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Secretariat of the Commission for Environmental Cooperation

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

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Party:	Canada
Original submission:	5 December 2011
Date of the notification:	7 November 2013
Submission no.:	**SEM-11-003 (*Protection of Polar Bears*)**

I. EXECUTIVE SUMMARY

1. On December 5, 2011, the Center for Biological Diversity (the "Submitter") filed SEM-11-003 (*Protection of Polar Bears*) (the "Submission"), a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or the "Agreement"),[1] with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC"). Articles 14 and 15 of the NAAEC provide for a process allowing any person or non-governmental organization to file a submission asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the* [NAAEC] (the "Guidelines").[2] When the Secretariat determines that a submission meets the criteria set out in Article 14(1), it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the NAAEC Party named in the submission. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances prevail, it proceeds no further with its consideration of the submission.[3]

[1] *North American Agreement on Environmental Cooperation*, United States, Canada and Mexico, 14-15 September, 1993, Can TS 1994 No 3, 32 ILM 1480 (entered into force 1 January, 1994) [NAAEC], online: CEC <www.cec.org/NAAEC>.

[2] Commission for Environmental Cooperation, *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Montreal: CEC, 2012) [Guidelines], online: CEC <www.cec.org/guidelines>.

[3] Previous Secretariat Determinations and Factual Records can be found on the CEC's website at:

2. The Submitter asserts that Canada is failing to effectively enforce the federal *Species at Risk Act*[4] ("SARA" or the "Act"), including its subsections 15(2), 25(3) and 27(3).

3. On 29 November 2012, the Secretariat determined that the allegations contained in the Submission respecting the Act as a whole and subsections 15(2), 25(3) and 27(3), met the admissibility criteria in Article 14(1) and merited requesting a response from Canada in accordance with Article 14(2).[5] Accordingly, the Secretariat asked for a response from Canada to the Submitter's assertions that Canada is failing to effectively enforce the *Species at Risk Act*.

4. Canada responded to the submission on 24 January 2013[6] and states its "position" that the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) is not subject to the Article 14 process because COSEWIC is not a Party to the NAAEC, and because subsection 15(2) of the Act does not meet the NAAEC's definition of "environmental law."

5. Canada states that, contrary to the Submission, the timelines in sections 25 and 27 of the Act were not breached. Canada also questions the Secretariat's analysis of whether the Submission involves an "ongoing" matter, and alleges other failures on the part of the Secretariat, including that aspects of the Determination are "contrary to the impartial exercise of the Secretariat's duties."

6. The Secretariat finds that having considered the Submission in light of the Response, there remain central open questions about Canada's enforcement of SARA in respect of the polar bear species. The Secretariat considers that a factual record would provide the public with a better understanding of the role of the "best available information" considered by COSEWIC in the SARA listing decision-making process, as well as how the timing of key steps in that process may be affected by other factors. Such factors include the role of land claims agreements and of consultations with Wildlife Management Boards and other parties.

7. The preparation of a factual record is therefore warranted in order to gather additional information concerning the matters raised in Submission SEM—11—003.

<www.cec.org/SEMregistry>. References to the word "Article" throughout this Notification, unless otherwise stated, refer to an article of the NAAEC. Use of the masculine implies the feminine, and vice-versa.

[4] SC 2002, c 29 ["SARA" or the "Act"]. See pages 20-24 of the Secretariat's Determination of 29 November 2012 for provisions of the Act that are mentioned in or most relevant to the Submission.

[5] SEM-11-003 (*Protection of Polar Bears*) Determination in accordance with Articles 14(1) and (2) (29 November 2012) [the "Determination"].

[6] Government of Canada, "Protection of Polar Bears: Response to Submission SEM-11-003" (24 January 2013) ["Response"].

II. SUMMARY OF THE SUBMISSION

8. The Submission was summarized at paragraphs 3 to 27 of the Determination.

III. SUMMARY OF THE RESPONSE

9. The Response was prepared by Environment Canada, for the Government of Canada.[7]

10. The Response's Introduction outlines the cultural significance of the polar bear to Canadians, Inuit and northern communities in particular. It describes polar bear management as a collaborative approach shared with provinces, territories and regional wildlife management boards (WMBs) established by aboriginal land claims agreements, noting that such agreements are recognized and affirmed by section 35 of the *Constitution Act, 1982*.[8]

11. The Introduction identifies SARA as part of the Government of Canada's strategy for protecting species at risk. It also states that the Act was designed to separate the scientific assessment of the status of wildlife species from the decision whether to list species in the List of Wildlife Species at Risk, and to embrace "Canadian values of participation."[9] It describes the process of consulting with various parties following the receipt of a wildlife species status assessment from the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), with "the engagement of Aboriginal peoples" identified as "of particular significance."[10]

Canada's view that "COSEWIC is not Subject to the SEM Process"

12. Noting the Submitter's assertion that Canada is failing to effectively enforce subsection 15(2) of SARA, Canada states its

> position that COSEWIC's actions concerning the listing of the polar bear are not subject to the SEM process, as 1) COSEWIC is an independent body that operates at arm's length from government; and 2) [subsection 15(2)] does not constitute environmental law as defined by the North American Agreement for [sic] Environmental Cooperation.[11]

Canada's view that "COSEWIC is Not a Party to the NAAEC"

13. In the Response, Canada states that the Secretariat "concluded that COSEWIC [is] a Party to the Agreement." It states that Environment Canada "informed COSEWIC in

[7] Response at ii.
[8] Response at 1; *Canada Act 1982*, (UK) 1982, c 11.
[9] Response at 1; see Schedule 1 of the Act.
[10] Response at 1.
[11] Response at 3.

writing (Annex 2) that it [COSEWIC] had been named by the Submitter in the submission, and explained that the Committee was not subject to the Agreement."[12]

14. Canada states that, as distinct from being part of the government, COSEWIC "offers the government independent assessments based on the best available biological information, including scientific knowledge, community knowledge, and aboriginal traditional knowledge, as required under SARA subsection 15(2)."[13] Canada also cites subsection 16(6) of SARA, which requires COSEWIC members to exercise their discretion in an independent manner, and subsection 16(4), which "establishes that COSEWIC members are not part of the public service of Canada" by virtue of their COSEWIC membership.[14] Canada also cites the requirement in SARA subsection 16(2) that each COSEWIC member "must have expertise drawn from a discipline such as conservation biology, population dynamics, taxonomy, systematics or genetics or from community knowledge or aboriginal traditional knowledge of the conservation of wildlife species."

15. Canada makes several statements ostensibly in support of the notions (none of which the Determination challenges) that "COSEWIC is a Scientific Authority"[15] and that "the Government of Canada trusts the expertise, independence and professionalism of the COSEWIC in determining the 'best available information.'"[16] The Response says that "COSEWIC was established to provide Canadians with a single, scientifically sound classification of wildlife species at risk of extinction."[17]

16. Canada notes that COSEWIC does not "take into account political, social or economic factors"[18] and that "[n]o other body or organization, including government, has the mandate to determine what constitutes the 'best available information' for wildlife species assessments."[19] Canada further notes that "[i]t is not open to the Minister to reject [COSEWIC's] assessment and to substitute his own."[20] The Response states that SARA identifies COSEWIC as "the only body of independent scientific and aboriginal traditional knowledge experts designated under the Act to assess the status of species at risk" based on the best available information.[21]

17. The Response further states "Canada's view that in simply accepting the Submitter's position that COSEWIC's listing assessment was biased and flawed, the Secretariat

[12] Response at 3; Canada indicates in the Response that a "copy of this letter was provided to the Secretariat." The Secretariat notes that there is no provision in the Agreement for its consideration of documents, such as the letter referred to by Canada, at this stage of the process. The Secretariat did not, therefore, consider the letter referred to by Canada in preparing the 29 November 2012 Determination.
[13] *Ibid*.
[14] Response at 3–4. The actual language of subsection 16(4) is "The members are not, because of being a member, part of the public service of Canada."
[15] Response at 4 (section heading).
[16] Response at 4.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid* at 5.
[21] *Ibid,* at 4.

failed in its responsibility to present a thorough and objective analysis of the submission."[22]

18. Canada's Response then explains the respective and distinct roles of COSEWIC, the federal Minister of the Environment and the federal cabinet (the "Governor in Council" or "GIC") pursuant to SARA, as follows.

