monitoring programs for sediments at five stream crossings in addition to Ram River and Prairie Creek, and a sediment and erosion control program for a section of the Mainline Road that intercepts a large number of small watercourses that are tributaries to an unnamed tributary to the Ram River, along with a promise to abandon existing winter logging roads west of the mainline alignment upon completion of the mainline construction.

The Secretariat asked DFO to indicate at what point in time DFO determined conclusively that the Sunpine Project did not require an environmental assessment under the CEAA. DFO replied "September 1996."¹⁵⁷ The Secretariat asked DFO to identify in detail information relied upon in determining that Sunpine's Mainline Road would not and does not result in a net loss of fish habitat productive capacity (or a HADD, requiring issuance of a s. 35(2) authorization under the *Fisheries Act* and an environmental assessment under the CEAA).¹⁵⁸ DFO responded "[a]ll relevant information used by DFO staff to determine that the proposed measures to avoid impacts of the Sunpine haul road on fish habitat were adequate to avoid a HADD, is contained in the Public Registry (see documents #12, #44 and #59 in the Public Registry)."¹⁵⁹ This "Public Registry" was set up by CCG in Sarnia, Ontario, in July 1996 under s. 55 of the CEAA for the purpose of providing convenient public access to information related to the CEAA screenings for the Ram River and Prairie Creek bridges. Under the CEAA, CCG had to conduct these screenings before it could issue NWPA permits to Sunpine for the two bridges.

157. "Oldman River II/SEM-97-006 Submission—DFO Response to the CEC Secretariat Follow-up Questions," attached to 22 January 2003 letter from Jenna Mackay-Alie, Environment Canada, to Katia Opalka, CEC [hereinafter "DFO 22 January 2003 Reply"].

158. Request for additional information; Appendix 5 at 11(ii).

159. DFO 22 January 2003 Reply.

In late June 1996, CCG staff responsible for Alberta—which by then had been transferred from the Western region in Vancouver, British Columbia to the Central and Arctic region headquartered in Sarnia, Ontario—designated each bridge as a separate project for the purpose of conducting a CEAA screening. The Navigable Waters Protection Division of the CCG (“DFO-NWP”) asked DFO-HMD for expert advice (under s. 12(3) of CEAA) regarding potential adverse environmental effects of each bridge on fish and fish habitat (Woodward: 6/25/96). DFO-HMD provided that advice on 15 July 1996 (Linsey: 7/16/96). DFO-HMD’s s. 12(3) conditions for protection of fish habitat were listed under “Mitigation Measures” in the DFO-NWP CEAA screening reports for the two bridges (Brant: 8/20/96). Under the CEAA, the RA (DFO-NWP) must ensure the implementation of mitigation measures listed in screening reports.¹⁶⁰

Under “Mitigation Measures,” both screening reports contained requirements for sediment monitoring programs. The screening report for the Ram River bridge stated, among other things,

[a] sediment monitoring program acceptable to DFO-HMD shall be implemented to assess the effectiveness of mitigation and sediment control measures and the need for remedial measures, both during and following construction. This sediment monitoring program must be approved by DFO-HMD prior to commencement of any inwater work (Brant: 8/20/96 and Brant: 9/16/96).

On 22 August 1996, DFO wrote to Sunpine, stating, among other things

[t]he reports presenting the results of the sediment monitoring should include relevant climatological information such as the record of precipitation events. These reports should be provided to DFO-HMD (Linsey: 8/22/96).

On 28 August 1996, Sunpine wrote to DFO stating

[t]hank you for your quick response of Aug. 22 concerning our sediment monitoring programs for Ram and Prairie Creek. Since we are in agreement on the site selection, sampling procedures and analytical methods we will proceed with these as described in our submission. With regard to sampling frequency, I would like to offer the following: At the Ram crossing we have revised our construction plans to include a clear-span bridge

160. S. 20(1) of CEAA.

which means we will be able to construct the crossing without in-water activity. In terms of sediment entering the river, this will narrow the potential to the abutments and the work areas on both sides of the river. With this in mind, we now commit to a monitoring frequency which will be done periodically and during heavy precipitation events commencing at the start of construction. This program would continue until freeze-up this fall, recommencing next spring and continuing until it is evident that the sediment control measures are working satisfactorily. [...] (Denney: 8/28/96).

The Prairie Creek bridge was never built because Sunpine decided to use an existing public road for that section of its log hauling route. The Secretariat asked DFO for copies of Sunpine's follow-up sediment monitoring reports for the Ram River bridge. DFO replied "[i]n both instances (Prairie Creek and Ram River) it was concluded that no HADD would occur. Therefore, no sediment monitoring reports were necessary, and none were provided."¹⁶¹

On 17 September 1996, DFO issued "letters of advice" to Sunpine in regard to the Ram River and Prairie Creek bridges, containing essentially the same requirements as the s. 12(3) advice DFO provided to CCG in July 1996.¹⁶² For information on "letters of advice," see s. 5.5, above. There were two differences between DFO-HMD's s. 12(3) advice to DFO-NWP and its letters of advice to Sunpine: the s. 12(3) advice stated "[i]nstream work is *prohibited* during the period from September 15th to April 15th [emphasis added]," while the letters of advice to Sunpine stated "[i]nstream work *is to be avoided* during the period from September 1st to April 30th [emphasis added]." The other difference is that in the s. 12(3) advice, DFO required that Sunpine provide DFO with a sediment monitoring program for both bridges, while only the letter of advice for the Prairie Creek bridge mentions a sediment monitoring program. One reason for this discrepancy could be that on 17 September 1996, the same day DFO issued the letters of advice, Sunpine notified DFO that the Ram River crossing would be a clear span bridge (causing less disruption to fish habitat than the pier structure originally proposed). However, DFO had earlier told Sunpine that sediment concerns were not limited to effects of instream work, but included concerns about run-off from construction work on the approaches (Linsey: 8/22/96). The government of Alberta has stated

[t]he design of the bridge was changed by the proponent part way through the federal review process, adopting a clear-span design. The change was

161. DFO 22 January 2003 reply.

162. Letters of advice from G.A. Linsey, DFO to Peter Denney, Sunpine re: Ram River and Prairie Creek Bridges, 17 September 1996.

done to facilitate the review of the project by DFO and not to address environmental concerns. The revised bridge design did not significantly alter the amount of disruption of fish habitat (small for both designs), but did comply with the anticipated preference of federal officials for one design over the other, at increased expense.¹⁶³

The Secretariat did not receive any information regarding why DFO decided to issue letters of advice to Sunpine in regard to the Prairie Creek and Ram River crossings despite already having submitted (slightly different) conditions for protection of fish and fish habitat at those crossings to DFO-NWP under s. 12(3) of the CEAA.

Information is provided below regarding the three Public Registry documents (#12, #44 and #59) DFO identifies (see above) as having been relied on by DFO in determining that the Mainline Road would not and does not result in a net loss of fish habitat productive capacity, or a HADD, requiring a s. 35(2) authorization and a CEAA screening.

Document 12 in the Public Registry is a letter of 2 January 1996, from the Habitat Coordinator, Alberta Area, of DFO-HMD to the Pacific Region Navigation Protection Program Supervisor at CCG, stating:

On recent referrals (Sunpine Forest Products and Suncor's Steepbank Mine, attached) where CCG is a CEAA Responsible Authority, I have been unable to determine what you have defined as the project, pursuant to s. 15 of CEAA. Both these proposals involve NWPA s. 5.1's for bridges, but are associated with much larger undertakings, and I do not know to what extent your CEAA project includes these other undertakings. We wish to provide you with a timely response to your request for a declaration of our CEAA "status"; however, if we are to provide CEAA s. 12.3 advice in particular then I am asking that you provide me with a CEAA project description for each of the examples (Hopky: 1/2/96).

Document 44 in the Public Registry is a September 1996 letter from Eastern Slopes Management Inc. to CCG reporting that the design of the Ram River bridge was changed from a pier structure to a clear span bridge (Reynolds: 9/17/96).

Document 59 in the Public Registry is entitled "Preliminary Assessment of Fisheries Resources and Impacts at the Sunpine Haul

163. Government of Alberta, "Alberta Case Study—Sunpine Project" in CEAA Review Provincial/Territorial Input, Appendix 1 [hereinafter "Alberta Case Study"] at 57, online: Ontario Ministry of the Environment <<http://www.ene.gov.on.ca/envision/ceaa/CS-AB.pdf>> (date accessed: 21 February 2003).

Road Crossing of Rough Creek, Tawadina Creek and an Unnamed Tributary to Dry Creek” prepared for Sunpine by Pisces Environmental Consulting Services Ltd. (“Pisces”), dated August 1995. That report states:

Rhude (1978) noted that habitat quality in Rough Creek was reduced by the lack of habitat type diversity and by extensive periods of low flow. Despite these limitations, Rough Creek supports a substantial brook trout and mountain whitefish population and what is likely a much reduced, remnant bull trout population. Although habitat quality in Tawadina Creek would likely be much lower during periods of low flow, which would extend from mid summer to early spring each year, than that found in June of 1995, the stream is still capable of supporting fish, although perhaps not at the proposed upper road crossing. Similarly, habitat quality in the unnamed tributary to Dry Creek would likely be much lower than that encountered at the relatively high flows in July of 1995. This tributary does not appear to be able to support fish. [...] Rough and Tawadina creeks, the unnamed tributary to Dry Creek, and because of its proximity, Dry Creek itself, will be subjected to increased sediment loads from road cuts, fills and ditches in the medium term and from the road surface over the life of the road (Allan: 8/1/95).

In its 5 June 2003 comments on the accuracy of the Draft Factual Record, Canada stated: “LFS, in its role as land manager, did conduct monitoring of the right-of-way, and direction was provided to Sunpine to submit an action plan to correct erosion problems.” It also stated: “Alberta’s regulatory process did not require monitoring for HADD. However, Alberta staff did observe the road and bridge crossing during and following construction and concluded that no violation of the *Fisheries Act* had occurred.” Both DFO and Alberta have confirmed that neither DFO nor Alberta did any active follow-up monitoring—or required Sunpine to submit results of any follow-up monitoring—to verify that sediment run-off from the Mainline Road surface is not causing a HADD of fish habitat in violation of s. 35(1) of the *Fisheries Act*.¹⁶⁴

In August 1996, Friends of the West Country brought an action in Federal Court to obtain the cancellation of Sunpine’s NWPA permits on the grounds that CCG’s July 1996 CEAA screenings of the Ram River and Prairie Creek bridges did not comply with the requirements of the CEAA.¹⁶⁵ Those screenings had concluded that the bridges were not likely to cause significant adverse environmental effects (Woodward: 8/16/96). The group maintained that the project should have been

164. DFO 22 January 2003 Reply at 3 and Alberta Case Study at 55.

165. *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans) (T.D.)*, [1998] 4 F.C. 340.

defined to include the whole Mainline Road and Sunpine's logging operations; that a consideration of the environmental effects of the Mainline Road and Sunpine's logging operations should have been included within the scope of the CCG assessment; and that cumulative environmental effects of other projects in the area should have been taken into account in considering whether the project was likely to result in significant, adverse environmental effects. The trial judge granted the application (except as to project scope) and cancelled Sunpine's NWPA permits.¹⁶⁶

On appeal, the Federal Court of Appeal agreed with the trial judge that a "responsible authority" under the CEAA, in this case, CCG, has discretion in determining the scope of a project for the purpose of assessing its environmental effects, but it also held that an environmental assessment under CEAA does not need to include construction, operation, decommissioning, abandonment or other undertaking outside the scope of the project.¹⁶⁷ Therefore, CCG was at liberty to scope each bridge as a separate project and not to include an assessment of the environmental effects of the Mainline Road and Sunpine's forestry operations within the scope of its assessments of the bridges. The Federal Court of Appeal also ruled that CCG had erred in law by interpreting the CEAA as preventing CCG from considering, as part of its "cumulative environmental effects" analysis, effects of other projects or activities in the area that were outside the scope of the project or were outside of federal jurisdiction.¹⁶⁸ In addition, the Federal Court of Appeal held that locating the public registry of documents related to the screenings in Sarnia, Ontario, approximately 2000 km from the project site, and requiring the public to file requests under the *Access to Information Act* in order to obtain copies of those documents, was patently unreasonable.¹⁶⁹ An application for leave to appeal to the Supreme Court of Canada filed by the environmental group was denied.

166. *Ibid.*: "[...] I conclude that the environmental assessments conducted were deficient in two fundamental respects: first, they were not conducted in respect of a construction or other undertaking, namely, the Mainline Road, that was a construction or other undertaking "in relation to" the projects, as defined, and that was proposed by the proponent; and, secondly, they failed to include consideration of the cumulative environmental effects likely to result from each project in combination with another project that had been or would be carried out, once again, the Mainline Road. [...] Based upon the foregoing analysis, I conclude that the Screening Environmental Assessment Reports and their addenda, and the resultant approvals under subsection 5(1) of the NWPA that are here under review cannot stand."

167. *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans) (C.A.)*, [2000] 2 F.C. 263 at para. 23; leave to appeal to the S.C.C. denied, [1999] S.C.C.A. No. 585.

168. *Ibid.* at para. 40.

169. *Ibid.* at para. 43.

In 2001, DFO conducted a second CEEA screening of the Ram River bridge (built in 1997) and again concluded that the project was not likely to cause significant adverse environmental effects.

Under “Potential Environmental Effects,” the first screening report for the Ram River crossing, dated July 1996, stated “[s]iltation related effects will be ameliorated based upon the required sediment control plan instituted by the proponent” (Woodward: 7/18/96). Under “Cumulative Effects,” the first report stated “[s]iltation related cumulative effects are considered insignificant as the sediments affected by construction will not be allowed to enter the waterway directly without pre-screening through geotextile filters placed prior to construction” (Woodward: 7/18/96). The second screening report for the Ram River crossing, dated September 2001, contains much more extensive information on expected sediment yield from the bridge, both short and long term, and comparative information (DFO: 9/1/01).

The second screening report for the Ram River bridge contains the following project definition for the purpose of the CEEA screening:

[f]or the purposes of the environmental assessment DFO as the Responsible Authority defined the scope of the Project as:

The construction and maintenance of a two lane single span bridge over the Ram River, including associated approaches and related works, storage areas or other undertakings directly associated with construction. The Project involves preparation of the construction site and construction of abutments and the bridge structure (DFO: 9/1/01).

The second screening report for the Ram River bridge contains detailed information under the headings “Effects of the Project,” “Mitigation,” “Residual Effects,” and “Cumulative Effects” (DFO: 9/1/01). The report identifies sedimentation as “the source of one of the primary environmental effects of the Project” (DFO: 9/1/01; 6.2). It states that consequently, mitigation strategies emphasize sediment control measures (DFO: 9/1/01; 6.2). Under “Residual Effects,” the report states:

Increased sediment is one of the main ways that development activities in forested watersheds affect fish and fish habitat (Waters 1995). Although mitigation measures will limit the amount of sediment likely to enter the Ram River, activities associated with construction of the bridge (i.e., site preparation, construction of bridge structures and shore protection activities) and maintenance, there will be an increase in the amount of sediment entering the River.

Elevated suspended sediment concentrations can result in a range of effects on fish depending on sediment concentration and duration of exposure. Effects range from no effect, change in behavior to physiological effects and, in rare cases, death (Newcombe and Jensen 1996). Additional effects from sedimentation can include changes in rearing and spawning habitat either directly through deposition of material or indirectly through changes in channel morphology.

Sediment yield is the amount of sediment delivered to a receiving water from the surrounding basin. It was used to estimate the amount of sediment resulting from the Project. Although variables such as precipitation will affect sediment yield from month to month and year to year, sediment yield represents a standard measure of sediment delivery from a catchment. Changes in sediment yield provide a reasonable estimate of the extent of disturbance.

Sediment yield can be determined directly through intensive multi-year monitoring programs or indirectly according to the method presented in Haigh (2000). This method estimates sediment yield indirectly through comparing the physical characteristics such as climate, hydrology, topography, soils and land use with those of other nearby river basins. This method was used in estimating sediment yield in this assessment. Sediment yields for watersheds in the vicinity of the Project are presented in Table 9 [not reproduced].

The project will increase the local sediment yield since the site will be altered from a relatively flat floodplain with a dense canopy cover and understory. Post-construction, the site will contribute sediment from the road surface, from the slopes along the road fill, and from cleared areas adjacent to the road. Typical sediment yield characteristics of various surfaces are presented in Table 10 [not reproduced].

Traffic volume also affects sediment yield. The Sunpine road is a private road, but is the main haul road for a number of logging areas. As such, the gravel road is expected to support relatively heavy logging truck traffic, but a low traffic volume compared to public roads. Characteristic sediment yields due to traffic volume are presented in Table 11 [not reproduced].

[...]

The determination of the sediment yield of the Project is based on the following assumptions:

- Project footprint area is 0.0125 km² (1.25 ha) and the downstream sediment transport distance is 2 km.

- The road surface¹⁷⁰ accounts for 40% of the Project area (conservatively high) and produces sediment at a rate consistent with a relatively heavy use haul road [60 mm/year].
- Road fill accounts for 40% of the Project Area
- Road fill is assumed to produce sediment yield similar to a typical road cut (conservatively high).
- The stream bank area accounts for 10% of the Project area.
- The Ram River wetted perimeter accounts for 10% of the Project area (conservatively low) and produces sediment similar to other low- to non-erodible streambeds throughout Alberta.

The average annual sediment yield for the project area is expected to increase 16.5mm, based on assumed site conditions and characteristic sediment yields for different surfaces. The relative contribution of the various project components in the determination of the sediment yield for the project is summarized in Table 12. The total volume of sediment produced annually by the Project will be approximately 200 m³ (average annual sediment yield [16.5 mm] x area of the contributing basin [1.25 ha]).

Table 12 Expected Post-Construction Sediment Yield at Bridge Location

Project Area	Percent of total Project Area	Sediment yield (mm/year) ^(a)
Road surface ¹⁷¹	40	30
Road cut	0	10
Road fill	40	10
Stream bank	10	5
Ram River	10	0.01
Total	100	16.5

^(a) The sediment yield from the Project area is the weighted average of sediment yield from different portions of the Project area (i.e., $(40 \times 30) + (0 \times 10) + \dots / 100$).

Using a conservative estimate of 0.01 mm/year for sediment yield, a forested watershed would be expected to produce 10 m³ of sediment for each 1 km² (100 ha) of contributing area. The estimated amount of sediment produced from a forested watershed the size of the Ram River watershed

170. "Road surface" is taken to mean the surface of the bridge and approaches on either side of the bridge; not the whole Mainline Road.

171. *Ibid.*

upstream of the crossing (1780 km²) would be 17,800 m³. The residual effects of the Project arising from loss of riparian area and increases in sediment yield on fish and fish habitat are negligible and most likely not detectable. The potential adverse effects of the project on fish and fish habitat are therefore considered not significant (DFO: 9/1/01; 6.3.1).

Under “Cumulative Effects,” the report states

[m]itigation measures will not entirely eliminate effects on fish and fish habitat and wildlife habitat resulting from Project-induced increases in sediment input to the Ram River and loss of forest cover, riparian vegetation and floodplain area respectively. Although the effects on fish, fish habitat and wildlife habitat will not be significant, these effects have the potential to contribute to the effects of other projects and activities in the area. Therefore, DFO focused its assessment of cumulative effects on determining the relative contribution of the Project-induced effects on fish and fish habitat and wildlife habitat in combination with effects from other projects or activities in the area.

Other projects and activities that take place within the watershed include:

- timber harvesting,
- seismic exploration,
- oil and gas drilling and production,
- oil and gas pipelines,
- recreational activities,
- hunting and trapping,
- fishing,
- roads.

The contribution of a given project to the cumulative effects of other projects can be considered in terms of *predetermined thresholds of effect on a particular environmental component* [emphasis added]. The effects of the project are considered significant when they combine with the effects of other activities or projects to exceed the threshold and result in an unacceptable effect. Conversely the incremental effects contributed by the project are *not* significant when baseline conditions already exceed the threshold or when, combined with the effects of the other projects, they remain below threshold levels [emphasis in original]. In areas such as the Ram River watershed, where the extent of perturbation is comparatively low, it is reasonable to assume that baseline conditions are well below threshold levels (DFO: 9/1/01; 7.1).

The screening report indicates that “threshold levels” are the basis for assessing whether the effects of a project are acceptable. If the effects of a project, in combination with the effects of other projects in the area or when added to baseline conditions¹⁷² exceed threshold levels, then the project’s effects would be considered significant. The report does not mention what the “threshold levels” are, for fish habitat in the Ram River watershed.