19. First, COSEWIC determines the "best available information" and assesses the status of each wildlife species, providing a copy of the assessment and the reasons for it to the Minister.[23]

20. On receiving a copy of the assessment, "the Minister must, within 90 days, include in the public registry a report" on how he intends to respond to it.[24] "Before making a recommendation"[25] to the Governor in Council in respect of the species, the Minister must "take into account the assessment of COSEWIC" and must consult other "competent ministers."[26] Finally, and also "before making [the] recommendation" the Minister must consult the relevant wildlife management boards authorized by land claims agreements in relation to the species.[27]

21. Next, the Governor in Council, taking into consideration the Minister's recommendation, decides whether to accept COSEWIC's assessment and add the species to the List of Wildlife Species at Risk,[28] not to add the species to the List, or to refer the matter back to COSEWIC for further information or consideration.[29]

22. The Response emphasizes that COSEWIC does not make the ultimate decision about legal protection for a species and "[c]orrespondingly, neither the Minister of the Environment who recommends, nor the Governor in Council who makes these decisions, is empowered under the Act to replace or vary a scientific assessment once it has been presented by COSEWIC."[30]

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[22] *Ibid.*
[23] *Ibid* at 4; see also SARA, ss 15, 23 and 25.
[24] SARA, s 25(3). See also Figure 1, "The Species Listing Process under SARA," in Annex 8 to the Response.
[25] SARA, s 27(2).
[26] SARA, s 27(2)(a)–(b). Consultation with the "competent minister(s)"—para 27(2)(b); see also s 2 ("competent minister") and s 2(3)—is not relevant in the case of the polar bear.
[27] SARA, para 27(2)(c). See also s 2: "'land claims agreement' means a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*;" and "'wildlife management board' means any board or other body established under a land claims agreement that is authorized by the agreement to perform functions in respect of wildlife species."
[28] SARA, s 2 ("'List' means the List of Wildlife Species at Risk set out in Schedule 1").
[29] Response at 4; SARA paras 27(1.1)(a)–(c). (Where the GIC has not taken a course of action under s 27(1.1) within nine months after receiving the assessment, "the Minister shall, by order, amend the List in accordance with COSEWIC's assessment:" SARA, s 27(3).)
[30] Response at 4.

Canada's view that "COSEWIC's Functions are not Environmental Law"

23. Canada states its view that "[f]or the purposes of this Response," SARA subsection 15(2) is not "environmental law" as that term is defined in Article 45(2), because the subsection "addresses COSEWIC's functional responsibilities."[31] Canada states that "While the SARA is environmental law, subsection 15(2) has the primary purpose of establishing the functions of COSEWIC as an independent scientific body, and therefore constitutes an administrative measure, not environmental law."[32]

24. The Response cites the Article 14(1) Secretariat Determination in Submission SEM-09-004 (*Quebec Mining*) as an instance where the Secretariat did not consider provisions establishing "requirements or powers for officials and bodies" to be "environmental law" as defined in Article 45(2).[33]

Canada's view that "The Minister Complied with all SARA-required Timelines"

25. The Response identifies "[t]imelines on several key obligations of the Government with respect to the listing of a species" as "an important aspect of SARA,"[34] giving as examples the timelines in subsections 25(3) and 27(1.1). It then summarizes the relationship between the procedures in SARA and the constitutional responsibilities of the Government of Canada to consult in relation to existing aboriginal and treaty rights.

26. The Response states that SARA timelines "cannot be considered in isolation [from] the Government of Canada's broader responsibility for respecting consultation obligations"[35] pursuant to land claims agreements. It explains that such agreements, signed by the Government of Canada and aboriginal peoples in Yukon Territory, Northwest Territories, northern Quebec, and Newfoundland and Labrador, establish wildlife management boards that have certain responsibilities within settlement areas defined by the agreements.[36] Canada notes the requirement of paragraph 27(2)(c) of SARA, namely "that the Minister [must] consult [wildlife management boards, or WMBs] before making a recommendation to the Governor in Council on the listing [of] a wildlife species found within the settlement area."[37]

27. Canada includes "more information on the SARA and Canada's duty to consult"[38] in Annex 3 to the Response, an undated document with no authorship identified.

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[31] *Ibid,* at 5; see NAAEC, Article 45(2).
[32] *Ibid*.
[33] *Ibid*, citing Article 14(1) Determination in *Quebec Mining* (20 October 2009) at 5.
[34] Response at 5.
[35] Response at 6.
[36] *Ibid*. The list of WMBs omits the Nunavut Wildlife Management Board (<http://www.nwmb.com/>; last visited 11 July 2013).
[37] Response at 6 (underlining in Response).
[38] *Ibid*.

28. Annex 3 notes that "responsibility for the conservation of wildlife in Canada is shared among the Governments of Canada," and that preventing species of special concern from becoming endangered or threatened "is to be accomplished through the development of a management plan that includes measures for the conservation of the species."[39] It notes the requirements of section 68 of SARA,[40] adding that "management plans are evaluated every five years and updated as necessary to accommodate new information."[41]

29. Annex 3 reiterates Canada's assertion that the scientific assessment conducted by COSEWIC is distinct from the listing decision made by the Government.[42] It outlines the steps of the listing decision process, beginning when COSEWIC sends the completed assessment report to the Minister: subsection 25(1).[43] Canada describes "an agreement reached through an exchange of correspondence between the Minister and COSEWIC in 2003 (Annexes 4 and 5),"[44] as a result of which the COSEWIC chair sends a completed status report for each species in question once a year to both the Minister and the Canadian Endangered Species Conservation Council ("CESCC").[45] For clarity, the Secretariat reproduces the relevant passage here in full:

> As the result of an agreement reached through an exchange of correspondence between the Minister and COSEWIC in 2003 (Annexes 4 and 5), *pursuant to SARA section 26*, the chair of the COSEWIC sends its completed, final assessment and supporting evidence, including the rationale and status reports, for species classified as at risk (i.e., extirpated, endangered, threatened or of special concern) to the Minister of the Environment, who is the minister responsible for the administration of the SARA, and to the [CESCC] as required under subsection 25(1) of the SARA.[46]

30. The Response states that the assessment, and reasons for it, "must be available in both official languages, pursuant to Canada's *Official Languages Act*."[47]

31. Following receipt of the assessment and related documents, according to subsection 25(3) the Minister "must, within 90 days, include in the public registry a report on how the Minister intends to respond to [each COSEWIC species] assessment and, to the extent possible, provide time lines for action."[48] By contrast, in both the Response and in

[39] Annex 3 at 1. S 65 of SARA requires that "the [management] plan must include measures for the conservation of the species that the competent minister considers appropriate […]."
[40] S 68 sets out the process and timelines for proposing and finalizing a management plan for species of special concern. S 68 is reproduced in the Appendix to the Secretariat's Article 14(1) Determination at 24.
[41] Annex 3 at 2. The five-year review and update process is a requirement of s 72, which requires the Minister to "monitor the implementation of the management plan and [to] assess its implementation five years after the plan is included in the public registry, and in every subsequent five-year period, until its objectives have been achieved."
[42] Response at 4; Annex 3 at 2.
[43] Response at 6; Annex 3 at 3.
[44] Response at 6.
[45] *Ibid*; see also Annex 3 at 3. The CESCC comprises the federal ministers of the Environment and of Fisheries and Oceans, "and ministers of the government of a province or a territory who are responsible for the conservation and management of a wildlife species in that province or territory:" SARA, s 7(1).
[46] Response at 6 (italics added). See also the paragraph headed "Receipt of Assessment" in Annex 3 at 3.
[47] Annex 3 at 3; *Official Languages Act* (RSC 1985, c 31 (4th Supp)).
[48] SARA, s 25(3).

Annex 3, Canada states that "Response Statements" "indicate how the Minister intends to respond to each COSEWIC assessment and, to the extent possible, provide timelines for action *and the extent of consultations*."[49]

32. Annex 3 states that there are two possible consultation paths: normal consultations that result in a species assessment's being sent from the Minister to the GIC within 2–3 months, and extended consultations that may take longer, although no time limit or estimate is indicated. According to Annex 3, extended consultations are undertaken where listing a species "could have significant and widespread impacts on the activities of Aboriginal peoples, industry or Canadians at large."[50] Annex 3 also states: "For those species undergoing extended consultations *the Minister will not forward the assessments to the Governor in Council until the consultation requirements* established in the SARA and land claims agreements […] and common law *have been met*."[51]

33. Annex 3 states that "[w]here existing land claims agreements apply to eligible terrestrial species, such that they fall under the authority of a wildlife management board [WMB], the Minister must seek a decision from the relevant board(s),"[52] and provides the following example:

> For example, under the Nunavut [land claims agreement], [Nunavut's] WMB is authorized to approve the designation of species at risk found on [sic] the settlement area. As such, the Minister presents the proposed listing to the WMB for approval of the designation. Once the Minister has received a decision from the WMB with regard to the proposed listing, he then has 60 days to accept it or to give written reasons for rejecting it. If he does not respond within 60 days he is deemed to have accepted the Board's decision and must then implement that decision. Where the Minister rejects the WMB decision, the board must reconsider the decision in light of the reasons provided by the Minister and then make a final decision. After receiving a final decision of the WMB, *the Minister may then accept or reject the final decision*, *or vary it*, before making a recommendation to the Governor in Council.[53]

34. Annex 3 cites the federal government's duty to consult with Aboriginal peoples on the implementation of SARA, as arising from constitutional aboriginal and treaty rights, from certain provisions of SARA, and from the common law.[54]

35. Annex 3 further describes how review and evaluation of comments received during consultations are documented in a draft Regulatory Impact Analysis Statement (RIAS) and published, along with the draft Order proposing to list a particular species, in the *Canada Gazette*. According to Annex 3, the RIAS

[49] Response at 6-7; Annex 3 at 3 (italics added). The Secretariat notes that s 25(3) does not mention, let alone require any reference to, the "extent of consultations". The Act also does not provide for "extended consultations" or "normal consultations" (see Annex 3 at 3).
[50] Annex 3 at 3.
[51] *Ibid* at 4 (emphasis added).
[52] *Ibid* at 3.
[53] *Ibid* at 5 (emphasis added).
[54] *Ibid* at 4.

> includes a description of the nature, content and results of consultations, including with WMBs when required, and an analysis of the expected impact. It is an integral part of the federal regulatory process. The draft Order proposing to list the species under consideration is published, along with the draft RIAS, in Canada Gazette, Part I for a comment period of 30 days. Once the Governor in Council makes a decision on the listing, the Order and RIAS is finalized and published in Canada Gazette, Part II.[55]

36. Annex 3 concludes by recalling the requirements of subsection 27(1.1) of SARA.[56]

The case of the polar bear

37. In the case of the 2008 COSEWIC re-assessment of the polar bear, Canada states that "the Minister acted in compliance with [subsection 25(3) of] SARA, by posting his intention within 90 days."[57] The 2008 assessment summary, according to the Submitter's Exhibit A, is dated April 2008. In contrast, Canada's Response states that the Minister received COSEWIC's final assessment on 28 August 2008, as contained in COSEWIC's Annual Report.[58]

38. Canada notes that subsection 25(3) of SARA requires the Minister to publish in the public registry his response to the species assessment within 90 days of receiving it. Canada refers to this response as a "Response Statement."[59]

39. Canada states that COSEWIC provided the Minister and the CESCC with the assessment and status report on the polar bear on 28 August 2008, and that COSEWIC's rationale for assessing the species as being "of special concern" is included in Annex 6 to Canada's Response.[60] Canada notes that the "Minister's Response Statement (Annex 7)" was issued within 90 days of the Minister's receipt of COSEWIC's final assessment.[61]

40. The Minister's Response Statement reads in part:

> ***How the Minister of the Environment intends to respond to the assessment***: The Minister of the Environment intends to make a recommendation to Governor in Council that the Polar Bear be added to Schedule 1 as Special Concern. Before making the

[55] *Ibid* at 5–6. (In the Determination at para 71, the Secretariat stated that Canada "may wish to include information about […] (b) the nature, content and result of any consultations […]".)
[56] *Ibid*.
[57] Response at 6.
[58] *Ibid* at 7; see also Annex 6 at iii.
[59] *Ibid*; see also Annex 3 at 3.
[60] Response at 7, citing Annex 6: Committee on the Status of Endangered Wildlife in Canada [COSEWIC], *COSEWIC Annual Report* (Ottawa: COSEWIC, 2008). Canada mentions both Annex 6 to its own Response and the Submitter's Exhibit A in relation to the assessment and status report. The "detailed version" of COSEWIC's Species Assessment for the Polar Bear is found at page 70 of Canada's Annex 6. It is half of one page long and is virtually identical to the Assessment Summary at page iii of the Submitter's Exhibit A. The Assessment and Update Status Report on the polar bear (Submitter's Exhibit A) is 82 pages long.
[61] Response at 7.

> recommendation, the Minister of Environment will undertake consultations with the governments of [several provinces, all three territories and wildlife and renewable resource management boards, among other bodies and persons, including the public] on whether or not the Polar Bear should be added to the *List of Wildlife Species at Risk* (Schedule 1) under the *Species at Risk Act* as Special Concern. The Minister of the Environment will forward the COSEWIC assessment of the Polar Bear to the GIC upon completion of consultations.[62]

41. Canada notes that the Minister indicated in January 2009 that "extended consultations" would be undertaken for the polar bear.[63]

42. In response to the Submitter's claim that the Minister of the Environment withheld COSEWIC's assessment from the GIC, resulting in a violation of subsection 27(3), Canada states that "the Governor in Council acted in compliance with […] SARA subsection 27(1.1), by making its decision within nine months. As such, the provision in subsection 27(3) requiring the Minister to amend the List was not triggered."[64]

43. Canada indicates that the Minister began consultations after 26 November, 2008 and concluded them in April 2010. The Response states, "Results of the consultations were shared with authorized WMBs, for their consideration, in accordance with the relevant [Land Claim Agreements or "LCA"s]. The last board decision was sent to the Minister on January 28, 2011."[65] Canada states that the Minister then forwarded the COSEWIC assessment to the GIC, "[w]ithin the [sic] five days of concluding the extended consultations."[66]

44. Canada provides the following further information in Annexes 9-11.

45. The February, 2011 *Canada Gazette, Part II* Order Acknowledging Receipt of the COSEWIC Assessment announced that consultations with the Nunavut WMB and the Nunavut Government "are now complete."[67]

46. The RIAS published in the *Canada Gazette, Part I* on 2 July, 2011, along with the proposed Order adding the polar bear species to the List outlines the further consultation processes that would follow listing, particularly during the development of a management plan: "The plan would […] be prepared in cooperation with authorized WMBs in accordance with the provisions of applicable Aboriginal land claims

[62] Annex 7 at 1.
[63] Response at 7. See Annex 8: Environment Canada, "Consultation on Amending the List of Species under the *Species at Risk Act*: Terrestrial Species" (Ottawa: January 2009) at 4 ("The choice of consultation period: [… due to] widespread impacts on the activities of Aboriginal peoples, industry or Canadians at large[, …] extended consultations will be undertaken for some terrestrial species."), 5, and 10 (where the "Consultation path" for the polar bear is identified as "Extended").
[64] Response at 7.
[65] *Ibid* at 8.
[66] *Ibid*.
[67] Response, Annex 9 at 430.

agreements."[68] The Response does not cite any particular legal provisions of LCAs for these further consultations.

47. The same RIAS summarizes the consultations undertaken with various parties. In relation to the consultations in Nunavut, the RIAS states:

> Comments received suggested that the Polar Bear is an adaptable species and it would be able to cope with climate change, that the Polar Bear population is increasing not decreasing, that the Inuit are capable of managing the Polar Bear, that the government should listen more to the Inuit, that scientists and the Inuit should work together, and that [polar bear hunting] quotas should be increased.
> […]
> The Nunavut Land Claims Agreement (NLCA) includes a decision-making process that provides for the Nunavut Wildlife Management Board (NWMB) to approve the designation of rare, threatened and endangered species in Nunavut. In 2008, a memorandum of understanding (MOU) was signed between the federal government and the NWMB. *The MOU, although not legally binding, serves to harmonize SARA's decision-making process for the listing of wildlife species with the decision-making process of the NLCA*. The NWMB has formally advised the Minister of the Environment that it does not support the proposed listing of the Polar Bear as a species of special concern. The NWMB's position reflects that of the communities in Nunavut. It believes the polar bear population as a whole is healthy, and it is increasing in numbers in most subpopulations, even with a decrease in available sea ice.[69]

The Response does not include any further information on the MOU referred to in the RIAS, including information about how the MOU "harmonize[s] SARA's decision-making process."

48. The RIAS published in the *Canada Gazette, Part II* along with the 27 October, 2011 Order amending the List to include the polar bear as a species of special concern, includes further information about sport hunting, "harvesting," and polar bear hunting quotas in the various provinces and territories. In explaining the alternative decisions available to the GIC pursuant to subsection 27(1.1), the RIAS states: "The third option is to refer the assessment back to COSEWIC for further information or consideration. It would be appropriate to send an assessment back if, for example, significant new information became available after the species had been assessed by COSEWIC."[70]

49. The RIAS discusses the benefits and costs of various decisions, including the decision to list the polar bear as a species of special concern, then summarizes the consultations undertaken. Under the heading "Feedback received following publication of the proposed Order," the RIAS states that:

[68] Response, Annex 11 at 2169.
[69] *Ibid* at 2165 (italics added).
[70] Response, Annex 10 at 2293.