Under “Cumulative Effects on Fish Habitat,” the report states

[s]ediment yield can be used to estimate cumulative effects of the sediment resulting from the Project because it represents the integrated effects of sediment inputs *from all the different land uses and activities occurring in the watershed* [emphasis added]. Comparing sediment yield from the Project area with sediment yield estimates for the remainder of the watershed provides a reasonable indicator of the relative contribution of sediment from the Project.

The Ram River consists of two main tributaries: the North Ram River and South Ram River. Shortly after the two join to form the main stem the river passes through a narrow gorge approximately 2 km upstream of the project, where a bedrock streambed controls both the channel gradient and the rate of upstream channel degradation (Figure 4). The headwaters representing nearly 5% of the total watershed area, is typical sparsely vegetated alpine and sub-alpine habitat. The remainder of the watershed is forested with stands of lodgepole pine. Although much of the watershed is comparatively undisturbed, roads, clearcuts, oil and gas wells, pipelines, and recreational area are present throughout.

The North Ram River upstream of its confluence with the South Ram River contributes very little sediment to the overall area. Throughout its lower reaches (prior to joining the South Ram River to form the main stem of the Ram River), the North Ram River has a low sediment carrying capacity. Much of the sediment it carries is deposited in a large depositional area upstream of where it joins the main stem of the Ram River. Consequently, the resulting sediment yield from the North Ram River at its confluence with the South Ram River is only about 8,000 m³/yr. By contrast, the South Ram River passes through a narrow 30-km gorge with steep, unvegetated, and highly erodible shale slopes before it joins the North Ram River. Erosion along the entire length of the gorge is high and results in a correspondingly high sediment yield. The corresponding sediment yield for the South Ram River was estimated at 820,000 m³/yr.

172. In February 1996, DFO had commented that sediment monitoring was needed in light of the lack of baseline data (Linsey: 2/15/96).

A comparison of the sediment yield for the Ram River watershed upstream of the proposed bridge before and after construction is presented in Table 13. The Project has increased the amount of sediment produced annually by approximately 200 m³. However, this amount when considered in the context of the total amount of sediment produced by the watershed represents a change of 0.02%. This additional increase in sediment is essentially undetectable given the exceptionally high volumes of sediment contributed by the South Ram River. The sediment contribution of the South Ram River alone overwhelms sediment inputs from *all other projects or activities that occur in the watershed* [emphasis added]. The cumulative effects on fish and fish habitat resulting from Project related sediment inputs in combination with sediment inputs from other projects and activities are therefore not significant (DFO: 9/1/01; 7.2).

Table 13 Sediment Yield for the Ram River Watershed Upstream of Proposed Bridge

Sub-basin	Contributing Area (km ²)	Sediment Yield (mm/year)	Annual Volume of Sediment Produced (m ³ /yr) Pre-Construction ^a	Annual Volume of Sediment Produced (m ³ /yr) Post Construction
North Ram River	800	0.01	8,000	8,000
South Ram River	820	1.0	820,000	820,000
Fall Creek	160	0.05	8,000	8,000
Project area (pre-construction)	0.0125	0.01	0.125	N/A
Project area - (post-construction)	0.0125	16.5	N/A	206.25
Total	1,780		836,000	836,206
% Contribution of Project				0.02%

^a Calculated by multiplying the contributing area (km²) by the annual sediment yield (mm).

The report states “[...] sediment contribution of the South Ram river alone overwhelms sediment input from all other projects or activities that occur in the watershed,” but it does not provide information on sediment inputs to the Ram River from all the different land uses and activities that occur in the watershed, such as, for example, sediment inputs from the rest of the Mainline Road surface (beyond the approaches on either side of the bridge) and Sunpine’s clearcut logging activities.

In reviewing the Sunpine Project under the *Fisheries Act*, DFO did not conduct the type of analysis outlined above (and did not require Sunpine to do so, pursuant to s. 37(1) of the *Fisheries Act* or otherwise) to determine that sediment yield from the Sunpine Project in its totality (road surface and twenty-one stream and river crossings) will not or does not cause a HADD of fish habitat and therefore does not result in a *Fisheries Act* violation in the absence of a s. 35(2) authorization.

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 01-08, which determined its scope, this factual record provides information relevant to a consideration of whether Canada is failing to effectively enforce ss. 35, 37 and 40 of the *Fisheries Act*, s. 5(1)(d) of the *Canadian Environmental Assessment Act* (“CEAA”), and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of the CEAA in regard to the Sunpine Project. Under the *Fisheries Act*, no one may harmfully alter, disrupt or destroy (“HADD”) fish habitat without an authorization, and the Minister of Fisheries and Oceans (“MFO”) has the power to issue authorizations and orders requiring changes to projects that are causing, or are likely to cause, a HADD of fish habitat. Under the CEAA, a CEAA environmental assessment is required before MFO exercises these authorization and order powers under the *Fisheries Act*.

In 1993, Sunpine Forest Products Ltd. (“Sunpine”) proposed to build a permanent, all-weather mainline log haul road through its forest management area in the Rocky Mountain foothills of West Central Alberta (the “Sunpine Project”). The proposed Sunpine Project would cross the headwaters of twenty-one watercourses. The Alberta Forest Service referred the proposal to provincial fish and wildlife staff. Provincial fisheries, wildlife, and forestry staff recommended against the Project and in favor of requiring Sunpine to use existing roads for its log haul in order to avoid, among other things, creating new, long-term impacts on fish and fish habitat. The Forest Service approved the Sunpine Project. Certain provincial fisheries staff carried appointments as fishery guardians under the *Fisheries Act*. Under these appointments, they could lay charges for *Fisheries Act* violations, but they could not issue *Fisheries Act* authorizations.

The federal Minister of Fisheries and Oceans (“MFO”) is accountable to Parliament for the administration and enforcement of the *Fisheries Act*. MFO was made aware of the Sunpine Project by a concerned citizen in June 1995. Department of Fisheries and Oceans (“DFO”) Habitat Protection and Conservation Guidelines identify relocation and redesign as preferred options for avoiding project impacts on fish habitat. At its discretion, DFO did not participate in selection of the road corridor or road alignment for the Sunpine Project. DFO requested information about the Sunpine Project from Sunpine, and reviewed permit applications Sunpine filed with the Canadian Coast Guard (“CCG”) under the federal *Navigable Waters Protection Act* (“NWPA”) for two bridges included in the Sunpine Project. Sunpine’s NWPA permit applications triggered a screening requirement under CEAA. Under s. 12(3) of the CEAA, CCG asked DFO for expert advice on potential adverse environmental effects on fish habitat associated with the two bridges. DFO conducted a detailed review of Sunpine’s plans for the two bridges and provided advice to CCG and letters of advice to Sunpine listing measures required to mitigate impacts of the two bridges on fish habitat. At the outcome of this review, Sunpine decided to redesign one bridge from a pier structure to a clear span structure, and decided that instead of building the other bridge, it would use an existing, public road for that section of its log haul. DFO reviewed mitigation and follow-up measures proposed by Sunpine to reduce and monitor fish habitat impacts associated with the rest of the Sunpine Project (road surface and nineteen stream crossings). DFO did not take any action to ensure the implementation, or verify the effectiveness, of those measures. Canada has stated that Alberta’s regulatory process did not require monitoring for HADD, but that Alberta staff did observe the road and bridge crossing during and following construction and concluded that no violation of the *Fisheries Act* had occurred. Canada has also stated that the Alberta forest service, in its role as land manager, directed Sunpine to submit an action plan to correct erosion problems.

In September 1996, DFO concluded that the Sunpine Project as a whole would not cause a HADD of fish habitat and therefore did not require a s. 35(2) authorization or an environmental assessment under the CEAA. Neither DFO nor Alberta conducted follow-up monitoring—or required Sunpine to submit results of follow-up monitoring—to verify that sediment run-off from the Mainline Road as a whole is not resulting in a HADD of fish habitat in Sunpine’s FMA area in violation of the *Fisheries Act*.

APPENDIX 1

**Council Resolution 01-08,
dated 16 November 2001**



Montreal, November 16, 2001

COUNCIL RESOLUTION 01-08

Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Canada is Failing to Effectively Enforce sections 35, 37 and 40 of the *Fisheries Act*, Section 5(1)(d) of *Canadian Environmental Assessment Act (CEAA)* and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA (SEM-97-006).

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 The Friends of the Oldman River and the response provided by the Government of Canada on July 13, 1998;

NOTING that the one specific case presented in the submission is the Sunpine Forest Products Forest Access Road case;

FURTHER NOTING that Sunpine Forest Products Forest Access Road case is no longer the subject of administrative or judicial proceedings and, as noted in Resolution 00-02, Council has reviewed the notification by the Secretariat of July 19, 1999 that the development of a factual record is warranted in relation to the submission (SEM-97-006); and

CONFIRMING that the submitter has not, pursuant to Resolution 00-02, provided relevant assertions of fact about other cases of asserted failures to enforce the environmental law identified in the submission;

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* on whether Canada, in the Sunpine

Forest Products Forest Access Road case, is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, Section 5(1)(d) of *Canadian Environmental Assessment Act* (CEAA) and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA;

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,
dated 14 December 2001**



Secretariat of the Commission for Environmental Cooperation

Overall Plan to Develop a Factual Record

Submission I.D.: SEM-97-006
Submitter(s): The Friends of the Oldman River
Party: Canada
Date of this plan: 14 December 2001

Background

On 4 October 1997, the Friends of the Oldman River 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 allege that “the Government of Canada is failing to apply, comply with and enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the *Canadian Environmental Assessment Act* (CEAA) and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA”.¹ The Submitters contend that, as a matter of Canada-wide policy, Canada is failing to apply, comply with and enforce the *Fisheries Act* and CEAA by issuing informal “letters of advice” to project proponents listing environmental conditions that will avoid the need to obtain *Fisheries Act* authorizations for which they would have to carry out an environmental assessment under CEAA. The Submitters also contend that, throughout the country, Canada routinely fails to ensure compliance with or prosecute violations of the habitat protection provisions of the *Fisheries Act*. The Submitters cite the Sunpine Forest Products Forest Access Road case (the “Sunpine Project”) as an example.

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 Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, “on whether Canada, in the Sunpine Forest Products Access Road case, is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regula-*

1. Submission at 1.

tions made pursuant to paragraphs 59(f) and (g) of CEAA.” 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 sections 35 and 37 of the *Fisheries Act* taken together and supported by appropriate regulations were to create a preventative and planning regime for works and undertakings with the potential to harm fish habitat. They assert that in practice, almost no section 37(2) orders are issued and the number of section 35(2) authorizations varies widely from province to province and has decreased significantly in recent years. They assert that the *Directive on the Issuance of Subsection 35(2) Authorizations* (Directive), which provides for the issuance of letters of advice in certain cases, invents a decision making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision making tool and as a mechanism for public participation. The Submitters also assert that there are very few prosecutions for violations of the habitat protection provisions of the *Fisheries Act* and they claim that there has been a *de facto* abdication of legal responsibilities by Canada to the provinces, which, they claim, have not done a good job of securing compliance with or enforcing the *Fisheries Act*.

The Submitters refer to the Sunpine Project as an example of Canada’s alleged failure to enforce the *Fisheries Act* and CEAA. The Sunpine Project involved the construction, by Sunpine Forest Products Ltd. (“Sunpine”), of a 40 kilometer road to access forest areas on the eastern slope of the Rocky Mountains, west of the town of Rocky Mountain House in Alberta.

The Submitters assert that they repeatedly urged Canada to initiate an environmental assessment of the Sunpine Project under CEAA on the basis that the Project triggered CEAA twice: first, it would result in the harmful alteration, disruption or destruction of fish habitat, thus requiring an authorization pursuant to section 35(2) of the *Fisheries Act*; and second, Canada had requested information from Sunpine and was evaluating it as provided by section 37(2) of the *Fisheries Act*. The Submitters assert that at the time of filing the submission, they had not received a response from Canada regarding whether an environmental assessment would be triggered by the Sunpine Project.

In its response, Canada contends that sections 35(2) and 37 of the *Fisheries Act* are not invoked if there is no harmful alteration, disruption or destruction of fish habitat. With regard to the Sunpine Project, Canada asserts that the Department of Fisheries and Oceans (DFO) became aware of the Project and that it included 21 river crossings. DFO concluded that 8 such crossings had potential implications for fish habitat and subsequently concluded that 6 of these had no potential to damage fish habitat if constructed as proposed by Sunpine. For the remaining 2 crossings, DFO wrote letters of advice.

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

- (i) application of section 35 of the *Fisheries Act* in connection with the Sunpine Project;
- (ii) Canada's enforcement of sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project; and
- (iii) whether Canada is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in the context of the Sunpine Project.

Overall Plan

Consistent with Council Resolution 01-08, execution of the overall work 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 will consider any information furnished by any of the Parties (Articles 15(4) and 21(1)(a) of the NAAEC). [January 2002] Information will be requested relevant to the facts regarding:
 - (i) application of section 35 of the *Fisheries Act* in connection with the Sunpine Project;
 - (ii) Canada's enforcement of sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project; and
 - (iii) whether Canada is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in the context of the Sunpine Project.
- 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 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,
dated 14 and 23 January 2002, respectively**



**Comments of Canada
on the Overall Plan to Develop a Factual Record
with regard to submission SEM-97-006**

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 Submission 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, dated January 2002



Secretariat of the Commission for Environmental Cooperation

REQUEST FOR INFORMATION For Preparation of a Factual Record Submission SEM 97-006 (Oldman River II) 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 (together, the Parties). The CEC operates through three organs: a Council, made up of a top-level environmental official from each of the Parties; 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 any non-governmental organization or person in North America to file a submission with the Secretariat asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. This initiates a process of review of the submission that 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 01-08, 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)*, “on whether Canada, in the Sunpine Forest Prod-

ucts Access Road case, is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA.” 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 Oldman River II submission, SEM-97-006. The following sections provide background on the submission and describe the kind of information requested.

II. The Oldman River II submission

On 4 October 1997, The Friends of the Oldman River (Submitters) filed a submission with the CEC asserting that the “Government of Canada is failing to apply, comply with and enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA.”¹ They assert that in practice, almost no section 37(2) orders are issued and the number of section 35(2) authorizations varies widely from province to province and has decreased significantly in recent years. They assert that the *Directive on the Issuance of Subsection 35(2) Authorizations (Directive)*, which provides for the issuance of letters of advice in certain cases, invents a decision-making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision-making tool and as a mechanism for public participation. The Submitters also assert that there are very few prosecutions for violations of the habitat protection provisions of the *Fisheries Act* and they claim that Canada has abdicated its legal responsibilities to the provinces, which, they claim, have not done a good job of securing compliance with or enforcing the *Fisheries Act*.

The Submitters refer to the Sunpine Forest Products Access Road case (Sunpine Project) as an example of Canada’s alleged failure to enforce the *Fisheries Act* and CEAA. The Sunpine Project involved the construction, by Sunpine Forest Products Ltd. (Sunpine), of a 40 kilometer road to access forest areas on the eastern slope of the Rocky Mountains, west of the town of Rocky Mountain House in Alberta.

1. Submission at 1.

The Submitters assert that they repeatedly urged Canada to initiate an environmental assessment of the Sunpine Project under CEAA on the basis that the Project triggered CEAA twice: first, it would result in the harmful alteration, disruption or destruction of fish habitat, thus requiring an authorization pursuant to section 35(2) of the *Fisheries Act*; and second, Canada had requested information from Sunpine and was evaluating it as provided by section 37(2) of the *Fisheries Act*. The Submitters assert that at the time of filing the submission, they had not received a response from Canada regarding whether an environmental assessment would be triggered by the Sunpine Project.

In its response dated 13 July 1998, Canada contends that sections 35(2) and 37 of the *Fisheries Act* are not invoked if there is no harmful alteration, disruption or destruction of fish habitat. With regard to the Sunpine Project, Canada asserts that the Department of Fisheries and Oceans (DFO) became aware of the Project and that it included 21 river crossings. DFO concluded that 8 such crossings had potential implications for fish habitat and subsequently concluded that 6 of these had no potential to damage fish habitat if constructed as proposed by Sunpine. For the remaining 2 crossings, DFO wrote letters of advice.

III. Request for information

The Secretariat requests information relevant to the facts concerning:

- (i) application of section 35 of the *Fisheries Act* in connection with the Sunpine Project;
- (ii) Canada's enforcement of sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project; and
- (iii) whether Canada is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in the context of the Sunpine Project.

IV. Examples of relevant information

Examples of relevant information include the following:

1. Technical information regarding the Sunpine Project, such as maps, technical drawings, and engineering studies, including any information regarding:
 - design options;
 - siting options; or
 - alternatives to the Project.
2. Information regarding the potential of the Sunpine Project to result in the harmful alteration, disruption or destruction of fish habitat, including:
 - environmental impact studies;
 - evaluations by government professionals;
 - concerns of the public.
3. Information about measures proposed, considered or adopted to prevent harmful alteration, disruption or destruction of fish habitat in connection with the Sunpine Project, including information about any public consultations.
4. Information about the effectiveness of measures adopted to prevent harmful alteration, disruption or destruction of fish habitat in connection with the Sunpine Project.
5. Information on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project.
6. Information on federal, provincial or local enforcement- or compliance-related staff or resources available for enforcing or ensuring compliance with, sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project.

-
7. Information on Canada's or Alberta's efforts to enforce or ensure compliance with sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project, including for example:
 - efforts to prevent violations, such as by placing conditions on or requiring modification of the Sunpine Project or providing technical assistance;
 - monitoring or inspection activity;
 - warnings, orders, charges or other enforcement action issued to Sunpine;
 - actions to remedy any impacts to fish habitat caused by the Sunpine Project; or
 - coordination between different levels of government on enforcement and compliance assurance.
 8. Information on the effectiveness of Canada's or Alberta's efforts to enforce or ensure compliance with sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project, for example their effectiveness in:
 - preventing violations of those provisions;or
 - remedying any violations that occurred.
 9. Information on barriers or obstacles to enforcing or ensuring compliance with sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project.
 10. 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 the submission number (SEM-97-006 / Oldman River II) in all correspondence.

For any questions, please send an e-mail to the attention of Katia Opalka, at <info@ccemtl.org>.

APPENDIX 5

**Follow-Up Information Request,
dated 10 September 2002**



Memorandum

DATE: 10 September 2002
À / PARA / TO: Jenna MacKay-Alie, Environment Canada
CC: Jean-François Dionne, Environment Canada
DE / FROM: Katia Opalka
Legal Officer,
Submissions on Enforcement Matters Unit
**OBJET /
ASUNTO / RE:** Follow-up questions regarding the factual record
for the SEM-97-006 (Oldman River II) submission

Pursuant to Canada's request, I am writing to provide follow-up questions the Secretariat wishes to pursue with Canada in regard to the factual record for the SEM-97-006 (Oldman River II) submission, consistent with NAAEC Article 21.

I intend to make arrangements shortly to meet with DFO-HMD officials involved in the Sunpine file late in September to discuss these questions and obtain copies of relevant information. In the event it is not possible to gather requested information in time for such meeting(s), I request that Canada provide written answers to any pending questions, along with copies of supporting documentation, as soon as possible thereafter.

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 25 March 2002 [*sic* - 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).

1. Please provide copies of any documents (agreements, letters, memoranda, etc.) reflecting arrangements or agreements entered into by the Department of Fisheries and Oceans and the Province

of Alberta for the administration and/or enforcement of the habitat protection provisions of the *Fisheries Act*, in particular any document or documents in effect at any time since January 1994.

2. For any arrangements or agreements listed at 1, above, please provide information regarding the implementation thereof, including, without limitation, identifying persons (titles) responsible and accountable for administering/implementing those provisions in Alberta, budgets allocated to such activities, and reporting requirements (and copies of all reports since January 1994).
3. Please indicate whether DFO-HMD and Alberta have engaged in integrated resource planning for the forestry sector pursuant to s. 4.2 of the *Policy for the Management of Fish Habitat (1986)*, and if so, please list DFO-HMD requirements that apply to Sunpine's activities in its forest management area pursuant to Sunpine's forestry management plan or other documents.
4. A letter from Hon. Brian Tobin to Martha Kostuch dated 26 July 1995 indicates that a letter from Dr. Kostuch to the Minister was the first notification DFO received of Sunpine's mainline haul road proposal.
 - (i) Was it / is it unusual for DFO to become aware of a project of this nature in this way, and were other notification procedures in place at the time which were not used in the case of the Sunpine project?
 - (ii) If so, why were they not used?
 - (iii) Is it unusual for DFO to become aware of a project of this nature only after a provincial review and consultation process has taken place?
5. An exchange of correspondence between Garry Linsey and David Christiansen in early August 1995 suggests that DFO-HMD expected to be able to work cooperatively with the province on the Sunpine mainline haul road project, but that provincial officials denied a request to do so. Please explain
 - (i) the circumstances of the denial of DFO-HMD's request;
 - (ii) whether and to what effect DFO-HMD and the province worked cooperatively on the project despite the denial; and

(iii) whether and how the denial affected the ability of DFO to evaluate/prevent any potential and actual project impacts pursuant to the habitat protection provisions of the *Fisheries Act*.