> The Government of Nunavut's Minister of Environment as well as the Director of Wildlife Management advised that the Government of Nunavut does not support listing the Polar bear under SARA because it is premature to base a listing decision on ice cover predictions or models that may or may not materialize and that the Canadian Polar Bear populations are already effectively monitored and managed. Therefore, a SARA listing is unwarranted. They advised that while some areas of Polar Bear habitat may decline, others may improve, and Polar Bears are adaptable and have persisted through previous warm periods. They also advise that Inuit have intimate knowledge of Polar Bears and their life cycles and have observed an increase in their numbers.[71]

50. The Response recalls the separate legal personality of each minister of the federal cabinet, as distinct from the Governor General in Council or Governor in Council; it also recalls that SARA distinguishes receipt of COSEWIC's assessment by the Minister of the Environment from its receipt by the GIC. It also states that as a matter of practice, the GIC formally confirms receipt of the assessment "once it receives" that assessment.[72] The Response then sets out Canada's views on the sequence of events in the case of the 2008 listing decision process for the polar bear.[73]

IV. PREPARATION OF A FACTUAL RECORD IS WARRANTED

51. As noted in the Determination, the Submission asserts Canada's failure to enforce SARA in the case of the polar bear, and also asserts failures to use the best available information in its assessment (subsection 15(2)) and to meet critical timelines during the listing process (subsections 25(3) and 27(3)).[74]

52. The purpose of the Act, stated in section 6, is: "to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened."

53. The requirements that i) the best available information form the basis of the assessment of a species and ii) that certain timelines be met, are at the heart of the legislation. If a species is assessed on criteria other than the best available information, its effective management may be compromised. If timelines are not observed, then assessments may become outdated, preventing the most effective management of a species, which would

[71] *Ibid* at 2309—2310.
[72] Response at 7–8.
[73] *Ibid* at 8–9.
[74] Determination at para 38. See also paras: 3 ("The Submitter asserts that … Canada … is failing to effectively enforce its environmental law, specifically the *Species at Risk Act* ("SARA" or "the Act") by failing to list the polar bear in a timely manner as a threatened or endangered species."); 70 ("… assertions that Canada is failing to effectively enforce its environmental law, namely the SARA, including subsections 15(2), 25(3) and 27(3)"); and 71 ("… assertions that Canada is failing to effectively enforce the [SARA]"). The Determination also notes that the various tasks set out in the SARA and assigned to various actors are "integral to [the overall] purpose" of the Act, which itself meets the definition of "environmental law" set out it in the NAAEC: Determination at para 32.

run counter to the express legislative purposes of SARA.[75] The best available information on the basis of which COSEWIC is required to "carry out its functions"[76] also forms the basis for decisions at subsequent stages of the SARA scheme, where such information must be considered by the Minister of the Environment and by the GIC.

54. The Submission asserts that "Parliament intended strict compliance with the statute's deadlines,"[77] and includes excerpts from Parliamentary debate on a "reverse onus" provision adopted, according to the excerpts, in order to ensure that only a limited delay would be allowed before a species would be listed on the basis of COSEWIC's assessment.[78] The "reverse onus" in subsection 27(3) is thus one instance of the integration of the substantive (COSEWIC's assessment of a species) and procedural ("within nine months after receiving an assessment […], the Minister shall, by order, amend the List in accordance with COSEWIC's assessment"[79]) elements of the Act.

55. The foregoing assertions concern specific provisions of SARA, and the submitter particularizes and provides support for its arguments regarding them.

Best Available Information

56. Canada's Response does not address the assertion that COSEWIC failed to "carry out its functions on the basis of the best available information" as required by subsection 15(2) of SARA,[80] despite the Submission having mentioned information considered by COSEWIC that may have pointed to a higher at risk status than special concern.

57. A failure by COSEWIC to carry out its functions pursuant to subsection 15(2) has direct implications for the subsequent listing decision respecting a species. Indeed, in the Regulatory Impact Analysis Statement published in the *Canada Gazette* along with the 2011 Order adding the polar bear to Schedule 1 of the Act as a species of special concern, Canada stated:

> A SARA listing decision must be based on the assessment provided by COSEWIC, which in turn must base its assessment on the best available information at the time of the assessment. COSEWIC based its conclusion on both scientific knowledge and traditional knowledge. This included knowledge informing the make-up of subpopulations and whether assessment by designatable units should be considered.
> Overall, the special concern designation is appropriate in the face of uncertainty over ice cover projections, climate change and the present and future impact on Polar Bears. The question of whether or not Polar Bears can adapt their movements and feeding habitats to compensate for changes to ice cover remains uncertain. COSEWIC must reassess a

[75] See para 52, *supra* (SARA, s 6).
[76] SARA, s 15(2).
[77] Submission at 4.
[78] Submission at 4-5.
[79] SARA, s 27(3).
[80] Determination at paras 4-5, 14-15, 20, 26 and 35.

> species every 10 years or at any time that it has reason to believe that a species' status has changed significantly.[81]

58. The Secretariat notes that Canada's statement, that a listing decision must be based on COSEWIC's assessment, is also consistent with the definition of "status report" in section 2(1) of the Act and with subsection 21(1):

> 2. (1) […] "status report" means a report […] that contains a summary of the best available information on the status of a wildlife species […]. […]
>
> 21. (1) COSEWIC's assessment of the status of a wildlife species must be based on a status report on the species that COSEWIC either has had prepared or has received with an application.

The "best available information" is also integral to decisions made later in the SARA process. For example, the competent minister must prepare a recovery strategy for a wildlife species that is listed as endangered or threatened; in preparing the strategy, "the competent minister must determine whether the recovery of the listed wildlife species is technically and biologically feasible," and such "determination must be based on the best available information, including information provided by COSEWIC."[82] Similarly, the recovery strategy must also identify the species' critical habitat, "based on the best available information, including the information provided by COSEWIC," and include "examples of activities that are likely to result in its destruction."[83]

59. The Secretariat also notes that the Response provides no information on how particular scientific and traditional knowledge led to COSEWIC's "conclusion," nor does it provide information on how consideration of different information may have affected the Minister's and GIC's recommendations and decisions in the process of listing the polar bear species.

60. The Submission cites authority for the statement that "at least seven of the 13 polar bear populations that inhabit Canada are likely declining."[84] A key authority cited for this latter statement is Amstrup *et al* (2007). The Secretariat notes a reference, in the 2008 COSEWIC assessment report, to the interplay between climate change science and threats to polar bear populations. For example, COSEWIC writes that it acknowledges that "effects of climate warming on conditions of sea ice are most important to the status of the species,"[85] and because of the wide variation of scientific projections of the effects of climate change on sea ice, "we recommend that model-averaged projections, such as those presented by the 2007 report of the IPCC [Intergovernmental Panel on Climate Change] and 2004 Arctic Climate Impact Assessment (ACIA), be used to anticipate

[81] Response, Annex 10 at 2310.
[82] SARA, ss 2(1) "recovery strategy" and 40.
[83] SARA, s 41(1)(c).
[84] Submission at 2-3, citing Amstrup *et al*, 2007 (Exhibit B to Submission).
[85] Submission, Appendix A at 15.

effects of climate change on the distribution and abundance of polar bears."[86] The assessment goes on to say:

> Higher temperatures and loss of sea ice in the Arctic do not bode well for the future of polar bears. However, quantitative data on what trends in habitat mean for the future distribution and abundance of polar bears are limited. In particular, there is a lack of data on how the dependent variables of projection models produced by bodies like the ACIA and IPCC (e.g., temperature, precipitation, summer extent of sea ice) relate as predictors of survival and reproduction (and thus abundance and distribution) of polar bears.[87]

COSEWIC then notes "efforts to forecast polar bear abundances based on projected changes in sea ice,"[88] including Amstrup *et al* (2007), saying that while the results are preliminary, they are "noteworthy because they are alarming: Amstrup *et al* (2007) predict the loss of 2/3 of the world's polar bears in 45 years (for Canada, complete extirpation or severe depletion of polar bears from Baffin Bay, Davis Strait, Foxe Basin, Western Hudson Bay, Southern Hudson Bay, and the Southern Beaufort Sea)."[89] COSEWIC then notes the lack of knowledge or predictability of the relationships between habitat loss and population.

61. The 2008 COSEWIC assessment report does not discuss the Amstrup paper further. Even if COSEWIC had expressly rejected the importance of a study like Amstrup's for the purpose of determining the relationship between climate change and polar bear population (and the COSEWIC assessment neither accepted nor rejected the study), it is not clear to what extent the listing decision made by Canada respecting the polar bear took the study into account. This circumstance leaves a central open question regarding the assertion in the submission that COSEWIC failed to "carry out its functions on the basis of the best available information", as noted above.

62. The Submitter attached a study by Hunter *et al* as Exhibit I[90] to the Submission, saying in Exhibit J to the Submission[91] that the findings of Amstrup *et al* (2007) are "supported by" Hunter *et al* (2007). Although the 2008 COSEWIC assessment makes reference to what appears to be a companion paper to Hunter *et al*,[92] it does not make reference to the Submitter's Exhibit I.

63. As noted in paragraphs 20, 22-24 (designatable units), and 25 of the Determination, and at pages 13-14 of Exhibit J to the Submission,[93] the Submitter also asserts a failure to effectively enforce subsection 15(2) of SARA by way of an alleged underestimation of

[86] *Ibid* at 16.
[87] *Ibid* at 19.
[88] *Ibid*.
[89] *Ibid*.
[90] Christine M. Hunter *et al*, "Polar Bears in the Southern Beaufort Sea II: Demography and Population Growth in Relation to Sea Ice Conditions" (2007) (United States Geological Survey) ("USGS").
[91] Submission, Exhibit J at 11, note 42.
[92] E.V. Regehr *et al*, Polar Bears in the Southern Beaufort Sea I: Survival and Breeding in Relation to Sea Ice Conditions, 2001-2006 (2007) (USGS).
[93] Submission, Exhibit J.

the threat posed by climate change to the polar bear species, along with an alleged lower status of endangerment assigned to the species by Canada.

64. Since the Submission asserts Canada's failure to take into account the "best available information" as outlined in the preceding paragraphs, and since Canada did not address this question in the Response, the Secretariat considers that there remain central open questions about the determination and application of the best available information throughout the SARA process. A factual record is likely to provide more information about the process followed by COSEWIC in considering certain information and not considering other information, and which of this information the Minister and the GIC took into account in making their recommendations and decisions pursuant to the Act. A factual record will also give the public a better understanding of the role of the "best available information" in decisions about what level of endangerment a species is ultimately assigned. Such information will allow the public to consider how or whether different information may affect decisions made on the basis of the assessment; for example, how the nature of the information deemed to be the "best available" can determine whether critical habitat of a species is identified and protected.

Timing: The 2005 consideration of the polar bear species

65. The Submitter alleges that the GIC announced in January 2005 its decision not to add the polar bear to the List,[94] which is a decision provided for in paragraph 27(1.1)(b) of SARA.[95] Before recommending that this action be taken, the Minister was required by paragraph 27(2)(c) to consult with the various WMBs in whose respective areas the polar bear can be found. The RIAS accompanying the Order indicated that consultations "[would] be undertaken" with the Nunavut WMB, after that Board

> wrote to express its opposition to listing the polar bear […] on the basis that community and aboriginal traditional knowledge was not fully considered during the assessment process, and that consultations with the Board on the proposal to add these species to Schedule 1 have not been sufficient. The Board requested that the […] species be referred back to COSEWIC for further consideration.[96]

66. Where the GIC took the course of action in paragraph 27(1.1)(b), the Minister was required, following the approval of the GIC, to "include a statement in the public registry setting out the reasons."[97] Neither the Submission nor the Response includes reference to such a statement being published; nor does the Submission or Response include any information about consultations that were to have taken place in spring

[94] "Order Amending Schedules 1 to 3 to the Species at Risk Act," (12 January 2005) C Gaz II, 96 and 104; see paragraph 39, *supra*.
[95] The Governor in Council may review the assessment and "may, on the recommendation of the Minister, […] (b) decide not to add the species to the List […]."
[96] "Order Amending Schedules 1 to 3 to the Species at Risk Act," (12 January 2005) C Gaz II at 103-104.
[97] SARA, subsection 27(1.2).

2005. Instead, the next step that appears to have been followed was a new assessment of the species in April 2008.[98]

67. More specifically, Canada's Response does not address the timelines in which the Minister of the Environment and the GIC, according to the Submission, took various procedural steps. The Response also does not address whether Canada "reconsider[ed] the matter" of whether to recommend listing the polar bear in spring 2005, as Canada indicated would occur, in the Order published in the *Canada Gazette* in January 2005.[99]

68. The Secretariat considers that there remain central open questions about how and whether SARA was effectively enforced in 2005. Specifically, a factual record would provide information about the procedures that were followed, including the reasons pursuant to subsection 27(1.2) for the GIC's decision not to add the species to the List, and provide information about why an explanation required by that subsection to be published in the public registry was not in fact published. A factual record would also provide information about the consultation sought by the Nunavut Wildlife Management Board. It is not clear from the RIAS published in the 26 January 2005 issue of the *Canada Gazette, Part II* whether the polar bear was ever "referred back to COSEWIC for further consideration" as the WMB requested, or whether the Board held further consultations with the Minister, as also seems possible.

69. If the Minister had recommended in late spring 2005 a "special concern" status for the polar bear consistent with COSEWIC's assessment (based on information determined by COSEWIC at the time to be the "best available"), and if the GIC had taken a subsection 27(1.1) course of action within nine months (i.e., by 20 March 2006), then the polar bear would have been listed as a species of special concern and the development of a management plan for the species would be more advanced than is currently the case.[100]

70. By contrast, due to the delays beginning with the 2005 consideration of the species, the current status for the polar bear does not require a management plan to be published before late 2014. Contrary to Canada's Response,[101] and as the Secretariat stated in the Determination, the assertions do "concern an ongoing situation at the time of the

[98] Response, Appendix 6 at 22.

[99] Submission at 6 and n 20, citing "Order Amending Schedules 1 to 3 to the Species at Risk Act," (12 January 2005) C Gaz II, 96 and 104. The Order struck out the polar bear from Schedule 3 ("Special Concern") and reads in part [at 96] that consultations with the Nunavut Wildlife Management Board "will be undertaken on an urgent basis and are expected to be completed this spring, at which time the Minister will reconsider the matter."

[100] Subsections 68 (1) and (2) provide: "(1) Subject to subsection (2), the competent minister must include a proposed management plan in the public registry within three years after the wildlife species is listed as a species of special concern. (2) With respect to a wildlife species that is set out in Schedule 1 as a species of special concern on the day section 27 comes into force, the competent minister must include a proposed management plan in the public registry within five years after that day." Section 27 came into force on 5 June, 2003 [See "Note" to s 142 of SARA at <http://laws-lois.justice.gc.ca/eng/acts/S-15.3/FullText.html> (accessed 21 August 2013)].

[101] Response at 10.

Submission, and the Secretariat therefore considers that the temporal requirement in the opening paragraph of Article 14(1) is met by the Submission."[102]

Timing: The 2008 consideration of the polar bear species

71. In 2008 COSEWIC completed its first re-assessment of the polar bear species since 2005. The Submission notes[103] that on completion of its assessment in April 2008,[104] COSEWIC ought to be considered as having sent, and the Minister as having received, the assessment immediately thereafter. Indeed, reading subsection 25(1) of SARA without any further information, the Minister ought to receive the assessment more or less immediately on its completion by COSEWIC:

> 25(1) When COSEWIC completes an assessment of the status of a wildlife species, it must provide the Minister and the [CESCC] with a copy of the assessment and the reasons for it. A copy of the assessment and the reasons must also be included in the public registry.

72. Moreover, a plain reading of subsection 25(1), including the words "when" and "must also," suggest that the copy of COSEWIC's assessment and reasons for it be included in the registry immediately on its completion by COSEWIC. Instead, Canada states (Annex 3 at 3) that "[p]osting on the SARA Public Registry is *controlled by Environment Canada*, which makes COSEWIC's final assessments available on the registry *once they are provided to the Minister*."[105] The Response neither cites particular statutory or other legal provisions as authority for the above statements, nor does it provide reasons for Canada's position.

73. Consistent with a plain reading of section 25, the Submission posits that upon COSEWIC completing its assessment, the Minister would have received the assessment on April 25, 2008 and the ninety-day clock in subsection 25(3) would have begun to run immediately, thus requiring the Minister to "include in the public registry a report" on his intended response and time lines for action.[106] Indeed, according to the Submission, that is what happened in 2004.[107]

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[102] Determination at para 31.

[103] Submission at 6: "[A]t its April 20-25, 2008 meeting, COSEWIC formally assessed the polar bear's status as a species of special concern. […] SARA then required COSEWIC to 'provide the Minister … with a copy of the assessment' and 'include[ ]' a copy in the public registry. S. 25(1). […] Accordingly, the Minister's response on the polar bear was due in late July 2008. However, the Minister did not issue a 'Response Statement' until November 26, 2008—seven months after COSEWIC assessed the polar bear."

[104] Submission at 6 refers to the April 20-25 meeting of COSEWIC; Submitter's Exhibit A (at iii) reads "Assessment Summary – April 2008." The Submitter's Exhibit A is referred to by Canada in its Response at 7 as the "Response Statement" and included as Annex 7 to the Response. The Response Statement is substantially the same as the Assessment Summary at page iii of the Submitter's Exhibit A.

[105] Response, Annex 3 at 3 (emphasis added).

[106] Submission at 6.

[107] *Ibid*: in April 2004, "[t]he GIC formally acknowledged receipt of the COSEWIC assessment [on] the same day" that the Minister issued a Response Statement acknowledging his receipt of COSEWIC's 2002 assessment.

74. Based on that reading of the Act, a response from the Minister would have been due by late July 2008, in order to comply with subsection 25(3). Instead, the Minister's response came in late November 2008, creating what the Submitter calls a seven-month delay between COSEWIC's assessment in April 2008 and the eventual response in late November 2008.