6. Please list all information regarding
 - (i) potential and/or actual impacts of the Sunpine mainline haul road (pre- and post construction) on fish habitat; and
 - (ii) any proposed mitigation or compensation measures generated by or supplied to DFO-HMD by provincial officials and relied upon by DFO-HMD in determining whether the mainline haul road, including any stream crossings, at any time could or did cause a HADD to fish habitat, and explain the circumstances under which this information was obtained and relied upon.
7. Please explain the basis for DFO-HMD's recommendation to the Coast Guard to include provincial fisheries timing constraints into the NWPA approvals for Sunpine's Ram River and Prairie Creek crossings (as reflected in a fax from Rocky Konynenbelt to Garry Linsey dated 16 August 1996 and a letter from Garry Linsey to John Woodward dated 21 August 1996).
8. Please provide a copy of the report for the 12 September 1995 DFO-HMD site inspection referenced in a 5 September 1995 letter from J.H. Allan to Garry Linsey as well as in a 21 February 1996 letter from Garry Linsey to Hal Ross.
9. On 15 February 1996 Garry Linsey sent Peter Denney a letter containing a list of 14 comments, questions and additional information requirements that Sunpine had to address in order for DFO-HMD to complete its review of the proposed crossings with regard to their effects on fish and fish habitat in the watercourses. Peter Denney replied on 18 March 1996, listing mitigation options that were still being investigated as well as actions that would be taken in the future.
 - (i) Please provide detailed information (including copies of inspection reports, etc.) regarding actions taken by DFO-HMD since 18 March 1996 to ensure that Sunpine complies with undertakings given in the 18 March 1996 letter.

- (ii) Question 11 of Garry Linsey's letter points out that no information was provided to DFO-HMD regarding impacts of the proposed road on many tributaries to an unnamed tributary to the Ram River mentioned in Sunpine's NWPAs application for the Ram River crossing.

Appendix C of Peter Denney's 18 March 1996 response lists mitigation measures to be adopted to address this issue. Under "Other Mitigation Measures," the response states that "[e]xisting winter logging roads west of the mainline alignment will be abandoned upon completion of the mainline construction."

- (a) Please explain how consideration of these measures factored into DFO-HMD's evaluation of Sunpine's proposal.
 - (b) Please explain in detail how the issue of offsetting habitat loss or disruption was addressed in connection with the Sunpine mainline haul road project as a whole, listing specific examples.
- (iii) Gary Linsey's letter mentions that information reviewed by DFO-HMD includes information received from Sunpine in September 1995 as well as the NWPAs permit application filed with the Coast Guard in December 1995. Please identify information received from Sunpine in September 1995 and explain whether further information was requested from Sunpine at that time, listing specific requirements.
10. Please provide copies of all sediment monitoring reports for Prairie Creek and Ram River provided to DFO-HMD by Sunpine pursuant to Garry Linsey's letter to Peter Denney dated 22 August 1996.
 11. On 15 February 1996, Glen Hopky advised H. Ross that DFO-HMD did not have a CEEA trigger in connection with the Sunpine Prairie Creek and Ram River crossings, but that this could change pending receipt of additional information from Sunpine.
 - (i) Please indicate at what point in time DFO-HMD determined conclusively that it did not have a CEEA trigger in connection with Sunpine's mainline haul road; and

- (ii) identify in detail information relied upon in determining that Sunpine's mainline haul road would not and does not result in a net loss of habitat productive capacity.

If any factors other than net loss of habitat productive capacity were at any time considered in determining that no authorization is required pursuant to s. 35(2) of the *Fisheries Act* in connection with the Sunpine mainline haul road, please identify such factors and explain how they were applied.

12. Please explain how the requirement to adopt an ecological approach to habitat management (listed in the "Factors to Consider in Assessment" contained in the Directive on the Issuance of Subsection 35(2) Authorizations dated 25 May 1995 ("Directive")) was implemented in connection with the Sunpine mainline haul road proposal.
13. Please provide a copy of the "Habitat Protection and Conservation Guidelines (1993)" referenced in the Directive.
14. Please explain whether any drafts of the July 2001 *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* ("Enforcement Policy") were in use in the Prairie Region in the period from 1995 – July 2001, provide copies of any such drafts, and explain the inter-relationship between the Enforcement Policy and the various DFO-HMD documents (Directive, etc.) providing guidance on the habitat protection provisions of the *Fisheries Act*.
15. Please provide copies of the two letters of advice referenced at page 11 of Canada's 13 July 1998 response to the submission.

Thank you for your consideration of these questions.

APPENDIX 6

List of Information Received by the Secretariat for Development of the Factual Record



**Information Received for the Development of the Factual Record
on Submission SEM-97-006 (Oldman River II)**

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
36	12/09/1993	Rhude, L.A., Fisheries Biologist, AEP-FWS, RMH	Memo to G. Robertson, Head, Timber Management, RMH re comments on proposed Sunpine haul road	Submitter
37	12/14/1993	Burrington, Brian, Wildlife Technician, AEP-FWS, RMH	Memo to G. Robertson, Head, Timber Management, Rocky Clearwater Forest Land and Forest Services cc. L. Rhude, re comments on proposed Sunpine haul road	Submitter
38	02/15/1994	Haupt, Steven, President, Friends of the West Country	Letter to Brian Evans, Minister, AEP re concerns about plans of Sunpine to build new road	Submitter
259	03/11/1994	Friends of the West Country	Unsigned letter to Minister of Environmental Protection, cc. M.D. of Clearwater, Sunpine, Fish & Wildlife, Alta. Transportation, P.C.N.A., along with documents outlining desired process to address perceived social, economic and environmental impacts of Sunpine Forest Products log haul routing (included in Item 256)	Canada
260	03/24/1994	Sunpine Forest Products Ltd.	Fax to M.D. of Clearwater along with Friends of the West Country call for public letter writing campaign against proposed new Sunpine road; fact sheet; map; Friends of the West Country newsletter (winter 1994, vol. 1, issue 1) (Included in Item 256)	Canada
1	06/00/1994	Townsend, D.M. and J.H. Allan, Pisces Environmental Consulting Services Ltd.	"Preliminary Assessment of Fisheries Resources and Potential Impacts of the Proposed Sunpine Forest Products Haul Road" prepared for Sunpine, Sundre	Submitter
177	06/00/1994	Townsend, D.M. and J.H. Allan, Pisces Environmental Consulting Services Ltd.	Report entitled "Preliminary Assessment of Fisheries Resources and Potential Impacts of the Proposed Sunpine Forest Products Haul Road prepared for Sunpine Forest Products, Sundre, Alberta"	Canada
261	08/10/1994	Sunpine Forest Products Ltd.	Unsigned letter from Managing Director apparently directed at members of public with concerns regarding road safety and log trucks along with report entitled "Sunpine Forest Products Ltd. Issue Scoping Report" prepared by Western Environmental and Social Trends, Inc. (included in Item 256)	Canada
257	03/20/1995	Stanley Associates Engineering Ltd.	Draft final report of Strachan Area Transportation Network Study (included in Item 256)	Canada

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
39	06/07/1995	Kostuch, Martha, Friends of the West Country	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans re notification of Sunpine's intent to build new permanent all weather road up the middle of the FMA area	Submitter
40	06/08/1995	Kostuch, Martha	Fax memo to Françoise Ducros asking for assistance	Submitter
262	07/04/1995	n/a	Memo to "Council" asking them to review Sunpine intial report re mainline road prior to next council meeting (included in Item 256)	Canada
41	07/06/1995	Glover, Robert N., Chief Ranger, Clearwater District, AEP	Memo to Lorne D. Goff, Regional Director, Eastern Southern Slopes, attn: G. Robertson re Sunpine Mainline Proposal Revised Phase I Submission	Submitter
42	07/07/1995	Konynenbelt, R.D., Fisheries Technician, RMH	Letter to G. Robertson, Forester I/C Forest Mgmt. Section, Southern Eastern Slopes Region - RMH, cc. M.E. Kraft, re comments on Sunpine Mainline Road Proposal Revised Phase I Submission dated 28 June 1995	Submitter
43	07/10/1995	Burrington, Brian, Wildlife Technician, AEP-FWS, RMH	Letter to George Robertson, Lands and Forests Services, RMH cc. R. Konynenbelt and E. Bruns, re potential impacts of Sunpine Mainline Haul Road - Phase I Revision	Submitter
44	07/13/1995	Kostuch, Martha	Note to file re: speaking to Carol in Minister's office re response sent to ADM	Submitter
264	07/17/1995	M.D. Clearwater	Letter to Forester, I/C Forest Management Section, Southern East Slopes Region-Rocky, cc. Council, re comments of Council on Sunpine Mainline Road Proposal Phase I Submission (included in Item 256)	Canada
45	07/26/1995	Tobin, Brian, Minister of Fisheries and Oceans	Letter to Martha Kostuch re: first notification received by DFO re Sunpine project	Submitter
178	07/26/1995	Tobin, Brian, Minister of Fisheries and Oceans	Letter to Martha Kostuch, Friends of the West Country, re preparation of DFO info request to Sunpine	Canada
263	07/29/1995	Forester, I/C Forest Management Section, Southern East Slopes Region-Rocky, AEP	M.D. of Clearwater along with Sunpine Mainline Road Proposal - Phase 1 Submission required pursuant to Sunpine Timber Harvest Planning and Operating Ground Rules, S. 4.4 Planning of Roads; asking M.D. to review and provide comments by 14 July 1995 (included in Item 256)	Canada
46	07/31/1995	Kostuch, Martha	Fax memo to Françoise Ducros sending copy of letter to Minister	Submitter

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
47	07/31/1995	Kostuch, Martha	"Media Release – Friends Request Federal Environmental Assessment of Sunpine Road"	Submitter
49	07/31/1995	Kostuch, Martha, Friends of the West Country	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans asking him to inform Sunpine of the need to apply for a s. 35(2) authorization and to trigger an environmental assessment under CEAA.	Submitter
179	07/31/1995	Kostuch, Martha, Friends of the West Country	Letter to Brian Tobin, Minister of Fisheries and Oceans, cc. Glen Hopky, Sheila Copps, Morley Christie, asking for an environmental impact assessment review of the Sunpine road proposal	Canada
233	08/00/1995	Allan, J.H., Pisces Environmental Consulting Services Ltd.	Report entitled "Preliminary Assessment of Fisheries Resources and Potential Impacts of the Proposed Sunpine Forest Products Haul Road prepared for Sunpine Forest Products, Sundre, Alberta"	Canada
50	08/01/1995	Robertson, George, Forester I/c Forest Management Section, AEP	Letter to Peter Denney, Sunpine identifying deficiencies in 28 June 1995 Phase I Mainline Road Proposal	Submitter
180	08/01/1995	Hopky, Glen, Habitat Coordinator, Alberta, DFO	Letter to Peter Denney, Sunpine, cc. J. Stein, G. Linsey, M. Christie, D. Christiansen, B. Stubbs, informing him that DFO has received a public inquiry regarding Sunpine's proposed permanent haul road, that from information provided it appears that the proposed works or undertaking have the potential to affect fish and fish habitat, and requesting Sunpine to forward to DFO plans and proposed mitigation measures in connection with the project.	Canada
181	08/03/1995	Linsey, Garry, DFO-HMD	Letter to D. Christiansen, AEP-NRS-FMD-RMH, cc. G. Hopky (DFO Winnipeg), J. Stein (DFO, Winnipeg), B. Stubbs (AFMD, Edmonton) proposing that AEP and DFO work cooperatively to protect fish and fish habitat re Sunpine proposal	Submitter
51	08/03/1995	Linsey, G.A., DFO-HMD Winnipeg	Letter to D. Christiansen, AEP-NRS-FMD-RMH, cc. G. Hopky (DFO Winnipeg), J. Stein (DFO, Winnipeg), B. Stubbs (AFMD, Edmonton) proposing that AEP and DFO work cooperatively to protect fish and fish habitat re Sunpine proposal	Canada
182	08/03/1995	Linsey, G.A., DFO-HMD Winnipeg	Draft of item 181, indicating that letter ok'd by "Jeff" and noting "we normally do not make these letters of request"	Canada

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
52	08/15/1995	Tobin, Brian, Minister of Fisheries and Oceans	Letter to Martha Kostuch stating the DFO officials recently requested information from Sunpine and contacted AEP to work cooperatively	Submitter
53	08/21/1995	Christiansen, D.G., Head, Fisheries Management Section, Northern and Southern Eastern Slopes Regions, AEP-RMH	Letter to Garry Linsey, DFO-HMD, Winnipeg, cc. F. Cardinal, M. Barrett, B. Stubbs, M. Kraft, R. Konynebelt, indicating that due to the unfortunate absence of an agreement between their respective agencies on the administration of the Fisheries Act, provincial staff could not provide input and comments to the proposal reviews initiated by DFO	Submitter
183	08/21/1995	Christiansen, D.G., Head, Fisheries Management Section, Northern and Southern Eastern Slopes Regions, AEP-RMH	Letter to G. Linsey, cc. F. Cardinal, M. Barrett, B. Stubbs, M. Kraft, R. Konynebelt, advising that due to the unfortunate absence of an agreement between their agencies on the administration of the Fisheries Act, provincial Fisheries staff could not comment on the DFO review of the Sunpine project	Canada
54	08/22/1995	Burrington, Brian, Wildlife Technician, AEP-FWS, RMH	Letter to George Robertson, Lands and Forests Services, RMH cc. E. Bruns and G. Mandrusiak, re deficiencies of Sunpine Phase I Revision Supplement	Submitter
267	08/29/1995	Canadian Field Operations Supervisor, Rocky Mountain Elk Foundation	Letter to Alberta Minister of Environmental Protection, cc. Chairman Sunpine FAC, Sunpine, Weyerhaeuser Canada Ltd. (included in Item 256)	Canada
57	09/01/1995	Pharis, Vivian, Chair, Public Policy Committee, Alberta Wilderness Association	Fax memo to Martha Kostuch re cooperation with AB Greens	Submitter
58	09/03/1995	Pharis, Vivian, Chair, Public Policy Committee, Alberta Wilderness Association	Fax memo to Martha Kostuch re Peter Abramowicz (Calgary Rainforest Action Group) proposal for the West Country Internet Strategy	Submitter
60	09/05/1995	Mussell, Dave, Wilderness Policy Advisor, Pembina Institute	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, cc. Hon. Sheila Copps, Minister of the Environment, re objection to construction of Sunpine Mainline Road	Submitter
184	09/05/1995	Allan, J.H., Pisces Environmental Consulting Services Ltd.	Letter to Gary Linsey, DFO, along with supporting documentation "describing crossing methods, construction procedures, surface runoff controls and mitigation for the four stream crossings on the proposed Sunpine Haul Road" and "an orthophoto map of Sunpine's proposed cut block pattern".	Canada

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
265	09/07/1995	Sunpine Forest Products Ltd.	Media Release re Phase I approval for mainline road and next steps	Canada
61	09/08/1995	Armstrong, Paul, Northern Light Ecoalition Society	Letter to Hon. Ty Lund, Minister of Environmental Protection, cc. Sheila Copps, Friends of the West Country, Calgary Herald calling for proper environmental assessment of Sunpine road	Submitter
62	09/10/1995	Kostuch, Martha, Friends of the West Country	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, cc. Hon. Sheila Copps, Minister of the Environment, Morley Christie, CEAA, Glen Hopky, Freshwater Institute, re Sunpine project	Submitter
185	09/10/1995	Kostuch, Martha	Letter to B. Tobin, cc. Hon. Sheila Copps, Morley Christie, Glen Hopky, calling for an environmental assessment of the Sunpine project and asking for info received from Sunpine and provincial response to request for cooperation	Canada
63	09/11/1995	Kostuch, Martha	Fax memo to Davel Mussell re assistance to Friends of the West Country and attendance at consultation on detailed management plan of Sunpine	Submitter
64	09/12/1995	Kostuch, Martha	Note to file re: information from Plesuk re Ty Lund trip to Ottawa re Sunpine	Submitter
65	09/20/1995	Kostuch, Martha	Note to file re: discussion with Morley Christie re CEAA re no application required under s. 35(2)	Submitter
66	09/25/1995	Van Tighem, Kevin	Letter to Hon. Sheila Copps, Minister of Environment asking for an environmental assessment under CEAA and noting that he never received a response from Sunpine Forest Advisory Committee to a letter (attached) sent 6 April 1995 expressing concern about proposed mainline road project	Submitter
67	09/25/1995	Grier, Tim	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, cc. Hon. Sheila Copps, Minister of the Environment, asking for an environmental assessment panel review of Sunpine proposed new log haul road	Submitter
68	09/25/1995	Brownold, Barbara	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, cc. Hon. Sheila Copps, Minister of the Environment, asking for an environmental assessment review of Sunpine proposed new log haul road	Submitter
69	09/26/1995	Diewold, R.J.	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, cc. Hon. Sheila Copps, Minister of the Environment, Friends of the West Country, asking for environmental assessment review panel concerning proposed Sunpine road	Submitter

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266	09/27/1995	Sunpine Forest Products Ltd.	Press Release by Woodlands Manager expressing concern re intention of federal government to initiate further review of mainline road proposal (included in Item 256)	Canada
70	10/02/1995	Pharis, Vivian, Director, Alberta Wilderness Association	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, cc. Hon. Sheila Copps, Minister of the Environment, Douglas Young, Minister of Transportation, Nick Taylor, AB Forestry Critic, re Sunpine FMA in Alberta and asking for DFO and federal department of highways to appoint an environmental assessment review panel for new road project	Submitter
71	10/04/1995	Lacey, Gordon	Letter to Martha Kostuch, Friends of the West Country, re letters to Brian Tobin and Sheila Copps	Submitter
72	10/04/1995	Lacey, Gordon	Letter to Brian Tobin, Minister of Fisheries and Oceans, asking for an environmental impact assessment review of the Sunpine road proposal	Submitter
73	10/04/1995	Lacey, Gordon	Letter to Sheila Copps, Minister of the Environment, asking for an environmental impact assessment of the Sunpine road proposal	Submitter
74	10/04/1995	Braben, Evelyn and Joseph Braben	Letter from resident of North Fork Road against mainline road proposal of Sunpine and calling for an environmental assessment review panel	Submitter
75	10/04/1995	Braben, Evelyn and Joseph Braben	Letter from resident of North Fork Road against mainline road proposal of Sunpine and calling for an environmental assessment review panel	Submitter
76	10/16/1995	Kostuch, Martha	Note to file re phone call from Mary Griffiths, Liberal researcher, saying that she had spoken to Paul in Brian Tobin's office who indicated there would be no assessment of Sunpine's road project because it was being grandfathered under EARP.	Submitter
80	10/16/1995	Godkin, Jeanette and Leonard Godkin	Letter to the Friends of the West Country containing body of letter sent to Brian Tobin re Sunpine proposed new road	Submitter
77	10/17/1995	Kinley, Jessie C.	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, cc. Hon. Sheila Copps, Minister of the Environment, and Friends of the West Country, expressing concern about Sunpine road proposal and requesting environmental assessment review panel	Submitter
78	10/18/1995	Kostuch, Martha	Note to file re telephone conversation with Glen Hopky, DFO re s. 35(2) and s. 37(2) Fisheries Act triggers for environmental assessment under CEAA	Submitter