75. In the Response, Canada states that COSEWIC provided the Minister and the CESCC with the completed assessment and status report on 28 August, 2008.[108]

76. Canada's Response also includes the exchange of correspondence between the Minister and the chair of COSEWIC, comprising Annexes 4 and 5.[109]

77. The overall aim of the agreement reached by means of the two letters in Response Annexes 4 and 5 appears to be administrative efficiency as well as, according to Canada, compliance with the federal *Official Languages Act*.[110] The Response does not identify any particular provisions of the *Official Languages Act* setting out how it applies to the Submission. The Minister's letter asks that "the status reports that form the basis of the assessments" be finalized two months before the assessment meeting.[111] In reply, the chair of COSEWIC proposes a procedure whereby final versions, in both official languages, of only those status reports determined at the annual COSEWIC meeting to require no more than minor changes, would be sent to the Minister in mid-July, in satisfaction of the Minister's procedural requests.[112]

78. In describing the agreement between the Minister and COSEWIC,[113] Canada twice makes reference to section 26 of SARA: "As the result of an agreement reached through an exchange of correspondence between the Minister and COSEWIC in 2003 (Annexes 4 and 5), *pursuant to SARA section 26*, the chair of the COSEWIC sends annually a letter to the Minister and CESCC which includes the completed status report."[114]

79. Section 26 reads: "COSEWIC must annually provide a report on its activities to the Canadian Endangered Species Conservation Council and a copy of that report must be included in the public registry." While section 26 requires that COSEWIC report at least annually to the Minister, nothing in the Act either suggests or requires that the transmittal of completed species status reports occur just once per year, nor that such transmittal be combined with the annual report. The Act does not prevent the status reports, even if they are included in the annual report, from being sent to the Minister earlier in the year, as they are completed.

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[108] Response at 7.
[109] See para 29, *supra*.
[110] Response, Annex 4 at 2.
[111] Response, Annex 4 at 2.
[112] Response, Annex 5 at 3.
[113] See para 30, *supra*; Annex 3 at 3; Annex 4 at 2; and Annex 5 at 3.
[114] Response at 6 (italics added); see also similar wording in Annex 3 at 3.

80. The explanation summarized above does not set out the particular circumstances, in the case of the polar bear, explaining why the Minister "received" the assessment four months after COSEWIC completed its assessment, except to explain that the assessment and reasons for it must be posted on the online SARA registry and therefore must be available in both English and French.[115] The Response describes only in general terms the procedure for sending finalized status reports to the Minister each year. Presumably, under the practice described by Canada, where a species' status report is completed at any time in a given year before mid-July (allowing time for translation), an assessment report will be sent to the Minister as part of that year's COSEWIC Annual Report; otherwise, a completed assessment and the reasons for it will not be provided to the Minister until the following year. Based on the foregoing, such delay appears to be the reason for Canada's statement that COSEWIC provided its completed assessment of the polar bear species on 28 August rather than on or immediately after 25 April, 2008, being the date when COSEWIC had itself completed it. A factual record may shed light on this aspect of enforcement of SARA.

81. The agreement evidently made between the Minister and COSEWIC by way of the correspondence contained in Annexes 4 and 5 modifies the procedure in section 25 of SARA. Specifically, it creates an indefinite delay between COSEWIC's completion of the assessment (subsection 25(1)) and the Minister's receipt of that assessment (subsection 25(3)). This means an indefinite delay before the 90 day-period in subsection 25(3) begins, following which the Minister must report on his intended response to the assessment.

82. Assuming conservatively that the assessment report might have been received by the Minister on 1 May, 2008 (the fourth working day after COSEWIC's 2008 meeting ended), the Minister would have been required to make his report (according to subsection 25(3)) by 29 July, 2008.

83. By contrast, assuming that the Minister received the COSEWIC Annual Report for 2007-2008 on 28 August as stated by Canada, beginning counting on 29 August,[116] the ninetieth day was 26 November. According to the entry in the SARA Registry[117] the Minister's "Response Statement – Polar Bear" was made on 26 November, 2008.

84. The Secretariat determines based on the foregoing that there remain central open questions about Canada's enforcement of subsection 25(3). Canada's Response provides some information that applies generally to COSEWIC's preparation of assessments, and suggests that the *Official Languages Act* applies to the posting of the assessment and reasons in the online SARA registry, but does not provide particulars (including dates) of what happened in the case of the polar bear assessment. A factual record would

[115] Response, Annex 3 at 3.
[116] *Interpretation Act*, RSC 1985, c I-21, subsection 27(2): "Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included."
[117] Submission, footnote 25; Response, Annex 7.

provide information explaining why the Minister's "Receipt Date"[118] was 28 August 2008, or four months after COSEWIC completed its assessment, including the relevance if any of Annexes 4 and 5 and specific provisions of the *Official Languages Act* to the particular case of the polar bear.

85. Following issuance of the Minister's SARA subsection 25(3) response, the next step in the process is the GIC's decision whether to "accept the assessment and add the species to the List;" "decide not to add the species to the List; or" "refer the matter back to COSEWIC for further information or consideration."[119] The GIC has nine months in which to do this, a period that begins when it receives COSEWIC's assessment. If the nine month period expires before the cabinet has made its decision, the subsection 27(3) "reverse onus" provision applies and the Minister "shall, by order, amend the List in accordance with COSEWIC's assessment."[120]

86. The Submitter equates COSEWIC's completion of the assessment with the GIC's receipt of the assessment: "SARA requires that, within nine months of when COSEWIC completes an assessment, the GIC *must act* or the species is automatically listed."[121]

87. Subsection 27(2) imposes further obligations on the Minister "before" he recommends a course of action to the GIC. Such recommendation, in turn, is implied by subsection 27(1.1) to be required prior to the GIC decision.

88. Section 27 is reproduced here, for ease of reference:

> **27.** (1) The Governor in Council may, on the recommendation of the Minister, by order amend the List in accordance with subsections (1.1) and (1.2) by adding a wildlife species, by reclassifying a listed wildlife species or by removing a listed wildlife species, and the Minister may, by order, amend the List in a similar fashion in accordance with subsection (3).
>
> (1.1) Subject to subsection (3), the Governor in Council, within nine months after receiving an assessment of the status of a species by COSEWIC, may review that assessment and may, on the recommendation of the Minister,
>
> (*a*) accept the assessment and add the species to the List;
>
> (*b*) decide not to add the species to the List; or
>
> (*c*) refer the matter back to COSEWIC for further information or consideration.

[118] Response at 9 (Table 1. Canada's performance in meeting the SARA's statutory deadlines with regard to the listing of the polar bear as a species of special concern).
[119] SARA, s 27(1.1).
[120] See para 54, *supra*.
[121] Submission at 4 (emphasis in original). See also Submission at 5: "SARA clearly requires a species to be listed within nine months of when COSEWIC completes an assessment …".

> (1.2) Where the Governor in Council takes a course of action under paragraph (1.1)(*b*) or (*c*), the Minister shall, after the approval of the Governor in Council, include a statement in the public registry setting out the reasons.
>
> (2) Before making a recommendation in respect of a wildlife species or a species at risk, the Minister must
>
> > (*a*) take into account the assessment of COSEWIC in respect of the species;
> >
> > (*b*) consult the competent minister or ministers; and
> >
> > (*c*) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, consult the wildlife management board.
>
> (3) Where the Governor in Council has not taken a course of action under subsection (1.1) within nine months after receiving an assessment of the status of a species by COSEWIC, the Minister shall, by order, amend the List in accordance with COSEWIC's assessment.

89. A plain reading of subsection 27 in its entirety would suggest that the requirements of subsection 27(2) ought not to add appreciably to the time required for the GIC to "receive" COSEWIC's assessment, particularly in view of the remarks during Parliamentary debate about the nine-month "reverse onus" provision.[122] However, the Submitter states that "the GIC claimed it did not 'receive' COSEWIC's assessment until February 3, 2011, *nearly 3 years after COSEWIC completed its assessment* […]."[123]

90. Canada's Response in this context begins with the Minister's report on how he intends to respond to the COSEWIC assessment, as required by subsection 25(3). As noted above,[124] the procedure followed by Canada includes elements outside of SARA, such as the notion of "extended consultations."[125] The Response Statement issued in November 2008 reads that "the Minister will forward the COSEWIC assessment of the Polar Bear to the GIC upon completion of consultations."[126]

91. The Response outlines the procedure for consultation with the Nunavut Wildlife Management Board, but does not cite particular statutory or other legal provisions as authority for this procedure,[127] for example by providing the relevant land claim agreements and citing the relevant provisions.

92. The Response explains that consultation is meant to satisfy the constitutional duty to consult arising from the common law and from section 35 of the *Constitution Act,*

[122] Submission at 4-5.
[123] Submission at 7 (emphasis in original); see also Submission at 8.
[124] See paras 29-31, *supra*.
[125] See para 32, *supra*.
[126] Response, Annex 7 at 1; see para 40, *supra*.
[127] See para 33, *supra*.