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79	10/23/1995	Scheunert, Sherry	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, cc. Hon. Sheila Copps, expressing concern regarding the proposed Sunpine road and asking that the project be referred to an environmental assessment review panel	Submitter
81	10/24/1995	Kostuch, Martha	Note to file re returning call from Paul Mon ____, DFO informing her that it had been decided that Sunpine road would not impact fisheries sufficiently to trigger the Fisheries Act or CEAA	Submitter
82	10/28/1995	Kostuch, Martha	Fax memo to Stewart Elgie re review of a draft letter	Submitter
83	10/30/1995	Kostuch, Martha	Letter to Glen Hopky, Habitat Coordinator, Freshwater Institute, DFO, stating disagreement with DFO interpretation of ss. 35(2), 37(1) and 37(2) of Fisheries Act and relationship to CEAA and asking for copies of correspondence between DFO and AEP	Submitter
84	10/31/1995	Dumka, Mary	Letter to Friends of the West Country enclosing copy of letter to Brian Tobin re Sunpine Road	Submitter
85	10/31/1995	Dumka, Mary	Letter to Hon. Brian Tobin, Min. Fisheries and Oceans, cc. Hon. Sheila Copps, Friends of the West Country, re concerns about new Sunpine road and asking for environmental assessment review	Submitter
2	11/00/1995	Allan, J.H., Pisces Environmental Consulting Services Ltd.	"Preliminary Assessment of Fisheries Resources and Impacts at the Sunpine Haul Road Crossings of Rough Creek, Tawadina Creek, an Unnamed Tributary to Dry Creek and the Ram River" prepared for Sunpine, Sundre"	Submitter
86	11/06/1995	de Jongh, Mrs. Elly	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans, re proposed new forestry road near RMH, Alberta asking that project be referred to an environmental assessment review panel	Submitter
91	11/10/1995	n/a	List of Forestry Advisory Committee Members – November, 1995	Submitter
135	11/14/1995	Transport Canada (CCG) Vancouver	Referral cover sheet addressed to NRC, Justice, NEB, DFO, Forestry Canada, EC, Parks Canada, Health and Welfare Canada, Indian and Northern Affairs, and CCG	Submitter
92	11/15/1995	Kostuch, Martha	Fax memo to Dwight sending copies of documents and requesting update	Submitter
87	11/22/1995	Tobin, Brian, Minister of Fisheries and Oceans	Letter to Vivian Pharis, Director, Alberta Wilderness Association, responding to her letter re Sunpine project	Submitter

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186	11/22/1995	Tobin, Brian, Minister of Fisheries and Oceans	Letter to Teresa Neuman re status of review of Sunpine project under Fisheries Act and NWPA	Canada
284	11/22/1995	McClelland, L., Habitat Biologist, Western Ops. & Chemical Hazards, Habitat Management & Enviro Science, DFO	Memo to Neil Stephens, CCG, cc. Jeff Stein, along with a package of infor- mation included in a letter to the Minister on Sunpine's permanent road proposal consisting of a petition with approximately 240 signatures and a number of letters of opposition.	Canada
88	11/23/1995	Tobin, Brian, Minister of Fisheries and Oceans	Letter to Friends of the West Country re DFO Fisheries Act and NWPA review of Sunpine proposal	Submitter
188	12/14/1995	Tobin, Brian, Minister of Fisheries and Oceans	Letter to Roxanne Snyder in reply to an inquiry about a 31 July 1995 letter from Martha Kostuch, Friends of the West Country re Sunpine proposal	Canada
89	12/15/1995	Hopky, Glen, Habitat Coordinator, DFO Winnipeg	Letter to Friends of the West Country responding to 30 October 1995 letter and 18 October 1995 telephone conversation re Fisheries Act requirements for Sunpine project and DFO-AEP communications	Submitter
187	12/15/1995	Reid, David, Agra Earth & Environmental	Fax to Reg Watkins, Area Officer, CCG Vancouver along with Sunpine appli- cation to CCG for Prairie Creek and Ram River Crossing authorizations under NWPA (missing appendices D-I)	Canada
90	12/18/1995	M.D. Clearwater	Unsigned letter to Sheila Copps, Minister of Environment and Brian Tobin, Minister of Oceans and Fisheries stating that 1 1/2 years earlier, a Local Forestry Advisory Committee representing various community and regional interests had reviewed a Sunpine report on access options and had concluded that the proposed road was the preferred option	Submitter
288	00/00/1996	n/a	Eighteen items of correspondence from 1996 expressing public opposition to and support for Sunpine project including two form letters dated 1995 addressed to Ken Brant, CCG Sarnia, indicating that fifteen responses were received using the first letter, twenty- nine responses received using the second	Canada
93	01/02/1996	Hopky, Glen, Habitat Coordinator, Alberta Area, DFO-HMD, Winnipeg	Letter to Yvette Myers, Supervisor Navigation Protection Program, CCG Vancouver asking for a definition of the project being referred to DFO by CCG under CEAA	Submitter

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134	01/02/1996	Hopky, Glen, Habitat Coordinator, Alberta Area, DFO-HMD, Winnipeg	Same as Item 93 (included in Item 123)	Submitter
189	01/02/1996	Hopky, Glen, Habitat Coordinator, DFO-HMD	Letter to Yvette Myers, Supervisor Navigation Protection Program, CCG Vancouver asking for a definition of the project being referred to DFO by CCG under CEAA	Canada
133	01/05/1996	Johnson, J. Derek, Impact Assessment Biologist, Forestry Canada, Edmonton	Fax to Reg Watkins, Area Officer, CCG Vancouver, stating that there are no CEAA forestry triggers related to the construction of Sunpine's Prairie Creek and Ram River bridges and approaches	Submitter
190	01/05/1996	Johnson, J. Derek, Impact Assessment Biologist, Forestry Canada, Edmonton	Fax to Reg Watkins, Area Officer, CCG stating that there are no CEAA forestry triggers in connection with Sunpine's proposed Prairie Creek and Ram River crossings	Canada
191	01/10/1996	Denney, Peter, Sunpine	Letter to CCG-NWPD Vancouver att. Kent Akhurst, Environmental Assessment Officer along with map and legend of Sunpine's bio-physical analysis of the two road alternatives described in the Prairie Creek and Ram River crossing application (Item 187)	Canada
192	01/11/1996	Linsey, G.A., DFO-HMD Winnipeg	Letter to Hal Ross, CCG-NWPD Vancouver cc. G. Hopky, J. Stein, M. Christie, re request for extension of referral review period pending definition of scope of Sunpine project	Canada
97	01/15/1996	Kostuch, Martha	Letter to Hon. Brian Tobin, Minister of Fisheries and Oceans re panel review of Sunpine proposal	Submitter
193	01/23/1996	Ross, Hal, Navigable Waters Protection Officer, Navigation Protection Program, CCG Vancouver	Letter to G.A. Linsey, DFO-HMD re indefinite extension of review period	Canada
99	01/30/1996	Armstrong, Paul	Unsigned letter to Premier Ralph Klein, cc. Friends of the West Country, Liberals, Calgary Herald, Edmonton Friends of the North, Western Canada Wilderness Committee, Sergio Marchi, United Nations Environmental Committee, Southern Interfaith Aboriginal Rights Coalition re information received under FOIPA re Ty Lund's refusal to call for an environmental assessment of Sunpine road project contrary to AEP expert advise and public opposition	Submitter
98	01/31/1996	CCG	NWPA notice re Sunpine Prairie Creek and Ram River bridge proposals	Submitter

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100	02/04/1996	Haupt, Steven, President, Friends of the West Country	Letter to Sergio Marchi and Fred Mifflin cc. Ty Lund and Larry Kennedy, stating that Larry Kennedy letter to Tobin and Copps on behalf of FAC was grossly misleading	Submitter
101	02/05/1996	Kostuch, Martha, Friends of the West Country	Unsigned letter to CCG Vancouver stating an objection to Sunpine road, enclosing information from provincial wildlife and fisheries biologists and foresters on negative impacts of project and stating that Sunpine project should be referred to a panel review	Submitter
102	02/05/1996	Kostuch, Martha, Friends of the West Country	Letter to Hon. Fred Mifflin, Minister of Fisheries and Oceans enclosing information from provincial wildlife and fisheries biologists and foresters on negative impacts of project and stating that Sunpine project should be referred to a panel review	Submitter
103	02/07/1996	Kostuch, Martha	Fax memo to Ed Reid, City of Edmonton, re watershed protection concerns related to Sunpine activities	Submitter
194	02/12/1996	Mifflin, Hon. Fred J., Rear Admiral, Minister of Fisheries and Oceans	Letter to Helen Wirrell in response to request for information re DFO actions in connection with Sunpine Proposal	Canada
104	02/14/1996	Kostuch, Martha	Fax memo to Connie Abbott re letters on Sunpine	Submitter
105	02/15/1996	Hopky, Glen, Habitat Coordinator, Alberta Area, DFO-HMD, Winnipeg	Letter to H. Ross, CCG Navigable Water, Vancouver, cc. G. Linsey (DFO Winnipeg), J. Stein (DFO Winnipeg), P. Denny (Sunpine), M. Christie (CEAA, Edmonton), R. Konynenbelt (AEP-FMD, RMH), B. Stubbs (AEP- FMD, Edmonton) re Sunpine Ram River and Prairie Creek Crossings referral response	Submitter
195	02/15/1996	Zaal, Fred, Environmental Assessment Coordinator, EC Environmental Protection Western & Northern Division, Edmonton	Letter to Hal Ross, Navigable Waters Protection Officer, CCG Vancouver, stating that conditional upon mitigation being conducted as outlined in AGRA Earth & Environmental Limited application submitted on behalf of Sunpine, EC had no concerns re Sunpine Ram River and Prairie Creek bridges (included in Item 123)	Submitter
132	02/15/1996	Hopky, Glen, Habitat Coordinator, Alberta Area, DFO-HMD, Winnipeg	Same as Item 105 (included in Item 123)	Submitter
131	02/15/1996	Zaal, Fred, Environ- mental Assessment Coordinator, EC Environmental Pro- tection Western & Northern Division, Edmonton	Letter to Hal Ross, CCG Vancouver stating that conditional upon mitigation being undertaken as set out in Item 187, EC does not have any concerns with the Sunpine Prairie Creek and Ram River crossings project proceeding	Canada

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196	02/15/1996	Linsey, G.A., DFO-HMD Winnipeg	Letter to Peter Denney, Sunpine, cc. G. Hopky, J. Stein, S. Mercer (DOE Edmonton), H. Ross, R. Konyonenbelt, B. Stubbs setting out DFO-HMD comments, questions and information requirements in connection with Sunpine Project as described in info received by DFO from Sunpine in September, 1995 and in the NWPA application dated December, 1995	Canada
197	02/16/1996	Hopky, Glen, Habitat Coordinator, Alberta, DFO	Letter to H. Ross, CCG Navigable Water, Vancouver, cc. G. Linsey (DFO Winnipeg), J. Stein (DFO Winnipeg), P. Denny (Sunpine), M. Christie (CEAA, Edmonton), R. Konyonenbelt (AEP-FMD, RMH), B. Stubbs (AEP-FMD, Edmonton) re Sunpine Ram River and Prairie Creek	Canada
130	02/21/1996	Linsey, G.A., DFO-HMD Winnipeg	Unsigned letter to Hal Ross, Navigable Waters Protection Officer, CCG Vancouver, cc. G. Hopky and J. Stein, re scope of CEAA assessment of Sunpine project and comments provided by DFO to Sunpine on 15 February 1996 on all proposed watercourse crossings (included in Item 123)	Submitter
198	02/21/1996	Linsey, G.A., DFO-HMD Winnipeg	Unsigned letter to Hal Ross, Navigable Waters Protection Officer, CCG Vancouver, cc. G. Hopky and J. Stein, re scope of CEAA assessment of Sunpine project and comments provided by DFO to Sunpine on 15 February 1996 on all proposed watercourse crossings	Canada
106	02/22/1996	Ross, Hal, Navigable Waters Protection Officer, Navigation Protection Program, CCG Vancouver	Letter to Martha Kostuch, Friends of the West Country stating that CEAA assessment would cover all crossings of navigable waters and stating that a copy of Sunpine's application could be obtained through access to information procedures or by asking Sunpine	Submitter
107	03/01/1996	Vollmershausen, Jim, Regional Director General, EC Prairie and Northern Region	Letter to Steven Haupt, President, Friends of the West Country, re Sunpine project, referring him to CEAA Edmonton for further information	Submitter
108	03/04/1996	Kostuch, Martha, Friends of the West Country	Letter to CCG Vancouver asking for scope of CEAA assessment of Sunpine project and copy of Sunpine application	Submitter
31	03/05/1996	Best, Mike, President, RMH Chamber of Commerce	Letter to Fred Mifflin, Minister of Fisheries asking him to respect the decisions made by the Provincial government on the issue of the Sunpine Mainline road proposal (in Item 12)	Submitter

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268	03/06/1996	M.D. Clearwater	Letter to Sergio Marchi and Fred Mifflin cc. Council, Alta Min. Env. Prot., M.P., referencing provincial approval process for mainline road proposal and urging them to handle federal permit applications fairly and expeditiously (included in Item 256)	Canada
109	03/07/1996	Ross, Hal, Navigable Waters Protection Officer, Navigation Protection Program, CCG Vancouver	Letter to Martha Kostuch saying scope of assessment will be determined after site inspection to take place after snow levels decrease and saying office had insufficient resources to photocopy Sunpine application, suggesting asking Sunpine for a copy	Submitter
110	03/14/1996	Mifflin, Hon. Fred J., Rear Admiral, Minister of Fisheries and Oceans	Letter to Martha Kostuch re Sunpine application for NWPA approvals and public participation in approval process	Submitter
199	03/15/1996	McClelland, L., Office of the Minister of Fisheries and Oceans	Fax to J. Stein containing action request from Bob Mills, M.P., Red Deer, seeking a reply from Fred Mifflin, Minister of Fisheries and Oceans to letters (attached) from Mike Best, President of RMH Chamber of Commerce and D.L. Soppit, Mayor of RMH, asking DFO to approve Sunpine proposal for tourism, tax and job reasons.	Canada
111	03/18/1996	Friends of the West Country	Media Release re federal environmental assessment of Sunpine Mainline Road and AB Ombudsman review of AEP decision to give Sunpine project Phase 1 approval	Submitter
200	03/18/1996	Denney, Peter, Chief Forester, Sunpine	Letter to G.A. Linsey, DFO-HMD providing 15 items of additional information (and appendices A-F) requested in a February 1996 memo (AB95-042)	Canada
201	03/22/1996	Mercer, Shauna, Manager, Alberta Division, Environmental Protection, Prairie and Northern Region, EC	Letter to Hal Ross, CCG Vancouver stating an interest in being present at a Sunpine site inspection and indicating that it would conduct a further project review if the definition of the project scope were to change	Canada
112	03/25/1996	Kostuch, Martha	Note to file re call to Patsy re sending letters to Navigable Waters	Submitter
113	03/25/1996	Kostuch, Martha	Letter to Hal Ross, Navigable Waters Protection Officer, CCG Vancouver, cc. Hon. Fred Mifflin, re public involvement in CEAA screening process for Sunpine project	Submitter

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202	04/13/1996	Brant, Ken, Superintendent, Navigable Waters Protection Programs, CCG Sarnia	"Site Inspection Report" re: Sunpine Forest Products; aerial inspection concluding that Ram River only navigable watercourse along proposed route, and handwritten note dated 96.05 by K. Brant indicating that based on legal counsel, they will take the position that both Ram River and Prairie Creek are navigable and require NWPA approvals; additional handwritten text indicating that inspection revealed that Ram River and Prairie Creek are the only navigable waterways involved	Canada
114	05/07/1996	Brant, Ken, Superintendent, Navigable Waters Protection Programs, CCG Sarnia	Letter to Martha Kostuch re merger of CCG and DFO and transfer of Alberta from Western to Central and Arctic region effective 1 April 1996, and re scoping of assessment of Sunpine project and details re public registry under CEAA	Submitter
115	05/14/1996	Brant, Ken, Superintendent, Navigable Waters Protection Programs, CCG Sarnia	Fax to Martha Kostuch re Sunpine application, sending copy of 7 May 1996 CCG letter (not attached)	Submitter
116	05/16/1996	Kostuch, Martha	Fax memo to Stewart Elgie re copies of letters	Submitter
117	05/20/1996	Kostuch, Martha, Friends of the West Country	Letter to Glen Hopky, Habitat Coordinator, Freshwater Institute, DFO, asking for status of DFO review of Sunpine proposal	Submitter
118	05/20/1996	Kostuch, Martha, Friends of the West Country	Letter to Ken Brant, Superintendent, Navigable Water Protection Programs, CCG Sarnia, asking for update and referral of Sunpine project to a CEAA panel review	Submitter
119	05/27/1996	Elgie, Stewart, Sierra Legal Defence Fund	Letter to Dr. Martha Kostuch, Friends of the West Country, re legal advice regarding the application of CEAA to the proposed road and bridge construction by Sunpine in the Ram River area	Submitter
203	06/20/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	E-mail to Gary Linsey along with copies of s. 12(3) CEAA requests for advice for Prairie Creek and Ram River crossings	Canada
9	06/21/1996	Hopky, Glen, Habitat Coordinator, Alberta Area, DFO-HMD	Letter to Martha Kostuch re referral of Sunpine project by CCG to HMD and stating that questions regarding CEAA review should be directed to John Woodward at CCG Sarnia	Submitter

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14	06/24/1996	Herman, Steve, Fisheries Technician, AEP, Fisheries Management Section, Rocky Mountain House	Letter to Martha Kostuch in response to request for sportfish species information for the general areas of Sec 2 Twp 38 Rge 10 W5 on Prairie Creek and Sec 19 Twp 38 Rge 11 W5 on the Ram River (in Item 12)	Submitter
120	06/24/1996	Hopky, Glen, DFO Winnipeg	Fax cover sheet to M. Kostuch	Submitter
126	06/25/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	Unsigned letter to Garry Linsey, DFO Winnipeg re Sunpine Prairie Creek Crossing, defining project scope and asking him to refer to information provided to DFO by Sunpine to provide comments to the CCG as per s. 12(3) of CEEA, including any recommendations for mitigative measures (included in Item 123)	Submitter
121	07/03/1996	Kostuch, Martha	Note to file re call to John Woodward: status of review, public notice, site inspection, location of and access to public registry, meeting with Friends of the West Country	Submitter
125	07/08/1996	Linsey, G.A., DFO-HMD Winnipeg	Letter to John Woodward, Environmental Assessment Officer, CCG Sarnia re proposed mitigation measures for Sunpine Prairie Creek Bridge Crossing (included in Item 123)	Submitter
122	07/09/1996	Brant, Ken, Superintendent, Navigable Waters Protection Programs, CCG Sarnia	Letter to Martha Kostuch re Sunpine application for NWPAs approvals and public participation in approval process	Submitter
128	07/09/1996	Linsey, G.A., DFO-HMD Winnipeg	Letter to John Woodward, Environmental Assessment Officer, CCG Sarnia re proposed mitigation measures for Sunpine Ram River Bridge Crossing (included in Item 123)	Submitter
123	07/10/1996	Brant, Ken, Superintendent, Navigable Waters Protection Programs, CCG Sarnia	Letter to Martha Kostuch and attachments: contents of public registry available without Access to Information Act request; handwritten note from Martha Kostuch indicating that Sunpine application not provided and insufficient time to obtain info through access request before deadline for responses under CEEA	Submitter
124	07/10/1996	CCG	Unsigned Sunpine Prairie Creek Bridge CEEA Screening Environmental Assessment Report (included in Item 123)	Submitter
127	07/10/1996	CCG	Unsigned Sunpine Ram River Bridge CEEA Screening Environmental Assessment Report (included in Item 123)	Submitter

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129	07/10/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	Unsigned letter to Garry Linsey, DFO Winnipeg re Sunpine Ram River Crossing, defining project scope and asking him to refer to information provided to DFO by Sunpine to provide comments to the CCG as per s. 12(3) of CEEA, including any recommen- dations (included in Item 123)	Submitter
136	07/12/1996	Kostuch, Martha	Fax memo to John Woodward re public involvement in screening process	Submitter
137	07/13/1996	Kostuch, Martha	Letter to Hon. Fred Mifflin, Minister of Fisheries and Oceans re status of DFO review of Sunpine proposal	Submitter
10	07/15/1996	Linsey, Garry, DFO-HMD	Letter to John Woodward, Environmental Assessment Officer, CCG Sarnia, cc. J. Stein (DFO-HMD Winnipeg), D. Christiansen (AEP, FMD, RMH), re comments on Sunpine proposed Prairie Creek Bridge Crossing	Submitter
138	07/15/1996	Friends of the West Country	Media Release re federal environmental assessment of Sunpine Mainline Road and AB Ombudsman review of AEP decision to give Sunpine project Phase 1 approval	Submitter
139	07/16/1996	Michelin, Lana, Advocate	Newspaper article entitled "Sunpine bridges get initial approval"	Submitter
140	07/16/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	Fax to Martha Kostuch re upcoming public meeting and requirement for access to information request to access non-government project documents	Submitter
204	07/16/1996	Linsey, G.A., DFO-HMD Winnipeg	Fax to J. Woodward, CCG Sarnia, along with copies of letters from G.A. Linsey to J. Woodward dated 15 July 1996 re Prairie Creek and Ram River crossings, providing s. 12(3) CEEA DFO-HMD advice	Canada
141	07/18/1996	Kostuch, Martha	Fax memo to John Woodward re upcoming public meeting	Submitter
142	07/18/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	Fax to Martha Kostuch including final screening environmental assessment reports for Prairie Creek and Ram River Crossings	Submitter
205	07/18/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia, Ken Brant, Regional Superintendent, NWP Sarnia, John McCann, Director, Marine Programs, Sarnia	CCG Screening Environmental Assessment Reports for Ram River and Prairie Creek Crossings, and photocopies of written submissions from public received pursuant to public call for comments	Canada
143	07/21/1996	Kostuch, Martha	Fax memo to John Woodward re faxing screening environmental assessment reports to Stewart Elgie	Submitter

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
144	07/24/1996	Herman, Steve, Fisheries Technician, AEP, Fisheries Management Section, Rocky Mountain House	Letter to Martha Kostuch, cc. D. Christiansen, M. Kraft, re response to request for sportfish species information for the general areas of Sec 2 Twp 38 Rge 10 W5 on Prairie Creek and Sec 19 Twp 38 Rge 11 W5 on the Ram River	Submitter
146	07/27/1996	Kostuch, Martha	Fax memo to John Woodward asking for a list of documents on the public registry for the Prairie Creek and Ram River environmental assessments and providing advance notice of certain questions that would be asked at the public meeting	Submitter
11	07/29/1996	Bennett, Perry, Environmental Protection Officer, Indian and Northern Affairs	E-mail to John Woodward providing Indian and Northern Affairs Canada's response to the Sunpine referral letter	Submitter
18	07/29/1996	Diggle, Lorna, ROUND	Letter to John Woodward, CCG Sarnia, re environmental assessment of Sunpine mainline road (in Item 12)	Submitter
13	07/30/1996	Kostuch, Martha	Submission by Martha Kostuch to CCG in response to environmental screening decision for Sunpine Prairie Creek and Ram River crossings (in Item 12)	Submitter
15	07/30/1996	Haupt, Steven, President, Friends of the West Country	Submission to CCG re scope of assessment of Sunpine mainline road (in Item 12)	Submitter
16	07/30/1996	Rodtka, Doris & Karl Rodtka	Submission to CCG re scope of assessment of Sunpine mainline road (in Item 12)	Submitter
17	07/30/1996	Neuman, Teresa E., Citizens Action Group on the Environment (CAGE)	Statement of Concern re Sunpine Forest Products proposed new Mainline Logging Road near RMH and its environmental impacts as presented to the CCG at public hearings on July 30, 1996 at the Red Deer and District Museum, Red Deer, Alberta (in Item 12)	Submitter
19	07/30/1996	Haupt, Carl and Jean Haupt	Submission to CCG Meeting, 30 July 1996 (in Item 12)	Submitter
20	07/30/1996	O'Brien, Michael, Chairman, Red Deer Recreation Board	Memo to John Woodward, CCG Sarnia, re Sunpine Forestry Road and Related Environmental Problems (in Item 12)	Submitter
22	07/30/1996	Rodtka, Duane & Lea Johnston	Written submission requesting a proper EIA on Sunpine's main line road (in Item 12)	Submitter
32	07/30/1996	Cook, Julia M.	Submission asking for a more complete Sunpine Road Assessment (in Item 12)	Submitter
148	07/30/1996	Kostuch, Martha	"Questions to ask Coast Guard"	Submitter

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
149	07/30/1996	Kostuch, Martha	Notes on presentation by John Woodward	Submitter
12	07/31/1996	Canadian Coast Guard, Sarnia	Envelope addressed to Martha Kostuch postmarked 31 July 1996	Submitter
21	07/31/1996	Pharis, Vivian, Chair, Public Policy Committee, Alberta Wilderness Association	Letter to John Woodward, CCG Sarnia, re environmental assessment of Sunpine mainline road (in Item 12)	Submitter
25	07/31/1996	Brownold, Barbara	Memo to Federal Hearing Fisheries and Coast Guard re Sunpine Mainline Road (in Item 12)	Submitter
151	07/31/1996	Neuman, Teresa E., Citizens Action Group on the Environment (CAGE)	Letter to Martha Kostuch re bill	Submitter
152	07/31/1996	Mazza, Brian, The Mountaineer	M.D. of Clearwater Notes: Sunpine Mainline Road	Submitter
206	07/31/1996	Woodward, John, CCG Sarnia	Fax to Ryerson Christie from DFO Inspection Office, Edmonton along with submission by Martha Kostuch in response to s. 18(3) CEAA advertisement and indicating that he and Ken were talking about an August 16th close date for submissions and stating that he asked Rory Thompson of AF&W if they could allow Sunpine to clear brush to the bridge sites and that the latter said it could be done	Canada
207	07/31/1996	Gunsch, Sam, Vice-Chair, Edmonton Chapter, Canadian Parks & Wilderness Society	Letter to John Woodward, CCG Sarnia, re environmental assessment of Sunpine mainline road	Canada
269	07/31/1996	M.D. Clearwater	Letter to John Woodward, CCG Sarnia, congratulating the federal government on its decision in the screening report (included in Item 256)	Canada
153	08/02/1996	Leonhard, Sharon, DFO/CG-Wpg	Fax to Martha Kostuch containing CEAA notice indicating that the final date for submissions concerning the environmental reviews of Sunpine's Prairie Creek and Ram River Bridge Crossings is 15 August 1996	Submitter
154	08/02/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	Fax to Martha Kostuch including a list of documents available upon the public registry without a request placed through the Access to Information Act	Submitter
155	08/04/1996	Kostuch, Martha	Fax memo to Stewart Elgie asking for advise on possible actions to take in connection with triggering CEAA under Fisheries Act	Submitter

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
156	08/04/1996	Kostuch, Martha	Fax memo to John Woodward re 5 February 1996 letter to CCG and 14 pages of information; asking that letter and information be considered in screening assessment of the projects	Submitter
34	08/06/1996	Brant, Ken, Superintendent, Navigable Waters Protection Programs	Letter to Martha Kostuch re Sunpine Forest Products Ltd. Application for crossings of the Ram River and Prairie Creek	Submitter
33	08/07/1996	Canadian Coast Guard, Sarnia	Notice of CEEA environmental screening for Sunpine Prairie Creek and Ram River Bridge Crossings noting that Environmental Screening Decision Reports available at CCG office in Sarnia, Ontario	Submitter
35	08/09/1996	Kostuch, Martha	Letter to Hon. Fred Mifflin, Minister of Fisheries and Oceans, cc. Hon. Sergio Marchi, asking him to refer Sunpine's proposed mainline road to Minister Marchi for an environmental assessment panel review	Submitter
157	08/12/1996	Stackhouse, Brian	Unsigned letter to Ken Brant, Superintendent, Navigable Waters Protection Program, CCG Sarnia, cc. Hon. Fred Mifflin, Hon. Sergio Marchi, Martha Kostuch, re: Sunpine Forest Products Ltd. Application for crossings of the Ram River and Prairie Creek	Submitter
158	08/14/1996	Trout Unlimited Canada	Fax from Kerry Brewin to Martha Kostuch re chapters of book "Influences of Forest and Rangeland Management on Salmonid Fishes and Their Habitats;" Chapter 6 – Timber Harvesting, Silviculture, and Watershed Processes, and Chapter 8 – Road Construction and Maintenance	Submitter
159	08/14/1996	Watson, Alexander, The Mountaineer	"Town Council Notes: Other business: Construction of middle support for Ram River bridge"	Submitter
160	08/14/1996	Mazza, Brian, The Mountaineer	"Coast Guard to rule on Sunpine Road"	Submitter
161	08/15/1996	Kostuch, Martha	Note to file re: John Woodward making decision under Section 20 on August 16	Submitter
162	08/16/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	Fax to Martha Kostuch including addenda to final versions of screening environmental assessment reports for the Sunpine crossings of Prairie Creek and Ram River	Submitter
208	08/16/1996	Woodward, John, CCG Sarnia, Ken Brant, Regional Superin- tendent, NWP Sarnia, John McCann, Marine Programs, Sarnia	CCG Screening Environmental Assessment Report for Ram River (ADDENDUM)	Canada

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
209	08/16/1996	Christiansen, D.G., Head, Fisheries Management Section, Northern and Southern Eastern Slopes Regions, AEP-RMH	Memorandum to Angela Ma, Water Resources, Red Deer, cc. R. Konynenbelt, B. Lenton, re Sunpine Ram River crossing, listing conditions recommended by FMD for Ram River crossing (8 conditions) along with fax cover sheet by which Dave Christiansen sent a copy of this letter to G. Linsey, DFO	Canada
211	08/16/1996	Konynenbelt, R.D., Risheries Technician, AEP-NRS-RMH	Fax to Gary Linsey, DFO Winnipeg, cc. J. Stein re Sunpine Ram River bridge re oversight on timing constraints for in-stream work	Canada
163	08/19/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	Fax to Martha Kostuch indicating that due to the pending legal motion, the Department of Justice would be handling the communication of information from that point forward	Submitter
164	08/19/1996	Friends of the West Country	News Release – “Court Action Filed Against Federal Government”	Submitter
165	08/19/1996	Kostuch, Martha	Letter to Hon. Fred Mifflin, Minister of Fisheries and Oceans, cc. Hon. Sergio Marchi, requesting an immediate response to her 13 July 1996 letter enquiring about the DFO review of the Sunpine proposal as a possible CEEA trigger	Submitter
166	08/20/1996	Kostuch, Martha	Fax memo to John Woodward requesting copies of public registry documents	Submitter
167	08/20/1996	Woodward, J., Environmental Assessment Officer, CCG Sarnia	Fax to Martha Kostuch including approval documents for Sunpine crossings at Prairie Creek and Ram River and referral response letter from the Department of Indian Affairs and Northern Development	Submitter
168	08/20/1996	Michelin, Lana, Red Deer Advocate	“Sunpine bridges started – Activists fight project in court”	Submitter
210	08/20/1996	Brant, Ken, Superintendent, Navigable Waters Protection Programs, CCG Sarnia	Unsigned letters of approval sent to Sunpine, att Keith Branter, re Prairie Creek and Ram River bridges and copies of approval documents dated 17 August 1996 signed by Jim Quinn, Regional Director, CCG	Canada
3	08/21/1996	Kostuch, Martha	Fax memo to Stewart Elgie including copies of NWPA approvals for Prairie Creek and Ram River	Submitter
4	08/21/1996	Kostuch, Martha	Note to file re telephone conversation with Garry Linsey, DFO-HMD re whether s. 35(2) Fisheries Act autho- rization issued for Ram River or Prairie Creek crossings and whether sediment monitoring programs approved	Submitter

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
212	08/21/1996	Linsey, G.A., DFO-HMD Winnipeg	Letter to J. Woodward, CCG Sarnia cc. J. Stein, D. Christiansen re amendment of timing-constraints for in-stream work and indicating that he would provide this information, along with other DFO-HMD requirements for the crossings, to Sunpine	Canada
5	08/22/1996	Kostuch, Martha	Fax memo to John Woodward Sunpine NWPA approval documents	Submitter
6	08/22/1996	Kostuch, Martha	Fax memo to Garry Linsey, DFO-HMD seeking confirmation that no Fisheries Act authorization was issued to Sunpine for Prairie Creek or Ram River and that Sunpine's sediment monitoring program not yet approved	Submitter
7	08/22/1996	Kostuch, Martha	Fax memo to Stewart Elgie re communications with CCG and DFO-HMD and intention to contact RCMP	Submitter
213	08/22/1996	Linsey, G.A., DFO-HMD Winnipeg	Letter to Peter Denney, Sunpine, cc. J. Stein, J. Woodward indicating that DFO expected greater sampling frequency as part of sediment monitoring program and requesting that reports be provided to DFO-HMD	Canada
8	08/23/1996	Kostuch, Martha	Fax memo to Stewart Elgie CCG enforcement of approval conditions and beginning of Sunpine work	Submitter
215	08/23/1996	Brant, Ken, CCG Sarnia	Fax to Dale Crewson, RCMP, stating that he is sending copies of NWPA authorizations for Prairie Creek and Ram River crossings	Canada
216	08/23/1996	Note to file	Hand-written note stating that Dale Crewson from the RCMP indicated that environmentalists claim that Sunpine does not have necessary permits and that there may be some civil disobedience and requesting copies of permits	Canada
217	08/23/1996	Woodward, John, CCG Sarnia	Fax to Martha Kostuch indicating that due to the pending legal motion filed 19 August 1996 by Friends of the West Country, the Department of Justice would be handling the communication of information from that point forward	Canada
214	08/26/1996	Reynolds, N.W.	Letter to G. Neale, Harvesting Manager, re Ram River Bridge construction schedule along with attached schedule and construction plan, procedures	Canada
218	08/26/1996	Denney, Peter, Forester, Sunpine	Letter to G.A. Linsey along with description of water monitoring process to be used during in-stream construction	Canada

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
219	08/28/1996	Denney, Peter, Forester, Sunpine	Letter to G.A. Linsey re Item 213 stating that clear span bridges are expected for both crossings and committing to sample "periodically" and during heavy precipitation events commencing at the start of construction and continuing until it is evident that the control measures are working satisfactorily	Canada
220	08/29/1996	Denney, Peter, Forester, Sunpine	Fax cover sheet to G.A. Linsey along with revised Ram River Construction Plan /Procedures	Canada
221	09/03/1996	Reynolds, N.W., Eastern Slopes Management Inc.	Letter to CCG Sarnia, att. John Woodward & Ken Brant, cc. P. Denney & K. Branter, re notification of Ram River bridge construction commencement and completion dates	Canada
222	09/16/1996	Brant, Ken, Regional Superintendent, NWP, CCG	Letter to Mr. Buchanan, Sunpine, cc. J. Stein, G. Linsey, along with amended Mitigation Measures under CEEA required by DFO-HMD re: constraints on in-water construction periods	Canada
223	09/16/1996	Brant, Ken, Regional Superintendent, NWP, CCG	Letter to Mr. Buchanan, Sunpine, advising that Sunpine is required to submit revised plans to CCG in connection with proposal to change construction to a clear span structure	Canada
224	09/17/1996	Reynolds, N.W., Eastern Slopes Management Inc.	Letter to John Woodward, CCG Sarnia, cc. G. Neale, Sunpine, along with copy of drawings for Sunpine Ram River crossing bridge	Canada
169	09/24/1996	Mifflin, Hon. Fred J., Rear Admiral, Minister of Fisheries and Oceans	Letter to Martha Kostuch responding to letters dated 13 July and 9 August 1996 and statement of no significant concerns re Sunpine project	Submitter
170	10/10/1996	Connelly, Bob, CEEA	Letter to Martha Kostuch including draft list of projects having been assessed under federal and provincial EA processes and two CCME documents on EA harmonization	Submitter
171	11/07/1996	Friends of the West Country	News Release – "Court Action Filed Claims Federal Government Violating Fisheries Act and Environmental Assessment Act"	Submitter
172	11/08/1996	Lagui, Brian	Newspaper article entitled "Environmentalists suing Fisheries Department – Potentially precedent-setting action alleges failure to trigger assessment over logging road"	Submitter
173	11/08/1996	n/a	Newspaper article entitled "Planned Logging Road Sparks Legal Challenge"	Submitter

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
174	11/09/1996	Michelin, Lana, Red Deer Advocate	Newspaper article entitled "Lawsuit over logging road"	Submitter
175	11/13/1996	Mazza, Brian, The Mountaineer	Newspaper article entitled "Friends of West Country file lawsuit over bridges"	Submitter
225	12/02/1996	Linsey, G.A., DFO-HMD Winnipeg	Letter to J. Woodward, CCG Sarnia cc. J. Stein, indicating that due to the fact that proposed bank armouring will extend into the river channel, mitigation measures at the revised Ram River bridge would remain the same	Canada
227	12/12/1996	CCG-Sarnia	DFO-HMD, Transmittal form for attached plans in respect of an approved work; file no. 8200-96-6121	Canada
228	12/12/1996	DFO-NWP	Approval issued to Sunpine re Ram River crossing under s. 5(1) of NWPA	Canada
176	01/15/1997	Elgie, Stewart, Sierra Legal Defence Fund	Letter to Ursula Tauscher, Department of Justice (Canada), Edmonton Regional Office, re: <i>Friends of the West Country v. Minister of Fisheries and Oceans, et al.</i> , Fed. Ct. No. T-1893-96 and T-2457-96	Submitter
229	02/25/1997	Reynolds, N.W., Eastern Slopes Management Inc.	Letter to Ken Brant, Superintendent, Navigable Water Protection Programs, CCG Sarnia, advising that construction of Prairie Creek bridge has been deferred until summer 1998 (and therefore beyond the six-month limit set in approval no. 8200-96-6120)	Canada
230	04/15/1997	Brant, Ken	Memorandum to Steve Drummond in file no. 8200-96-6121 along with construction schedule for Ram River to assist in carrying out inspection and indicating that two-year extension request for Prairie Creek will be granted	Canada
231	04/28/1997	Drummond, Steve	Memo to Ken Brant indicating that Ram River bridge interim inspection took place on 24 April 1997 along with a copy of notes and photographs taken	Canada
232	05/08/1997	Reynolds, N.W., Eastern Slopes Management Inc.	Memo to John Woodward, CCG Sarnia, re Ram Crossing access maps	Canada
234	01/05/1998	Woodward, John, Environmental Assessment Officer	Note to file re Ram River and Prairie Creek Bridges indicating that Theresa Fulton at AEP-Water Resources in Red Deer required written request for information in connection with Sunpine Mainline Road project and indicating that he faxed her a letter identifying his information requests	Canada
235	01/06/1998	Woodward, John, Environmental Assessment Officer	Note to file re Ram River and Prairie Creek Bridges indicating that he spoke to Murray Anderson concerning his information request to the latter's office and re Sunpine's applications.	Canada

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
236	07/08/1998	Tauscher, Ursula, Counsel, Civil Litigation and Advisory Services, Department of Justice	Fax to Gary Linsey, DFO Winnipeg along with Reasons for Order in connection with Sunpine No. 1 (FCTD Docket no. T-1893-96, Gibson J.)	Canada
237	08/03/1998	Kostuch, Martha	Letter to Hon. David Anderson, Min. Fisheries and Oceans and Hon. David Collenette, Min. Transport, re: Reasons for Order of Gibson J. and asking them to refer Sunpine project to a panel review under CEAA	Canada
238	09/17/1998	Branter, Keith, General Manager, Sunpine	Letter to John Woodward re approvals and order setting aside approvals asking that DFO-NWP appeal the order or alternately advise Sunpine on how to challenge the order	Canada
239	10/05/1998	Drummond, Steve	Fax cover sheet along with copies of 25 photos and 1 info sheet re subject of photos	Canada
240	10/09/1998	Brant, Ken E., Superintendent, DFO-NWP Sarnia	Letter to Keith Branter, General Manager, Sunpine, cc. Kirk Lambrecht, stating that approval for Prairie Creek crossing had expired and that to comply with Gibson J.'s order it would be necessary to determine whether a revised scope of project should be considered, and asking that Sunpine indicate its intention to proceed with construction	Canada
250	11/24/1998	AEP	Notice in Mountaineer entitled "Ram River Catch and Release Angling Regulations Proposal" (included in Item 249)	Canada
251	11/30/1998	Kennedy, Cameron, Advocate	Newspaper article entitled "Province wants fishery deemed catch and release" (included in Item 249)	Canada
241	12/01/1998	Brewin, Kerry, Alberta Council Manager and Biologist, Trout Unlimited Canada	Letter to Ken Brant, DFO-NWP, asking him to respond to letters from TU dated 9 October 1996 and 15 August 1996 and handwritten note dated 2 Decem- ber 1998 (attached) asking "John" to respond to Mr. Brewin as matters addressed were beyond navigation	Canada
242	12/07/1998	Kostuch, Martha	Letter to CCG Sarnia cc. Hon. David Anderson, Hon. David Collenette, Hon. Christine Stewart, re 3 August 1998 letter and response to order of Gibson J.	Canada
243	12/08/1998	Branter, Keith, General Manager, Sunpine	Fax to Ken Brant responding to 9 October letter and stating that Sunpine does not intend to construct Prairie Creek bridge at this time	Canada
244	12/21/1998	Woodward, John	Note to file stating that he spoke to Ray Kerber and Angela Fulton, AEP-Water Resources, Bob Stone, AEP Env. Assessment, and Murray Anderson, AEP-Forest MD about getting info on Sunpine applications	Canada