1982,[128] noting that "[t]he appropriate scope of consultation, and accommodation if appropriate, is to be proportionate to the strength of the asserted aboriginal right and the potential for adverse impact on those rights."[129] However, the Response does not apply this analysis to the context of the polar bear listing decision; nor does it say how any consultation was conducted or whether such consultation affected the decisions that were ultimately made about the listing of the polar bear.[130]

93. In its Response, Canada states that it "wishes to clarify" that the nine-month period "starts when the Governor in Council receives the assessment, not when the Minister receives it,"[131] and that the GIC officially confirms receipt of an assessment by making an order.[132]

94. As the Secretariat noted with respect to section 25, the nine-month timeline and "reverse onus" provision in subsection 27(3) appear relatively clear on a plain reading; however, Canada's Response shows that Canada's consultations procedures including its "extended consultations" process have the potential to add a significant amount of time to the steps in paragraphs 27(2)(a)-(c), prior to the GIC "receiving" the assessment.

95. While a plain reading of section 27 would suggest that the GIC could have received the COSEWIC assessment in November 2008, the use of extended consultations delayed such receipt by two years and two months to 3 February 2011, while the Minister's subsection 27(2) consultations with WMBs were carried out. Following such delay, the GIC's acceptance of the Minister's recommendation on 27 October, 2011, came within nine months of the GIC's February receipt of the assessment, in compliance with subsection 27(1.1).

96. Canada states that "the Submitter does not include an assertion that Canada is failing to effectively enforce" subsection 27(2).[133]

97. The Secretariat has however already determined that the Submitter's assertions meet the admissibility criteria of Article 14(1).[134] Therefore, the Secretariat considers further the assertion of the delay created by the Government of Canada's "extended consultations," as well as substantive matters reported as a result of such consultations, as these are apposite to the assertion of a failure to effectively enforce section 27 of the Act.

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[128] *Canada Act 1982*, (UK) 1982, c 11.
[129] Response, Annex 3 at 4-5.
[130] A recent decision of the Supreme Court of the Yukon Territory highlights the procedural and substantive dimensions of the duty to consult: see *White River First Nation* v *Yukon Government*, 2013 YKSC 66 at para 108, online: <http://www.yukoncourts.ca/judgements/supreme/2007/2013_yksc_66_white_river_first_nation_v_yukon_government.pdf>.
[131] Response at 7.
[132] Response at 8. See Response, Annex 9, "Order Acknowledging Receipt of the Assessment Done Pursuant to Subsection 23(1) of the Act," (16 February 2011) C Gaz II, 430.
[133] Response at 11.
[134] Determination at para 38.

98. The October 2011 RIAS introduces several relevant points of information for considering the assertions. It introduces information contained in comments from Nunavut that, contrary to information cited by the Submitter, suggests that a lesser degree of SARA protection is due to the polar bear species, compared to other information in COSEWIC's assessment.[135]

99. The July 2011 RIAS mentions the MOU between Canada and the NWMB, which appears to have an effect on the enforcement of SARA, but does not provide details or information about legal provisions.[136]

100. Ultimately, the consultations extended the nine-month statutory limit in SARA subsection 27(3) by an additional two years and two months.[137]

101. The Secretariat determines that there remain central open questions about Canada's enforcement of SARA section 27. In particular, a factual record would provide information about the procedures followed by Canada in determining which information to consider in arriving at its SARA subsection 27(1.1) decision. For example, after consulting with WMBs, the GIC could have made the decision in paragraph 27(1.1)(b) (deciding not to add the species to the List) or (c) (referring the matter back to COSEWIC for further information or consideration). It chose instead to accept the assessment and add the species to the List (subsection 27(1.1)(a)) as a species of special concern.

102. A factual record would provide further information about the role played by the various land claims agreements, consultations, the MOU with the NWMB, and the role of the "best available information" contained in COSEWIC's assessment which the Minister was also required by subsection 27(2) to consider in making his recommendation to the GIC. A factual record would also provide further information about the various consultations held concerning the polar bear, and shed light on the enforcement of time limits in SARA subsection 27(1.1). It would also provide information concerning the best available information considered by COSEWIC in its 2002 and 2008 assessments, shedding light on when a management plan for the polar bear might have been put in place. A factual record would also provide further information on the interplay between the requirements of SARA and constitutional and other duties to consult, including the role of "extended consultations." A factual record would also provide information on further consultations that would be necessary as part of the preparation of the management plan for the polar bear species due to the requirements of land claim agreements, and the possible effect on SARA timeframes.[138]

[135] Paragraphs 48 and 49, *supra*.
[136] Paragraph 47, *supra*.
[137] Paragraph 95, *supra*.
[138] See para 46, *supra*.

103. In summary, the Secretariat has determined that there remain central open questions about Canada's enforcement of the *Species at Risk Act* including the interplay among the best available information considered by COSEWIC, delays in the process that may have rendered different outcomes by the date of the Submission, administrative agreements, and constitutional and other legal provisions affecting the requirements of SARA. Such information involving the case of the polar bear might also shed light on the enforcement of SARA in respect of other species.

104. As the Secretariat has noted in the context of SARA, the SARA process appears to be "designed to arrest a species' progress toward extinction," and thus the timely listing of a species is relevant to enforcement of the Act.[139]

105. The Secretariat now addresses additional matters raised by Canada in its Response.

Canada's views concerning COSEWIC

106. Canada states at page 3 of the Response that "the Secretariat provides no explanation of how it concluded that COSEWIC was a Party to the Agreement." The Secretariat makes no such conclusion,[140] and Article 14 requires no such explanation had the Secretariat in fact made such a conclusion. In assessing the admissibility of the Submission pursuant to Article 14(1), the Secretariat considers only the criteria listed in that Article.

107. The Submission includes an assertion that the "best available information" was not considered in assessing the status of the polar bear species. The Submission does assert a failure to enforce SARA subsection 15(2), which provides that "COSEWIC must carry out its functions on the basis of the best available information on the biological status of a species, […]."

108. However, the information considered by COSEWIC (whose members are appointed by the Minister[141]) in making its assessment also forms the basis of the Minister's report on how he intends to respond to the assessment (SARA subsection 25(3)). The statutory definition of "status report" in SARA reinforces the linkage between the "best available information" considered by COSEWIC and the ministerial and GIC decisions that are based upon such information:

> 'status report' means a report, prepared in accordance with the requirements of regulations made under subsection 21(2), that contains a summary of the best available information on the status of a wildlife species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.[142]

[139] SEM-06-005, (*Species at Risk*), Article 15(1) Notification (10 September 2007) at 9.
[140] See note 12, *supra*.
[141] SARA, s 16(1).
[142] SARA, s 2(1) ("status report").

No regulations appear to have been made pursuant to subsection 21(2).

109. The best available information forms the basis for the course of action taken by the GIC pursuant to subsection 27(1.1): if the GiC accepts the assessment (based on the information in question), the information is accepted;[143] if the GIC does not accept the assessment, the Minister of the Environment "after the approval of the [GIC]" is required to publish a statement in the public registry setting out the reasons for not accepting the assessment.[144]

110. The "best available information," on the basis of which COSEWIC is to carry out its functions, thus forms the essential starting-point for subsequent steps in the SARA regime. As Canada notes, "[i]t is not open to the Minister to reject [COSEWIC's] assessment and to substitute his own."[145] COSEWIC's functions are legislated in SARA, and anchor Canada's responsibility for implementing the Act.

111. In this case, the Secretariat considers COSEWIC's role in the SARA enforcement scheme, to the extent that such role forms part of the assertions. Consideration of COSEWIC's role in SARA as a result of the Submitter's assertion is in no way tantamount to stating that "COSEWIC is a Party to the Agreement." Such a Statement would imply that the Secretariat somehow considers, as a regular part of its Article 14 assessment, whether entities created by law are Parties to the NAAEC. It is clear from the NAAEC that there are just three Parties to the Agreement.[146] In the case of Canada, the Secretariat is also aware that three provinces have signed the Canadian Intergovernmental Agreement, thereby allowing the Secretariat to consider assertions regarding those provinces' environmental laws. COSEWIC does not appear to be a sovereign entity, such that the Secretariat would have to consider whether it were a Party to the Agreement. Rather, the Secretariat only considers COSEWIC and its functions, in the context of the valid assertions that a Party to the Agreement, Canada, is failing to effectively enforce its environmental law.

112. In regard to the statements made by the Party and quoted in paragraph 17, above, the Secretariat always endeavors to be thorough, impartial and neutral. The Secretariat always considers thoroughly the documents and information before it, and substantiates the reasons for its findings. Whenever a situation has arisen where a Secretariat staff member involved in the assessment of a Submission might have had any dealings with a Party or Submitter that could affect the impartial exercise of that staff member's duties in the SEM process, that staff member has recused him- or herself. The Party's statements regarding the Secretariat's supposed lack of objectivity are unsubstantiated and lack justification. The Secretariat has a stake neither in the outcome of any Submission nor, for that matter, in any Party Response, and always evaluates information provided from both the Submitter and Party with complete objectivity.

[143] SARA, para 27 (1.1)(a).
[144] SARA, paras 27(1.1)(b) and (c).
[145] Response at 5.
[146] The Preamble of the Agreement begins by listing the Governments of Canada, the United Mexican States and the United States of America.