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
245	12/22/1998	Woodward, John	Note to file re requesting info about Sunpine project from mayor of RMH and Manager of Municipal District of Clearwater	Canada
247	01/27/1999	Anderson, David, Minister of Fisheries and Oceans	Letter to Martha Kostuch cc. Hon. David Collette and Hon. Christine Stewart re her letters dated 3 August 1998 and 7 December 1998 re enviro. review of Sunpine Project and re DFO appeal of Gibson J. order and reconsideration of approvals by DFO and associated info-gathering	Canada
248	01/31/1999	Kostuch, Martha	Letter to John Woodward, CCG Sarnia, asking for copies of documents in public registry re Sunpine Project and intentions of CCG respecting assessment	Canada
252	02/08/1999	Jensen, Dave	Letter to Martha Kostuch along with report entitled "Teetering in imminent disarray... South Ram River 1998 – The River That Was? (A Continuum of 1997...)"	Canada
249	03/01/1999	Kostuch, Martha	Letter to John Woodward, CCG Sarnia, cc. Hon David Anderson, asking for response to 31 January 1999 letter at providing additional info re environmental effects of Sunpine project	Canada
253	03/10/1999	Brant, Ken E., Superintendent, DFO-NWP Sarnia	Letter to DFO-HMD Winnipeg (addressed to "Wayne") re file no. 8200-96-6121 re departure of John and recent requests from Martha Kostuch	Canada
254	03/10/1999	Brant, Ken E., Superintendent, DFO-NWP Sarnia	Letter to Sunpine c/o Agra re: departure of John Woodward and replacement by Gary Linsey	Canada
255	03/10/1999	Irmen, Brian, Manager, Municipal District of Clearwater	Letter to John Woodward, CCG-Sarnia along with copies documents and request for reimbursement	Canada
270	03/31/1999	Stein, J.N., Manager, DFO-HMD	Letter to Martha Kostuch, cc. G. Linsey, D. Robinson, K. Brant re 31 January 1999 letter and outlining actions taken to re-assess Ram River project	Canada
271	04/05/1999	Reynolds, N.W., Eastern Slopes Management Inc.	Memo to G. Linsey along with notice/ application to AEP Water Resources, Parkland Region, for carrying out Ram River work	Canada
246	05/01/1999	Woodward, John, DFO-HMD	Fax to Angela Fulton, AEP formally requesting all info held on Sunpine project	Canada
272	05/12/1999	n/a	Letter to Jeff Stein, DFO-HMD, asking for strict enforcement of catch and release regulations against Sunpine	Canada

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
273	05/22/1999	n/a	Letter to Jeff Stein, DFO-HMD, expressing opposition to Sunpine bridge proposal	Canada
283	05/28/1999	Brewin, Kerry, Alberta Council Manager and Biologist, Trout Unlimited Canada	Letter to Ken Brant, Regional Superintendent, CCG Sarnia, cc. Hon. David Anderson, Alta Council representatives, TUC Chapter Presidents in Alta, re failure by CCG to reply to info request re CCG decision	Canada
274	05/31/1999	n/a	Submission under CEAA re Sunpine Ram River Bridge re-assessment	Canada
275	06/10/1999	Mayor, RMH	Letter to Jeff Stein, DFO-HMD stating that the town of RMH endorses the building of the mainline road based on tourism, tax, and job considerations	Canada
276	06/12/1999	Grier, Tim	E-mail to Martha Kostuch re e-mail to J. Stein re re-assessment of Mainline Road and Ram River crossing	Canada
287	03/00/2000	n/a	Sunpine Forest Products Ram River Bridge Project Description	Canada
277	11/07/2000	Linsey, G.A., DFO-HMD Winnipeg	Letter to (name removed) cc. D. Robinson, J. Stein, C. Stoneman re: response to letter dated 4 July 2000 and providing info on scoping and assessment of cumulative effects, and referencing 14 April 2000 Project Description	Canada
278	05/07/2001	n/a	Letter to Public Registry Officer, DFO-HMD Winnipeg, expressing concern that describing the project as "Ram River Bridge" is misleading to the public	Canada
280	05/14/2001	n/a	Submission commenting on Ram River CEAA screening report	Canada
281	06/04/2001	Burcombe, Jean, Mouvement au Courant	Submission re comments on Sunpine Ram River Bridge Project Screening Report	Canada
282	06/12/2001	Brewin, Kerry, Alberta Council Manager and Biologist, Trout Unlimited Canada	Letter to Mary Vincent, DFO Public Registry Officer, cc. Tom Daniels, Sunpine, Christina Stoneman, DFO re comments on Ram River Bridge screening report	Canada
286	09/00/2001	DFO-HMD	Sunpine Forest Products Ram River Bridge CEAA Screening Report	Canada
285	03/04/2002	DFO-Habitat Management & Environmental Science	HRTS Public Registry Report, FEAI No. 20308, Sunpine Forest Products Ltd. Ram River Bridge Crossing (17 pp.)	Canada
23	Undated	Klineck, Jennifer, Northern Alberta Wilderness Association	Written submission regarding application of CEAA to Sunpine project (in Item 12)	Submitter
24	Undated	Ritchie, Denise	Submission to CCG re assessment of Sunpine's Mainline Road (in Item 12)	Submitter

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
26	Undated	Grier, Tim	Outline for Oral Presentation (in Item 12)	Submitter
27	Undated	Brahen, Joe & Evelyn Brahen	Submission re need for EIA on proposed Sunpine Mainline Road (in Item 12)	Submitter
28	Undated	Collins, Dell & Henry Collins	Statement of Concern re Sunpine Forest Products proposed new Mainline Road permitting unlimited access to the West Country of West Central Alberta (in Item 12)	Submitter
29	Undated	Broder, D.	Statement demanding environmental assessment of Sunpine Mainline Road proposal (in Item 12)	Submitter
30	Undated	Haupt, Darren	Statement of concern re scope of assessment of Sunpine Mainline Road (in Item 12)	Submitter
48	Undated	Kostuch, Martha, Friends of the West Country	"Action Alert – Sunpine's Proposed New Road"	Submitter
55	Undated	Kostuch, Martha	Fax memo to Vivian Pharis and Madeline Oldershaw re Action Alert on Sunpine Road, draft letter, maps, background information, letters to and from B. Tobin and a media release	Submitter
56	Undated	Kostuch, Martha	Draft letter to Brian Tobin, Minister of Fisheries and Oceans, cc. Hon Sheila Copps, Minister of the Environment re impacts of proposed Sunpine road and asking for environmental assessment review panel	Submitter
59	Undated	Mussell, Dave, Pembina Institute	Note to Martha Kostuch re letter to Copps/Tobin and asking for input on letter to Lund/Klein	Submitter
94	Undated	Kennedy, Larry, Chairman, Forest Advisory Committee	Signature page of letter resembling Item 90, above, faxed to Laurie Drolet on 2 January 1996.	Submitter
95	Undated	Kennedy, Larry, Chairman, Forest Advisory Committee	Signature page of letter resembling Item 90, above, faxed to Martha Kostuch on 5 January 1996.	Submitter
96	Undated	Haupt, Steven, President, Friends of the West Country	Letter to Mr. Brian Tobin and Ms. Sheila Copps, cc. Ty Lund and Larry Kennedy, stating that Larry Kennedy letter to Tobin and Copps on behalf of FAC was grossly misleading	Submitter
145	Undated	n/a	"Action Alert – Environmental Assessment of Sunpine's Mainline Road – Meeting with the Canadian Coast Guard – 1-5 P.M., July 30, 1996, Red Deer"	Submitter

No.	MM/DD/YY	AUTHOR (Last Name, Name)	DOCUMENT	RECEIVED FROM
147	Undated	Neuman, Teresa E., Citizens Action Group on the Environment (CAGE)	Red Deer and District Museum and Archives Facility Booking Form indicating rental date 30 July, group name Friends of the West Country, contact person Martha Kostuch and amount due \$48.15, paid 8 August 1996 by cheques no. 128.	Submitter
150	Undated	Kostuch, Martha	"Written Presentations" – List of names	Submitter
226	Undated	CCG	NWPA Approval; file no. 8200-96-6121 re Sunpine Ram River crossing, listing five conditions and nine mitigation measures	Canada
256	Undated	Sunpine Forest Advisory Committee	Notice of Workshop on the Sunpine Strachan Area Road Network to be held 30 March 1995 along with copy of public workshop information package	Canada
258	Undated	Sunpine Forest Products Ltd.	Plan for Public Input into Forest Management of the FMA Area (included in Item 256)	Canada
279	Undated	n/a	Letter to Public Registry Officer, DFO-HMD Winnipeg, stating that the Sunpine project should be assessed in relation to compounding effects of all industry activity in the region and that scope of assessment should take into account lack of provincial legislation to restrict access to remote areas	Canada

APPENDIX 7

Photos





PHOTOS



Photo No. 1: Entrance to Mainline Road off Route 752
(5 November 2002)



Photo No. 2: Mainline Road (5 November 2002)



Photo No. 3: Approach to stream crossing, Mainline Road
(5 November 2002)

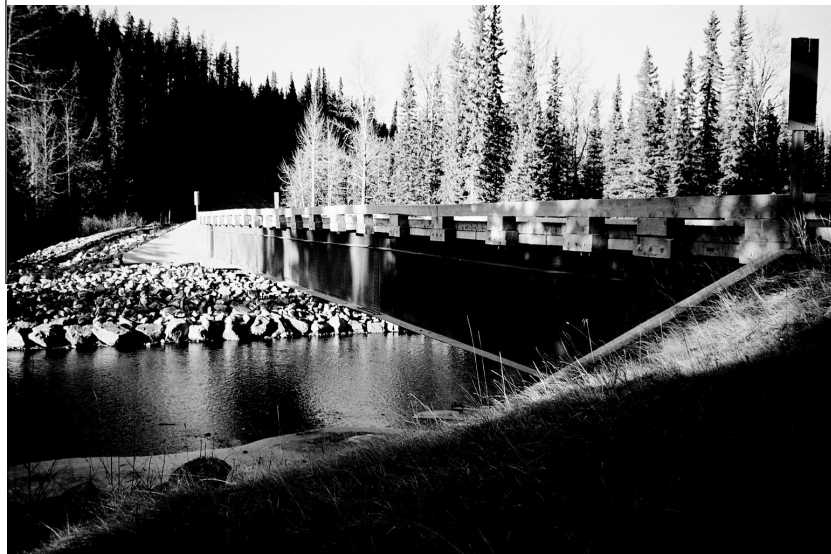


Photo No. 4: Ram River Bridge on Mainline Road (5 November 2002)

Appendix 8

Acronyms and Defined Terms





Acronyms

AEP	Alberta Environmental Protection
CCG	Canadian Coast Guard
CEAA	<i>Canadian Environmental Assessment Act (Canada)</i>
CEC	Commission for Environmental Cooperation
DFO	Department of Fisheries and Oceans (Canada)
EARP	Environmental Assessment and Review Process (Canada)
FAC	Forest Advisory Committee
FMA	Forest Management Agreement
FWS	Fish and Wildlife Service (Alberta)
HADD	Harmful Alteration, Disruption or Destruction (of fish habitat in violation of <i>Fisheries Act</i> s. 35(1))
HMD	DFO Habitat Management Division
LFS	Land and Forest Service (Alberta)
LOC	License of Occupation
MD	Municipal District of Clearwater (Alberta)
MFO	Minister of Fisheries and Oceans (Canada)
MLR	Mainline Road (see also Sunpine Project)
NFR	North Fork Road
NWPA	<i>Navigable Waters Protection Act (Canada)</i>
NAAEC	North American Agreement on Environmental Cooperation
RA	Responsible Authority—Federal department responsible for conducting environmental assessment under CEAA
RMH	Rocky Mountain House, Alberta

Defined Terms

Alberta Case Study	“Alberta Case Study—Sunpine Project” in CEAA Review—Provincial/Territorial Input, Appendix 1 (Alberta)
Article 15(1) Notification	SEM-97-006 (Oldman River II) Article 15(1) Notification (19 July 1999)
CEAA Guide	<i>CEAA Guide—Applying the Canadian Environmental Assessment Act for the Fish Habitat Management Program (2002) (DFO)</i>

Compliance and Enforcement Policy	July 2001 DFO <i>Fisheries Act</i> Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy
DFO 22 January 2003 Reply	Information provided by DFO to the Secretariat in response to the Secretariat's 10 September 2002 Follow-Up Information Request (Appendix 5)
Directive	Directive on the Issuance of s. 35(2) Authorizations (DFO)
EARP Order	<i>Environmental Assessment and Review Process Guidelines Order (1984) (Canada)</i>
FMA Area	Geographic area covered by Sunpine's FMA
Ground Rules	Timber Harvest Planning and Operating Ground Rules negotiated by Sunpine and AEP in 1993
Habitat Policy	<i>Policy for the Management of Fish Habitat (1986) (DFO)</i>
Pisces response	Pisces Environmental Consulting Services Ltd. Canada's response to the submission pursuant to Art. 14(3) of the NAAEC
Secretariat Submission	Secretariat of the CEC Submission 97-006 (Oldman River II) filed by Friends of the Oldman River with the Secretariat on 4 October 1997
Sunpine Sunpine Project	Sunpine Forest Products Ltd. 40-km, permanent log haul road connecting Route 752 and the North Fork Road in Sunpine's FMA area (see also MLR)

ATTACHMENT 1

Council Resolution 03-13





7 August 2003

COUNCIL RESOLUTION 03-13

Instruction to the Secretariat of the Commission for Environmental Cooperation to make public the Factual Record for Submission SEM-97-006 (Oldman River II)

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-97-006;

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-97-006; 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

5 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 97-006 (the “Oldman River II” submission) with great interest.

In order to assist the Secretariat in the development of the final Factual Record for this submission, I would like to provide Canada’s comments, which you will find attached.

Canada appreciates the extremely thorough and complete draft document prepared 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 the reader of the Factual Record to draw their own conclusions with respect to the alleged failure of a Party to effectively enforce its environmental law.

In addition to the attached comments I would like to note what appear to be fundamental misunderstandings which are central to the enforcement of the *Fisheries Act*, and will need to be corrected throughout the document:

- **with respect to the Harmful Alteration, Disruption or Destruction (of fish habitat in violation of *Fisheries Act* s. 35(1)) (HADD):**
 - There is a difference between issuing HADD authorizations and the investigation and assessment of whether an unauthorized HADD has occurred. Solely the Federal Minister of Fisheries and Oceans may issue a HADD authorization. Those designated as Fisheries Officers may investigate and assess whether an unauthorized HADD has occurred.

- Alberta does not have, and has never had, any authority under the *Fisheries Act* for the administration or issuance of HADD authorizations (e.g. Section 1, Paragraph 3; Section 3, Paragraph 4; Section 5.6, Paragraph 1; Section 5.8, Paragraph 6; etc.) That responsibility, under s. 35 of the *Fisheries Act*, rests solely with DFO.
- **with respect to violations of the *Fisheries Act* in the Sunpine case:**
 - Canada would like to reiterate that neither DFO nor Alberta Environmental Protection found there to be any violations of the *Fisheries Act* in the Sunpine case. Therefore, there was no reason or basis for any enforcement action under the *Fisheries Act*. Despite this fact, throughout the document, the reader is led to believe that a violation of the *Fisheries Act* occurred. Because the draft Factual Record improperly and repeatedly implies such a violation, Canada asks the Secretariat to review the document in its entirety to ensure that the reader is not unintentionally misled.
- **with respect to the “Habitat Policy” and to the “Protection Guidelines”:**
 - In several sections of the draft Factual Record (e.g. Section 1, Paragraph 8; Section 5.3.2, Paragraph 1; Section 5.8, Paragraph 3; Section 5.8, Paragraph 5) the Secretariat has incorrectly attributed force of law to the “Habitat Policy” and to the “Protection Guidelines”. These documents do not have force of law; they serve for guidance purposes only. Therefore, we request that the draft Factual Record be reviewed to reflect that proponents are not bound by a particular course of action under the “Habitat Policy” or the “Protection Guidelines”.

Regarding Canada’s co-operation in the development of this Factual Record, the Secretariat appears to suggest, in Section 5.1, Paragraph 6; Section 5.3.1.1, Paragraph 2; Section 5.7, Paragraph 18; Section 5.8, Paragraphs 6, 10, 13 and 21, for example, that Canada has not been forthcoming, open or fully co-operative in providing information to the Secretariat. Specifically, in Section 5.1, the Secretariat states that Canada refused to organize a meeting between government officials and the Secretariat. Canada would like to remind the Secretariat that a meeting could have been held, if the Secretariat — once it reviewed Canada’s written responses to the list of follow-up questions provided to Canada on September 10, 2003 — felt a need for further discussions. However, the Secretariat did not request a follow-up meeting. Canada has fully

disclosed all requested and available information in as timely a manner as possible. Therefore, we request that the Secretariat review the draft Factual Record to remove any unintentional negativity with respect to how Canada conducted itself in providing information for this Factual Record.

Canada welcomes a meeting with the Secretariat to discuss how Canada might better help the Secretariat in obtaining information for the preparation of Factual Records.

Similar to the “BC Logging” draft Factual Record, in many Sections of the “Oldman River II” draft Factual Record, the Secretariat appears to use language that draws conclusions and provides commentary. In Canada’s view, this is beyond the Secretariat’s mandate to set out facts objectively and impartially. Examples of this include Section 5.2.2, Paragraphs 8 and the last Paragraph; Section 5.5, last Paragraph; Sections 5.6, Paragraph 8; Section 5.8, Paragraphs 5 and 7; and Section 6, Paragraphs 2 and 3. The attached specific comments note each time this type of language appears. We ask the Secretariat to ensure that language used in the setting out of facts is as impartial as possible.

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), Canada recognizes that it is not the Secretariat's practice to cite references in this Section. 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. Further, because some references include the date, some include the sender, and some include the addressee, the Secretariat should ensure that the format used for references throughout the document is uniform.

With respect 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 excessive. 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, we suggest that the Secretariat limit this discussion to the information that will be the subject of the Factual Record. Further, the scope of the Factual Record, as set out in Council Resolution 01-08, is limited to whether Canada is failing to effectively enforce provisions of CEEA and the *Fisheries Act*. As such, discussion of Alberta's approval process or the enforcement of provincial laws should only be included when relevant to the issue in question. Further, the Secretariat is correct in clarifying that Section 5.6 should not evaluate Alberta's approval process or the enforcement of provincial laws. This is beyond the scope of the Factual Record (similarly, an "evaluation" of Canada's enforcement practices is also beyond the scope).

Canada recognizes that this is an extremely complex submission. For this reason, it is essential that the Secretariat ensure that the terminology used throughout the document is clear and well defined. For example, when the term "Sunpine Project" is used, sometimes it is referring to the bridge, sometimes the road, sometimes the area around the project. Because there are different jurisdictions for different parts of the project it is extremely important that the terminology be very detailed. Therefore, the Section entitled "Defined Terms" on page iii will need to be reviewed to ensure detailed definitions are used.

The Secretariat should ensure that all references to the CEEA threshold refer to "significant adverse environmental effects" rather than to other thresholds such as "significant environmental impacts" (e.g. Section 5.4)

in order to accurately follow the language used in CEAA. It is also important that the Secretariat appropriately qualify the type of impact that is required in order for a HADD to have occurred. When referring to an impact of effect on fish habitat, the draft Factual Record should include the word “adversely” after the word “impact” or “effect”.

In several Sections of the draft Factual Record (e.g. Section 1, Paragraph 9; Section 5.8, Paragraph 26; Section 6, Paragraph 3; Section 6, Paragraph 4,) the Secretariat uses the term “follow-up monitoring”. This is inaccurate. There is no obligation placed on either the Government of Canada or the Alberta Government to conduct “follow-up” monitoring in the absence of any indication that a HADD would occur. As such, the term “follow-up” preceding the word “monitoring” should be deleted throughout the entire draft Factual Record as well as any indication that such an obligation exists.

With respect to s. 37(2) of the *Fisheries Act*, absent regulations, the Governor in Council (i.e. Cabinet) which is the regulation-making body under the *Fisheries Act*, must approve the order made by the Minister of Fisheries and Oceans requesting modifications to plans or restricting of work or undertaking. In several Sections of the draft Factual Record (e.g. Section 1; Section 5.2.2, Paragraph 10; Section 6, Paragraph 1) changes will be necessary to reflect this information correctly.

Finally, the draft Factual Record acknowledges that no formal agreement existed between DFO and the province of Alberta with respect to fish habitat. It is important to recognize that the absence of a formal agreement did not affect the ability of DFO officials to evaluate/prevent any potential and actual project impacts pursuant to the application of the *Fisheries Act*. In fact, DFO and Alberta enjoyed a positive and productive working relationship in the review of the Sunpine Project. In Canada’s view, the Secretariat should include this information where appropriate (e.g. Section 5.7, Paragraph 8 and 10).

Canada would like to inform the Secretariat that DFO and the province of Alberta are currently developing working agreements to enhance internal and external communications between both departments, the stakeholders and the general public. Since the completion of the Sunpine Project in 1997, an “Interim Protocol on Delivery of an Enforcement and Compliance Program for the Habitat Protection Provisions of the Fisheries Act (Canada)” was signed and is attached. The Secretariat may wish to use this document in the finalization of this Factual Record.

Specific Comments

Section 1 Executive Summary

Paragraph 3, sentence 1 and 2: In order to ensure an accurate summary of Canada's response to the submission, we request that the paragraph read:

"On 13 July 1998, Canada responded, asserting that compliance with the *Fisheries Act* habitat protection provisions ~~could be~~ **is achieved assured, among others, on a preventative basis** through voluntary, routine communications between DFO and project proponents aimed at prevention of the potential contravention of the law. Canada reminds ~~claims~~ that **this approach is consistent with the *Fisheries Act*, which** does not require DFO to review project information or issue *Fisheries Act* orders and authorizations."

Paragraph 3, sentence 3: In light of the misunderstanding noted in the cover letter, we request that the following changes be made:

Canada asserts that DFO has designated some provincial fish and wildlife employees in all provinces as fishery officers under the *Fisheries Act*. It should be noted, however, that the specific DFO and Alberta biologists referenced in this matter were not designated as Fisheries Officers nor did they have responsibility for enforcement matters. Canada states that in many cases, actions that violate the *Fisheries Act* are also offences under the provincial laws and ~~are~~ prosecuted under these provincial laws."

Paragraph 5, sentence 2: In order to accurately reflect the fact that no regulations currently exist, the Secretariat should include the following information:

"S. 37(1) requires proponents of projects that are likely to result in a HADD to provide information to MFO, in the manner and circumstances prescribed by regulations as required made under the *Fisheries Act* (there are no regulations at this time) or on the request of MFO. Under s. 37(2), the MFO may, by order, subject to regulations made under the *Fisheries Act*, or, if there are no such regulations in force (which is the case at this time) with the approval of the Governor in Council, require changes to plans for a work or undertaking or to an existing work or undertaking, and may restrict its operation. Under the *Statutory Instruments Act*, MFO's orders are regulations for the purposes of the regulatory process."

A project proponent is not required under the *Fisheries Act* to obtain a s. 35(2) authorization. The project proponent risks being charged under

s. 35(1) if the project, carried on without the authorization, were to cause HADD of fish habitat. Therefore, reference to *Fisheries Act* regulations should be deleted.

Paragraph 5, sentence 4: Sections 35(2) and 37(2) of the *Fisheries Act* confer a discretionary power on the Minister. Therefore, we request that the sentence include the underlined text:

“[...] Violation of ss. 35(1), 37(1) or 37(2) is an offense under s. 40 of the *Fisheries Act*, punishable by fines, or jail time, or both. Before MFO can decide to issue a s. 35(2) authorization or a s. 37(2) order under the *Fisheries Act*, DFO must conduct an environmental assessment of the project under the CEAA. [...]”

Paragraph 5, sentence 5 and the last sentence: These sentences are incorrect. There is no requirement for DFO to conduct an environmental assessment under CEAA. These sentences should read:

“[...] Before MFO can issue a s. 35(2) authorization or a s. 37(2) order under the *Fisheries Act*, DFO must ~~conduct~~ ensure that an environmental assessment of the project under the CEAA is conducted. [...] The CEAA requires federal authorities such as DFO to ~~conduct~~ ensure that assessments are conducted as early as is practicable in the planning stages of a project, and before irrevocable decisions are made.”

Paragraph 6, sentence 1: The sentence is incorrect. The actual area at the time was approximately 656,000 ha, or 6560 km², or slightly over 2500 miles². The Secretariat should make this correction.

“In July 1992, Sunpine Forest Products Ltd. (“Sunpine”) signed a forest management agreement (“FMA”) with the Alberta government giving Sunpine long-term tenure over an area of approximately 656,000 ha, or 6560 km², or slightly over 2500 miles² ~~over one thousand square miles~~ of forest land in the Rocky Mountain foothills of West Central Alberta [...]”

Note that this correction must also be made in Section 5.6, Paragraph 2.

Paragraph 6, sentence 3: To ensure that the reader understands why DFO was not involved in governing Sunpine’s operations within the forest management agreement (FMA), the Secretariat should include the following underlined text:

“[...] DFO, whose constitutional jurisdiction is limited to the matters relating to fisheries was not involved in developing these ground rules. [...]”

Paragraph 6, sentence 6: The beginning of the sentence suggests that the decision to approve the road should have been based solely on the views of provincial fisheries staff and that this was a bad decision. This is inaccurate. The sentence should read:

“Despite objections to the Project from provincial fisheries staff, After weighing all the information, including who recommended recommendations from fisheries management staff requiring Sunpine to use an existing, public road for its log haul to avoid creating new impacts on fish habitat, the Lands and Forest Service approved the road under Alberta’s legislation, the province’s forest service approved the proposed road corridor. The province’s forest service approved the proposed road corridor under Alberta’s *Resource Road Planning Guidelines* in August 1995.”

Paragraph 6, sentence 7: This sentence suggests that DFO’s involvement should have been mandatory. This is inaccurate. DFO had knowledge of the project in July 1995 and received information from Sunpine later in 1995. DFO exercised its discretion in deciding what level of involvement it would have in the project. Therefore, the sentence should be revised to read:

“[...] With provincial approval and without DFO involvement, Sunpine built and operated a temporary road within the Mainline Road corridor in the winter of 1995-96.[...]”

Paragraph 6, sentences 10: In light of the misunderstanding noted in the cover letter, we request the following revisions to this sentence:

“[...]Provincial fisheries- The Alberta fisheries biologists staff principally involved with the Sunpine Project had appointments as fishery officers under the in this matter did not hold Fishery Officer designations and were not responsible for enforcement of the *Fisheries Act*. The fisheries biologists were responsible for providing Alberta decision-makers with advice concerning fisheries issues under Alberta legislation. Alberta fisheries biologists were advised by DFO officials on August 3, 1995 of DFO’s intent to review the proposal pursuant to DFO’s responsibilities under the *Fisheries Act*. Under these appointments, they had the power to lay charges for violations of s. 35(1), but could not issue authorizations under s. 35(2). [...]”

Paragraph 6, sentence 11: This sentence suggests that provincial fisheries staff did not take any action. This is inaccurate for two reasons:

- First, fisheries staff provided input regarding fisheries habitat protection to the provincial regulators and provided recommendations to

Sunpine Forest Products, including that construction of crossings involving any disturbance of fish habitat could place Sunpine in violation of the *Fisheries Act*.

- Second, the passage incorrectly equates fisheries management advice critical of a road alignment with violations of the *Fisheries Act*. This sentence also implies there were violations of the *Fisheries Act* upon which Alberta did not act. This is incorrect. One complaint was received from Dr. Kostuch, regarding a hole cut in the ice of the Ram River during the winter of the year that bridge crossing was constructed. Fisheries and Enforcement staff investigated the complaint and determined there was no evidence of a violation. These facts were presented to Dr. Kostuch in a meeting to explain the results of the investigation. There were no other complaints that Fisheries Management staff were aware of in relation to the construction project that required enforcement action.

Therefore, the sentence should read:

“[...] Despite their concerns regarding the project impacts on fish habitat, Provincial fisheries staff investigated one complaint, but did not take any other action, in their capacity as fishery officers/guardians under the *Fisheries Act* to enforce s. 35(1) of the *Fisheries Act* against Sunpine in connection with the temporary road or the Mainline Road because no other action was required.”

Paragraph 7, sentence 3: This sentence is inaccurate. As such, the Secretariat should add the following underlined language and replace the stricken text with the language used in the Habitat Policy:

“The Habitat Policy states that DFO does not apply actively the Habitat Policy in those provinces where the province manages the fishery with the capability to manage fish habitat, including Alberta. The Habitat Policy states, on page 8 that DFO will have an administrative agreement or protocol with such provinces to ensure compliance with the Habitat Policy “the provincial agencies are being encouraged to apply it (the policy) through bi-lateral administrative agreements and protocols which will also clarify roles and responsibilities for the respective parties involved” The federal government had not entered into an administrative agreement with Alberta and were applying the Habitat Policy at the time of the Sunpine Project.”

Paragraph 9, sentence 1: This sentence suggests that DFO should have participated in the selection of the road corridor or road alignment. DFO

was under no obligation to participate. Therefore, the sentence should read:

~~“A concerned citizen made DFO aware of the Sunpine Project in June 1995, two months before the Mainline Road corridor was approved by Alberta’s forest service. DFO did not participate in the selection of a road corridor or road alignment for the Sunpine Project in order to evaluate relocation or redesign options as contemplated by the Habitat Conservation and Protection Guidelines. DFO made an information request to Sunpine regarding the Sunpine Project in August 1995, listing information Sunpine was required requested to provide to DFO for review.”~~

Paragraph 9, sentence 4: This sentence suggests that the Minister had an obligation to apply s. 37(1) of the *Fisheries Act*. This is inaccurate. Section 37 of the *Fisheries Act* confers a discretionary power on the Minister. Therefore, we request that the sentence include the underlined text:

“According to DFO, the Minister decided that this information request would ~~was~~ not be made pursuant to the information gathering powers given to the MFO by s. 37(1) of the *Fisheries Act*. Following Sunpine’s reply, DFO made another detailed information request. [...]”

Paragraph 9, last sentence: This sentence is inconsistent with Canada’s July 1998 response to the submission. LFS, in its role as land manager, did conduct monitoring of the right-of-way, and direction was provided to Sunpine to submit an action plan to correct erosion problems. Therefore, we request that the sentence be reviewed.

~~“[...] Neither DFO nor Alberta have conducted follow up monitoring—or required Sunpine to submit results of follow up monitoring—to verify that sediment run-off from the road surface is not causing a HADD of fish habitat in Sunpine’s FMA area in violation of the *Fisheries Act*. Alberta’s regulatory process did not require monitoring for HADD. However, Alberta staff did observe the road and bridge crossing during and following construction and concluded that no violation of the *Fisheries Act* had occurred.”~~

Paragraph 10, sentence 4: The chronology is inaccurate. The transfer of responsibility of CCG from the federal Ministry of Transport to DFO occurred in April 1995, prior to the December 1995 Sunpine application to CCG. As a result, the sentence should read:

“In December 1995, Sunpine applied to the Canadian Coast Guard (“CCG”) in Vancouver for permits under the federal Navigable Waters Protection Act (“NWPA”) for two bridges it proposed [...] ~~In the following~~

months, Responsibility for CCG was transferred- had been transferred in April of that year from the deferral Ministry of Transport to DFO, and [...]"

Last Paragraph: The draft Factual Record refers to the judicial proceedings surrounding the Sunpine case. In order to give a complete factual summary of the course of the judicial proceedings, we ask that the Secretariat note that the decision rendered by the Federal Court, which recognized the federal government 's discretion to determine the scope of a project, was appealed by the submitters to the Supreme Court of Canada. However, the leave for appeal was refused. In order for the public to have a complete overview of these judicial proceedings, it is essential that in this Section, and in Section 5.8, Paragraph 28, the Secretariat include the underlined text and remove the stricken text,:

"On appeal, the Federal Court of Appeal reversed the Trial Division's decision on the issue of project scoping. The Federal Court of Appeal held that CCG has discretion under the CEAA to determine the scope of a project for the purpose of assessing its environmental impacts, and that this discretion extends to a determination of the scope of the environmental assessment. Therefore, CCG was at liberty exercised its discretion properly by not to including an assessment of the environmental impacts of the Mainline Road and Sunpine's forestry operations within the scope of its assessment of the bridges. The Federal Court of Appeal also ruled that CCG had erred in its interpretation of the CEAA when it decided that it could not consider cumulative environmental effects from activities outside of the scope of the project, or outside of federal jurisdiction, in its cumulative environmental effects assessment under the CEAA. Finally, The Federal Court of Appeal held that locating the public registry of documents related to the screenings in Sarnia, Ontario, and requiring the public to file requests under the *Access to Information Act* in order to obtain copies of those documents, was patently unreasonable. In 2001, DFO conducted a second CEAA screening of the Ram River bridge (built in 1997) and again concluded that the bridge was not likely to cause significant adverse environmental effects. Finally, the submitters also requested a leave to appeal of the Federal Court's decision to the Supreme Court of Canada. This request was refused by the Supreme Court of Canada."

Last Paragraph, last sentence: This sentence suggests that the second screening is related to the Court's decision. This is inaccurate. The second screening was not completed as a result of the Court case but was completed on DFO's initiative after the Court case was concluded. Therefore, the Secretariat should provide this information in a separate paragraph:

“In 2001, DFO conducted a second CEAA screening of the Ram River bridge (built in 1997) and again concluded that the bridge was not likely to cause significant adverse environmental effects.”

Section 3 Summary of Canada’s response

Paragraph 4, sentence 1: In order to be completely accurate, we request that the following modifications be made:

“[...] Regarding enforcement, Canada states that DFO has identified provincial personnel responsible for the ~~implementation of the habitat provisions and enforcement of the~~ *Fisheries Act* for every province in Canada, including an estimated 650 provincial conservation and fish and wildlife officers in Canada’s four inland provinces [...]”

Section 5.2.1 Introduction

Paragraph 2: The statement referring to navigable waters is correct but only with respect to matters relating to navigation. It is not accurate with respect to fish. The discussion of fishing rights is not correct and not relevant to the scope of the Factual Record as directed by the Council. Therefore, the Secretariat should make the following changes:

“The Parliament of Canada has constitutional authority to enact laws for the protection of fish and fish habitat in Canada, and for the prior environmental assessment of projects that are likely to cause the harmful alteration, disruption or destruction (known as a “HADD”) of fish habitat. This authority extends to all fish habitat in Canada, regardless of who owns the fish habitat and/or the fish. ~~In Alberta, subject to Aboriginal and treaty rights, the province owns the fishing rights on provincial Crown lands, except in navigable waters, where there is a public right to fish. In navigable waters, the federal Parliament has exclusive legislative jurisdiction. In non-navigable waters, b~~Because of the province’s right of ownership in the fisheries, legislative jurisdiction for the protection of fish and fish habitat is concurrent between the federal and provincial governments. However, in case of conflict between a provincial and a federal law, the federal law has paramountcy priority. “

Paragraph 3, sentence 1: The process described in this paragraph is inaccurate. As such, we request the following changes.

“In the forestry context, to the extent that if Fisheries and Oceans Canada (“DFO”) considers that a proposed forestry operation is likely to cause a HADD of fish habitat, the *Fisheries Act* may apply requiring a Fisheries Act authorisation, the federal government has jurisdiction to conduct an environmental impact assessment of the proposed forestry operation (and/or

~~related works, such as logging roads, bridges, and culverts) to determine whether it is likely to cause unjustifiable, adverse environmental impact. If the project is likely to cause unjustifiable, environmental impacts, the federal government cannot take any action under federal law, such as issuing an authorisation under the Fisheries Act, that would permit the project to be carried out, in whole or in part. In effect, this means that to avoid contravention of 35(1) of the *Fisheries Act*, a project proponent would require an authorization under section 35(2) of the *Fisheries Act*, which is a trigger for CEAA, the federal government has the power to stop forestry operation from proceeding, even if the operation is located on provincial Crown land and the province has issued all necessary provincial permits.”~~

Furthermore, with respect to footnote 30, the reference to land clearing activities carried out on federal lands used for military training is beyond the scope of the Factual Record and should be removed.

Paragraph 5, last sentence: To ensure accuracy, the Secretariat should add the underlined sentence:

“The federal government has authority to legislate on all subjects not specifically assigned to the provinces by the Constitution. For example, the Supreme Court of Canada has affirmed that the environment is an area of shared jurisdiction between the provinces and the federal government.”

Paragraph 6, sentence 2: This sentence is accurate. The sentence should read:

“[...] A provision in law that directly or indirectly seeks to regulate a matter within the legislative jurisdiction of the other order of government can be found to be unconstitutional or *ultra vires* and struck down by the courts, but generally only to the extent that the federal and provincial laws are in actual conflict.”

Paragraph 11: We request that the paragraph be deleted as it is not relevant to the direction provided by the Council for the preparation of the Factual Record: There is no suggestion that the provincial forest development law conflicts with the *Fisheries Act*.

Section 5.2.2 The Habitat Protection Provisions of the Fisheries Act

Paragraph 8, sentence 2: For factual accuracy the sentence should be modified as follows:

~~“The framework is a superstructure that leaves open the possibility of three types of implementation scenarios; [...]~~

Paragraph 9: The matter of identifying circumstances in which a project is likely to adversely affect fish habitat is outside the regulation-making powers of the government. As such, the following changes should be made which are consistent with the language used in the act:

“In the regulations scenario, the federal government would make adopt Fisheries Act regulations telling proponents of projects that are likely to adversely affect fish habitat the manner and circumstances in which ~~what kind of information~~ they must submit information to DFO for review under s. 37(1); identifying the circumstances in which DFO may ~~will~~ issue an order under s. 37(2); and setting out the kinds of terms such orders can contain. The regulations scenario would also include regulations describing how to carry on activities that cause a HADD of fish habitat in such a way as to comply with s. 35. The federal government did not adopt this scenario.”

Paragraph 10, sentence 1: This sentence suggests that DFO has an obligation to enforce compliance with the *Fisheries Act* habitat protection provisions. This is inaccurate. We request that the sentence read:

“In the other scenario, no regulations are made and the above-noted matters are considered adopted and DFO is responsible for enforcing compliance with the Fisheries Act habitat protection provisions by defining requirements on a project-by-project basis.”

Paragraph 10, sentence 4: The Secretariat should provide additional information to clarify this point. As such, the Secretariat should include the underlined text:

“For projects that do or will cause a HADD of fish habitat, in the absence of Fisheries Act regulations, it is not an offense for a project proponent to proceed without an authorization under s. 35(2). An authorization, similarly to regulations – if they were made in respect of s.35(2) – shields the project proponent from a possible prosecution under s. 35(1) if a HADD were to occur. But the occurrence of HADD must be proved beyond a reasonable doubt for the prosecution to succeed.”

Paragraph 10, sentence 5: In order to minimize unnecessary commentary, the sentence should be modified as follows:

“Under the Act, DFO involvement is “after the fact”: if once an unauthorized HADD of fish habitat has potentially occurred, DFO can recommend laying charges against the project proponent, provided that DFO becomes aware of the existence of the project.[...]”

Section 5.3.1 The Habitat Policy

Paragraph 2, last sentence: This sentence is inaccurate. The DFO policy does not impose an obligation. It does not have force of law. The sentence should read:

“[...] DFO’s policy is to authorize a HADD of fish habitat under s. 35(2) if the no net loss guiding principle can be respected. If it cannot, DFO should will not, in general, issue a s. 35(2) authorization for a project.”

Section 5.3.1.1 Application of the Habitat Policy in Alberta

Paragraph 2, sentence 1: This sentence suggests that an administrative agreement did or should have existed, which is not the case. This is inaccurate. We request that the text read:

“~~The Secretariat requested Canada to provide copies of any Canada Alberta administrative agreements or protocols of the type referred to above, but none were provided. There is no Canada-Alberta administrative agreement or protocol respecting the issuance of HADD authorizations.~~”

Section 5.3.2 *Fisheries Act* Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy

Paragraph 1, last sentence: The Secretariat suggests that DFO has an obligation to apply the “2001 Compliance and Enforcement Policy” to the Sunpine project, which was completed in 1997. This is inaccurate. The text should read:

“~~The Secretariat has not received any information regarding whether DFO has been applying the Compliance and Enforcement Policy in connection with the Sunpine Project since July 2001.~~“The Compliance and Enforcement Policy was finalized in July 2001, and published in November 2001 after going through the Canada Gazette process, and is in effect nationally.”