113. The Parties have stated on numerous occasions that the SEM process is non-adversarial. Therefore, statements impugning the Secretariat's neutrality, especially unsubstantiated statements to that effect, do not appear to have a place in the SEM process. Such statements are rather the hallmark of adversarial proceedings where one party is challenging a court's jurisdiction, or a particular judge's ability to adjudicate fairly.

114. The letter from the Assistant Deputy Minister, International Affairs, Environment Canada to the Chair of COSEWIC, dated 30 March 2012, included as Annex 2 to Canada's Response and referred to at page 3 of the Response, does not have any bearing on matters considered by the Secretariat pursuant to Article 14. In particular, the following statement: "As COSEWIC operates at arm's length from the Government of Canada, Environment Canada does not consider COSEWIC to be party to the [NAAEC]," assumes that COSEWIC's status is an issue. To the contrary: for a number of reasons, it is not relevant to the Article 14 process whether COSEWIC is a Party to the NAAEC, as stated above.

Canada's view that "COSEWIC's Functions are not Environmental Law"

115. Canada states its view that "For the purposes of this Response," SARA subsection 15(2) is not "environmental law" as defined in Article 45(2).[147] It is not clear whether Canada views subsection 15(2) as "environmental law" for purposes other than the Response.

116. Article 45(2) of the NAAEC defines "environmental law", for the purposes of Article 14(1), as "(a) […] any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through […] (iii) the protection of wild flora or fauna, including endangered species, their habitat, [etc. …]." Article 45(2) goes on to say that "(c) The primary purpose of a particular statutory or regulatory provision for purposes of [subparagraph (a) …] shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part."

117. A difficulty that can arise in interpreting paragraph (c) of the above Article 45 definition is that sometimes a meaningful "primary purpose" cannot be ascribed to a provision, without considering a provision's legislative context. In the case of subsection 15(2) of SARA, in order to discern an overall purpose for the requirement that COSEWIC "carry out its functions on the basis of the best available information," one must look at the legislative context for the provision, namely that of identifying and categorizing species at risk in order to take action to protect them, in accordance

[147] Response at 5.

with the other provisions of SARA. COSEWIC performs its functions in furtherance of the legislative purposes of SARA.[148]

118. While Canada's Response says that subsection 15(2) "has the primary purpose of establishing the functions of COSEWIC as an independent scientific body, and therefore constitutes an administrative measure, not environmental law,"[149] those functions were put in place by Parliament in support of the broader role of implementing SARA, the legislative purposes of which are found in section 6.

119. While the Secretariat is not a court and is not bound by precedent in preparing its determinations, the Secretariat responds here to Canada's invocation of the Determination in SEM-09-004 (*Quebec Mining*).[150]

120. In *Quebec Mining*, the Secretariat found that certain provisions of Quebec's *Mining Act* appeared to "concern reporting requirements for issues other than environmental protection," and that another provision "on its own merely establishes the powers of inspectors."[151] The Secretariat noted that this latter provision "may be considered … in guiding the Secretariat's analysis […] regarding the effective enforcement of the environmental law in question."[152] The Secretariat distinguishes the *Quebec Mining* situation from the *Protection of Polar Bears* Submission on the basis that, in contrast to the *Mining Act*, which addresses a wide variety of matters involving the mining industry, SARA, as characterized by its legislative purposes section, clearly accords with the definition of "environmental law" in Article 45(2).[153]

121. In its Article 15(1) Determination in the *Transgenic Maize in Chihuahua* Submission, the Secretariat noted that "the establishment of a comprehensive administrative regime" within the *Biosafety of Genetically Modified Organisms Act* (LBOGM) of Mexico did "not appear to be conceived of as an end in itself."[154] The Secretariat referred instead to the overall purpose of the LBOGM, which was the prevention or reduction of risks that the release of genetically-modified organisms may pose to human health or the environment. The Secretariat could thus consider as "environmental law" those provisions forming part of what the Party referred to as an administrative regime. The Secretariat does not automatically abandon consideration of an assertion concerning a provision just because it is enforced by an authority other than the environment ministry in question. The person or body administering a provision is not by itself dispositive of the question whether that provision is "environmental law."

[148] See para 52, *supra* [SARA, s 6 ("Purposes")].
[149] Response at 5.
[150] See para 24, *supra*.
[151] SEM-09-004 (*Quebec Mining*), Article 14(1) Determination (20 October 2009) at 5.
[152] *Ibid* at note 29.
[153] See the Determination at para 32.
[154] SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 15(1) Determination (20 December 2010) at para 54.

122. To exclude the functions of COSEWIC from its place in the overall legislative scheme of SARA would artificially isolate the function of assessing species from every other function in the SARA process. Without the assessment of the biological status of the species, there would be no basis for proceeding with the subsequent actions required by the Act.

123. The Secretariat remains satisfied that subsection 15(2) is "environmental law" as defined by the NAAEC and thus, has also considered that assertion and the fact that there are central open questions about its enforcement warranting the recommendation of a factual record.

Canada's "Views on Other Aspects of the Determination"

124. In the "Views on Other Aspects of the Determination" section of the Response, Canada asserts that the Secretariat was wrong in determining "that there was an 'ongoing situation *at the time of the submission*'"[155] and maintains that ongoing action or inaction is distinct from the ongoing effects of actions or inactions, which according to Canada are outside the scope of the NAAEC.[156]

125. The Secretariat addressed in the Determination the question of whether the Submission asserts an ongoing failure to effectively enforce environmental law, and summarizes the matter further in paragraphs 69-70, above.

126. With respect to private remedies, Canada's Response states that the Secretariat failed to consider various private remedies available to a Submitter pursuant to Article 14(2)(c) of the NAAEC.[157]

127. Article 14(2)(c) does not require an exhaustive consideration of all private remedies available to a Submitter; it requires that the Secretariat "be guided by whether […] private remedies available under the Party's law have been pursued."

128. The Secretariat properly considered Article 14(2)(c) in the Determination.[158] The Secretariat considers that a submitter's failure to apply for judicial review of a Minister's or GIC's decisions, as Canada suggests, is not fatal to a Submission in view, for example, of the significant costs that such a course of action is likely to entail.

129. The Secretariat considers that an application to COSEWIC for an assessment of the polar bear pursuant to SARA subsection 22(1), as suggested by Canada, was neither practical nor desirable. The Submitter asserts a failure to enforce SARA based partly on a COSEWIC assessment that was actually done. An application for a separate assessment would address COSEWIC's assessment indirectly, whereas the Submission

[155] Response at 10, citing Determination at para 31 [emphasis in Canada's Response].
[156] Response at 10.
[157] Response at 10-11.
[158] Determination at paras 62-66.

addresses the question directly. The Secretariat further considers that a subsection 28(1) application to COSEWIC for an assessment based on an "imminent threat" to the species is also not applicable to the Submitter's assertions.

130. Canada's Response concludes by stating that the interpretation of the words "best available information" and the interpretation of SARA section 27 are questions of law that should not be considered by the Secretariat because the SEM process is ill suited to dealing with questions of law.[159] The Response cites the Secretariat's Determination in the *Species at Risk* Submission,[160] where it is stated that "the language and legislative history of s. 27 of SARA" was a question of law to which the SEM process was ill-suited. The Secretariat continued in that Determination that it was

> not determining the broader question of whether s. 27 of the SARA can ever give rise to an allegation that would be eligible for review under the [SEM] process. It is simply finding that the allegations advanced by the Submitters in this submission, as regards the interpretation of s. 27 of the SARA, do not raise a factual question of enforcement which can be considered by the Secretariat under Article 14.[161]

In contrast to *Species at Risk*, which asserted a general failure to enforce SARA's listing provisions in respect of 46 species, the assertions in the *Polar Bears* Submission deal with the operation and application of SARA in the context of a particular factual question of enforcement.

IV. RECOMMENDATION

131. For the reasons contained in this Determination, the Secretariat finds that having considered the Submission and the Response, central open questions remain about Canada's enforcement of the following provisions of SARA:

> Subsection 15(2) (see paragraphs 61 and 64, above);
> Subsection 25(3) (see paragraph 84, above); and
> Section 27 (see paragraphs 68 and 101, above).

Preparation of a factual record is thus warranted in order to gather additional information concerning the matters raised in Submission SEM-11-003 (*Protection of Polar Bears*), and is necessary for a thorough consideration of the assertions that Canada is failing to effectively enforce Canada's *Species at Risk Act*, including the above-mentioned provisions respecting the timely listing and management of the polar bear species. In accordance with Article 15(2) and Guideline 19.4, the Council has 60 working days, that is until 21 February, 2014, to vote on whether to instruct the Secretariat to prepare a factual record.

[159] Response at 11-12.
[160] SEM-06-005 (*Species at Risk*), Article 14(1) and (2) Determination (11 December 2006) at 5.
[161] *Ibid.*

Respectfully submitted for your consideration on this 7 day of November, 2013.

Secretariat of the Commission for Environmental Cooperation

Per: Irasema Coronado, Ph.D.
Executive Director