Section 5.4 Meaning and Scope of s. 5(1)(d) of the *Canadian Environmental Assessment Act* (CEAA) and Schedule 1 Part I Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of the CEAA

Paragraph 4, sentence 1: The definition of a “project”, is inaccurate. A “project” is not a physical work, it is an undertaking in respect of a physical work. As such, the sentence should read:

“A project can therefore be a “physical work” or a “physical activity”, A “project” can therefore be an undertaking in relation to a physical work or it can be a “physical activity” not relating to a physical work, but in order to [...].”

Paragraph 5, sentence 1: This sentence is inaccurate. This sentence should not include physical activities that are not related to a physical work. Therefore, the sentence should read:

“If a “physical activity” requires an authorization If a “physical activity” not relating to a physical work requires an authorization under s. 35(2) of the Fisheries Act, [...].”

Paragraph 7, sentence 1: This sentence is erroneous. The fact that a project is carried out on federal land is not, in and of itself, a CEAA “trigger”. If a federal project is carried out on federal land, the CEAA “trigger” is the proponent [s. 5(1)(a)]. However, if a non-federal project is carried out on federal land, the CEAA “trigger” is either the issuance of an interest in federal land [5(1)(c)] or the issuance of a licence to use or occupy federal land [item 8 of Part II of Schedule I to the Law List Regulations — 5(1)(d)]. Therefore, we request that the Secretariat review this paragraph in light of this clarification.

Paragraph 7 sentence 2: This sentence indicates that the *Law List Regulations* list only statutory provisions. This is inaccurate. The *Law List Regulations* list both statutory and regulatory provisions. Further, the sentence does not mention that in order for a “trigger” to exist, there must be a “project”. Therefore, the sentence should read:

“[...] if a statutory provision is listed in the if a provision of a statute or a regulation is listed in the Schedule to the CEAA *Law List Regulations*, an RA cannot act under that provision in respect of a project without triggering an environmental assessment requirement under the CEAA. [...]”

Paragraph 7, last sentence: This sentence overlooks the fact that a project can be immediately subject to a review panel or mediator under s. 21. In addition, this sentence implies that a determination of significant adverse environmental effects is relevant to a screening but that it is not relevant to a comprehensive study. Finally, the concept of “likelihood” is missing from this sentence. To be accurate, the sentence should be removed and replaced with the underlined text:

“The issuance of an order under s. 37(2) of the Fisheries Act and the issuance of an authorization under s. 35(2) of the Fisheries Act are CEAA

~~“triggers,” but only where a “project”—as defined in the CEAA—is involved (see above).”~~

“It is either automatically:

a) excluded from environmental assessment; or

b) subject to either

i) a comprehensive study, a mediation or a panel review; or

ii) a screening

to determine whether it is likely to cause significant adverse environmental effects.

Paragraph 8, last sentence: This sentence is inaccurate. It does not mention that a project must be sent to a panel if an RA (Responsible Authorities) determines in a screening that the project has significant adverse environmental effects that are justifiable under the circumstances. Therefore, this sentence should be revised to include this information.

“A screening can lead to a finding of no significant adverse environmental impacts effects, in which case the RA can proceed to issue the authorization or otherwise act to allow the project to go forward. ~~or, a~~ screening can, on the other hand, determine that either uncertainty public concern, about possible project impacts, or public concerns, or both, the existence of significant adverse environmental effects that are justifiable in the circumstances, warrant requires referring the project to a mediator or a review panel. Finally, a screening can determine that the project is likely to cause significant adverse environmental effects that are unjustifiable in the circumstances, in which case, the federal power, duty or function pertaining to the project cannot be exercised.”

This information should also be included in Paragraph 12 of this Section.

Paragraph 9, sentences 2: The Secretariat should not refer to forestry projects. They are beyond the scope of this Factual Record, which deals with the project to build a road. The sentence should be removed:

~~“[...] Forestry projects are not listed in these regulations. [...]~~

Paragraph 9, sentence 3: This sentence is incorrect. It should read:

“If a project triggers the CEAA (for example, the project requires a s. 35(2) authorization under the *Fisheries Act*) but the project is not within the clas-

~~ses of projects that are automatically covered or automatically excluded from the application of the CEAA, nor within the classes of projects in respect of which a comprehensive study is required, the RA must conduct a “screening” of the project.”~~

Paragraph 9, last sentence: The Secretariat should not refer to the Model Class Screening Report. An instrument developed in 2002 should not be used to judge an activity in 1995. The Model Class Screening Report for Prairie Grain Roads came into affect in 2002 and did not exist in 1995. Therefore, this sentence should be removed:

~~“[...] The Canadian Environmental Assessment Agency has a Model Class Screening Report for Prairie Grain Roads, but there are no model class screening reports for logging roads such as the Sunpine Project.”~~

Paragraph 11 section (b) of the citation: The words “whether any such change occurs within or outside Canada” apply equally to paragraphs (a) and (b) of the definition of “environmental effect” in the CEAA. Therefore, we request that the words be severed from paragraph (b) and inserted as a “tail” at the bottom of the definition to read:

“[...]

(b) any change to the project that may be caused by the environment whether any such change occurs within or outside Canada.”

Paragraph 12, last sentence: This paragraph seems to be summarizing the situation in which the Minister may refer a project to a panel review. Reference is solely made to s. 28 where the Minister refers a project to a panel review of his or her own volition. To be complete, reference should also be made to s. 25 where an RA may request the Minister to refer a project to a panel and to s. 21 where an RA may require the Minister to refer a project to a review panel. We request that this paragraph be reviewed to include this information.

Paragraph 18, last sentence: This sentence incorrectly indicates that all records relevant to an EA are to be included in the CEAA public registry. The sentence should read:

“[...] The CEAA states that for every project subject to assessment under the act, the RA must establish and operate a public registry containing ~~all~~ subject to certain exceptions, records produced, collected, or submitted with respect to the environmental assessment of the project in a manner to ensure convenient public access to the registry.”

Paragraph 19, sentence 1: The word “unjustifiable” should be removed because if significant “unjustifiable” adverse environmental effects are found to exist, no federal powers contained in a CEAA “trigger” can be exercised and the RA will not have any obligation to ensure the implementation of mitigation measures. The sentence should read:

“[...] the RA must ensure that any mitigation measures considered appropriate to prevent a project from causing ~~unjustifiable~~ significant adverse environmental effects are implemented. [...]”

Paragraph 20, sentence 3: This sentence contains items that are listed in s. 38 that are not part of a follow-up program. Section 38 of the *Fisheries Act* is a confusing section since it contains both follow-up and other items. This confusion is being remedied in Bill C-9. Therefore, the Secretariat should remove this sentence.

~~[...] These regulations would guide RAs in designing and implementing programs to follow up on projects. This would include advising the public of the following:~~

- ~~• the RA’s course of action in relation to a project;~~
- ~~• any mitigation measures to be implemented with respect to the adverse environmental effects of the project;~~
- ~~• the extent to which the recommendations set out in any report submitted by a mediator or a review panel have been adopted and the reasons for not having adopted any of those recommendations;~~
- ~~• any follow-up program designed for the project [...]; and~~
- ~~• any results of any follow-up program.~~

Section 5.5 The CEAA and the Protection of Fish Habitat under the *Fisheries Act*

Paragraph 3, sentence 2: This sentence is inaccurate. The Supreme Court of Canada held, indirectly, in *Friends of the Oldman River*, that s. 35(2) was outside the ambit of the order. Therefore, the sentence should read:

“DFO adopted its Habitat Policy two years later, in 1986. ~~The Habitat Policy does not mention the EARP Order.~~ The Habitat Policy defines “major” and “minor” projects, and sets out the respective roles of DFO and project proponents depending on the size of the project.”

Citation under paragraph 3: In order to remain impartial, the emphasis added in the first paragraph of the citation on “forest harvesting operations” should be removed.

Paragraph 4, sentence 1: This sentence is incorrect. The Habitat Policy does not assume that a project proponent will be required to submit information to DFO under s. 37(1). Section 37(1) confers a discretionary power on the Minister. Therefore, the sentence should be removed.

~~“For major projects, the Habitat Policy assumes that project proponents will be required to submit information to DFO under s. 37(1). Under s. 37(1), this requirement can either be stated in a regulation (which to date does not exist) or it can take the form of an information request from MFO.”~~

Paragraph 5, sentence 1: To ensure accuracy, the sentence should read:

~~“The Courts have said that been asked to consider whether the public can-
not force DFO to issue s. 37(2) orders or s. 35(2) authorizations, thereby
triggering a requirement for a CEAA screening.[...]”~~

Section 5.6 Planning of the Sunpine Project and Alberta’s Approval of the Sunpine Project

Paragraph 1: In light of the clarifications provided in the cover letter, we request the following changes:

~~“Information is provided below regarding the origin of the Sunpine Project and the process that resulted in provincial approval of the Sunpine Project. This information is relevant to a consideration of whether DFO Canada including provincial fisheries staff carrying appointments as fishery officers under the *Fisheries Act* is failing to effectively enforce the *Fisheries Act* habitat protection provisions and the CEAA in regard to the Sunpine Project. No evaluation of Alberta’s enforcement of provincial laws is intended or implied. The Alberta approval process was not established pursuant to either the *Fisheries Act* or CEAA and no evaluation of Alberta’s approval process or the enforcement of provincial laws is within the scope of this Factual Record.”~~

Paragraph 3: The Paragraph does not reflect the information provided in the last sentence of footnote 113. In order to ensure accuracy, the Secretariat should refer specifically to the decision of the Development Appeal Board. The sentence should read:

~~“During a multi-stakeholder process used to select a site for Sunpine’s veneer plant, LFS, the Municipal District of Clearwater (the “MD”), muni-~~

~~icipal residents and Sunpine had worked on the assumption that Sunpine would use existing public roads – in particular, the North Fork Road (“NFR”) – to deliver lumber from its FMA area to its new plant. When the Development to Appeal Board Approved the zoning for Sunpine’s plant, it noted that “evidence was presented that the road system has ample capacity to accommodate additional traffic”.~~

Paragraph 4, sentence 1: To ensure accuracy, the Secretariat should specify what “process” is it referring to in this Paragraph (e.g. legislation, bylaws). Further, the Secretariat should cite the source of this information in a footnote.

“Under the municipal road development process, the cost of any necessary upgrades to public roads required to allow Sunpine to conduct its log haul would have been borne by Sunpine and the MD, in proportion to the use made of those roads by Sunpine and area residents. [...]”

Paragraph 4, sentence 2 and 3: These sentences are not consistent with footnote 114, which refers to a memo by a provincial official, rather than a document by Sunpine. Further, the memo does not contain references to the advantages described and attributed to Sunpine. Therefore, the sentences should be removed.

~~“[...] According to Sunpine, one advantage of the proposed new, private road would be to enable all-season delivery of logs to the new plan (as opposed to winter-only log hauls), thereby ensuring continuous employment in the area. Another would be that the new road would be paid for entirely by Sunpine (and any other commercial interests wishing to use the road in the future...”¹¹⁴~~

Paragraph 8, sentence 6: In order to remain impartial, the Secretariat should not imply that Sunpine had an obligation to accept or act on the recommendation made in the consultant’s report. The sentence should read:

“[...] Sunpine did not act on the recommendations contained in disregarded the consultant’s report. [...]”

Paragraph 8, last sentence: The word “disappointed” used in this sentence does not appear to be consistent with footnote 121, “disregard”. We suggest the following underlined language as an alternative.

“Thereafter, Sunpine, LFS and the MD together commissioned a study of the area’s transportation needs for the purpose of assessing potential log

haul routes and establishing criteria for ranking alternatives. After a review of several alternatives, the transportation consultant identified an upgraded NFR and the MLR as the most promising routes, concluding that neither was clearly preferable to the other. Sunpine was disappointed that the study did not conclude in favor of the MLR. In subsequent media coverage, Sunpine expressed concerns about the results of the study.”

Paragraph 9, last sentence: In order to remain impartial, the Secretariat should also include the number of persons representing the local political, industrial, commercial and social interests or remove the sentence.

~~“[...]FAC members represent local political, industrial, commercial, and social interests, and Sunpine. In 1995, the FAC had one member representing environmental interests.~~

Paragraph 11, sentence 1: This sentence appears to indicate that Sunpine directed the nature of the advisory committee’s recommendation. This is inaccurate. The paragraph should read:

“In late May 1995, Sunpine asked for a FAC recommendation on the MLR. Sunpine and received a FAC recommendation in favor of the MLR, subject to a commitment from Sunpine to control access to the MLR and mitigate impacts on fish and wildlife. [...]”

Paragraph 11, sentence 2: The Secretariat should cite the source of information in a footnote. In the absence of any evidence to support this sentence, the Secretariat should remove the sentence.

~~“[...] All FAC members voted in favor of the MLR except the member representing environmental interest, who refused to endorse the MLR proposal in the absence of a long term road development plan and detailed environmental information on, and an environmental assessment of, the two alternatives (MLR, NFR), including baseline data on fisheries resources in the area.”~~

Paragraph 16, sentence 2: The statement implies that there was a replacement of temporary crossings with permanent ones in 1997. This is inaccurate and should be removed. As previously indicated, provincial Fisheries Management staff had advised Sunpine that the temporary crossings had to meet the permanent standards so there was no replacement of crossings.

~~“[...]Sunpine built and used a temporary road and stream crossings [...], and Sunpine then built the permanent road and crossings in 1997[...].”~~

Paragraph 16, last sentence: This sentence leads the reader to believe that there was an obligation placed on Sunpine to obtain a s. 35(2) authorization under the *Fisheries Act*. This is inaccurate. The sentence should read:

“Sunpine ~~obtained no~~ did not require a s. 35(2) authorization under the *Fisheries Act* for the Sunpine Project, and DFO did not conduct an environmental assessment of the Sunpine Project under the CEAA.”

Section 5.7 Canada’s Actions in Regard to Alleged Violations of the *Fisheries Act* and the CEAA in Connection with the Sunpine Project

Paragraph 6: To ensure accuracy, we request that the Secretariat include the following information:

“On 1 August 1995, the DFO Habitat Management Division in Winnipeg, the agency responsible for issuing HADD authorizations for activities in Alberta, wrote to Sunpine, stating:”

Paragraph 11: To ensure accuracy, the following changes should be made:

“On 25 August 1995, LFS approved the corridor for the Sunpine Project under pursuant to Alberta’s legislation, including Alberta’s *Resource Road Planning Guidelines* ~~over objections by FWS staff (see above, s. 5.6).~~”

Paragraph 23, clarification point: To ensure accuracy, the Secretariat should specify that September 1996 is when Sunpine was advised by DFO that there was no HADD. Consequently, there was no CEAA “trigger” on bridges. The NWPA question was resolved in August 1996 to determine whether the project would have an impact on navigational issues on the bridges.

Section 5.8 Facts Regarding Whether Canada is Failing to Effectively Enforce the *Fisheries Act* and the CEAA in Connection With the Sunpine Project

Paragraph 5, sentence 3: This sentence is inaccurate. FWS was not the only staff to recommend relocation. In fact, Fisheries, Wildlife, and LFS staff recommended the relocation. The sentence should reflect their participation.

Paragraph 6, sentence 1: In light of the Secretariat 's apparent misunderstanding noted in our cover letter, we request that the following modifications be made:

~~“FWS staff working on the Sunpine Project had appointments as fishery officers under the *Fisheries Act* did not have the power to issue authorizations under s. 35(2). Under these appointments, they had the power to take enforcement action for violations of s. 35(1), but they did not have the power to issue authorizations under s. 35(2). The Secretariat did not obtain any information regarding why, in light of their concerns regarding impacts of the Sunpine Project on fish and fish habitat, Fisheries Management staff, in their capacity as federal fishery officers, did not take enforcement action when Sunpine built a temporary logging road, and then a permanent logging road, within the MLR corridor, without a s. 35(2) authorization.” that indicated that a violation of the HADD provisions of the *Fisheries Act* had occurred.”~~

Paragraph 6, sentence 2: This sentence presupposes that there is an offence, which is not relevant to this discussion, and it overlooks the fact that the biologists were not Fishery Officers. The sentence should read:

~~“FWS staff working on the Sunpine Project did not hold had appointments as fishery officers under the *Fisheries Act*. Under these appointments, they had the power to take enforcement action for violations of s. 35(1), but they did not have the power to issue authorisations under s. 35(2).~~

Paragraph 9, sentence 2 and 3: Because these sentences do not accurately reflect the entire process we ask that they be removed, including the citation.

~~“In order to allow RAs to comply with the CEAA requirement to ensure that environmental assessments are conducted as early as is practicable in the planning stages of a project (and before irrevocable decisions are made), the CEAA contains provisions allowing an RA (in this case, DFO) to request the federal Minister of the Environment to refer a project such as the Sunpine Project to a mediator or review panel for assessment, if public concerns warrant such a reference, even if the RA is not certain that it will exercise a power or perform a duty or function referred to in s. 5 of the CEAA (in this case, issue a s. 35(2) authorization) in connection with the project. If the RA subsequently decides that it will not exercise a power referred to in s. 5 of the CEAA, the CEAA provides:~~

~~Where at any time a responsible authority decides not to exercise any power or perform any duty or function referred to in s. 5 in relation to a project that has been referred to a mediator or review panel, the Minister may terminate the environmental assessment of the project.”~~

Paragraph 26, sentence 2: This sentence suggests that there is an obligation placed on either the Government of Canada or the Alberta Government to conduct “follow-up” monitoring. This is inaccurate. In the absence of any indication that a HADD would occur, there was no reason to deploy resources. Moreover, the project was clear-span bridges – DFO relied upon the documents identified as well as discussions with Sunpine and Alberta, site inspections, as well as education and experience of officials in aquatic ecosystem research, fisheries research and field biology and habitat management to reach its conclusions. In any event, staff of LFS, in their role as land manager, did conduct monitoring of the right-of-way, and that direction was provided to Sunpine to submit an action plan to correct erosion problems. Therefore, this sentence should be removed.

~~“[...]Both DFO and Alberta have confirmed that neither DFO nor Alberta did any active follow-up monitoring—or required Sunpine to submit results of any follow up monitoring—with regard to the Sunpine Project.”~~
Please note that this comment is also applicable to Section 6, Paragraph 4.

Last Paragraph: This paragraph leads the reader to believe that there was an obligation placed upon DFO to conduct an analysis. This is inaccurate. No analysis was necessary since the projects were defined as encompassing the bridges and the physical extent of the area to be considered for the cumulative effects assessment based on the footprint of the potential impacts from the project(s). DFO need only to analyze the cumulative effects within the boundaries that were determined by DFO. The analysis was completed on the cumulative effects found within the boundaries. Therefore, this paragraph should be removed.

~~“DFO did not conduct the type of analysis outlined above (and did not require Sunpine to do so, pursuant to s. 37(1) of the *Fisheries Act* or otherwise) to determine that sediment yield from the Sunpine Project in its totality (road surface and twenty-one stream and river crossings) will not or does not cause a HADD of fish habitat and therefore does not result in a *Fisheries Act* violation in the absence of a s. 35(2) authorization.”~~

Section 6 Closing Note

Paragraph 2: To ensure accuracy we request the following changes:

“In 1993, Sunpine Forest Products Ltd. (“Sunpine”) proposed to build a permanent, all-weather mainline log haul road through its forest management area in the Rocky Mountain foothills of West Central Alberta (the “Sunpine Project”). The proposed Sunpine Project would cross the headwaters of twenty-one watercourses. The Alberta Forest Service, prior to

authorizing the road under provincial legislation, referred the proposal to provincial fisheries fish and wildlife management staff, who strongly recommended against the Project and in favor of requiring Sunpine to use existing roads for its log haul in order to avoid creating new, long-term impacts on fish and fish habitat. The Forest Service assessed these comments and ultimately approved the Sunpine Project under Alberta's legislation.

The Forest Service approved the Sunpine Project over objections from fisheries staff. Provincial fisheries staff carried appointments as fishery officers under the Fisheries Act. Provincial fish and wildlife enforcement staff carried appointments as fishery officers under the Fisheries Act. Under these appointments, they could lay charges for issue Fisheries Act violations, but they could not issue Fisheries Act authorizations, but they could not issue Fisheries Act authorizations. Despite their concerns regarding the Sunpine Project, provincial fisheries staff did not take any enforcement action against Sunpine under the Fisheries Act when Sunpine built a temporary road, and then a permanent road, in the new road corridor without a Fisheries Act authorization. To date there has been no information or evidence presented that the HADD provisions of the Fisheries Act have been violated."

Paragraph 3, sentence 1: This sentence is inaccurate. It is the Minister who is accountable to Parliament not DFO.

"The federal Department of Fisheries and Oceans ("DFO") The Minister is accountable to Parliament for the administration and enforcement of the Fisheries Act. [...]"

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